



Neutral Citation Number: [2022] EWHC 2984 (Admin)

Case No: CO/1381/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2022

Before :

MRS JUSTICE LANG DBE

Between :

THE KING

Claimant

on the application of

SAVE BRITAIN'S HERITAGE

- and -

HEREFORDSHIRE COUNTY COUNCIL

GERARD DAVIES

Defendant
Interested Party

Richard Harwood OBE KC (instructed by **Harrison Grant Ring**) for the **Claimant**

Jack Parker (instructed by **Legal Services**) for the **Defendant**

The **Interested Party** did not appear and was not represented

Hearing date: 9 November 2022

Approved Judgment

This judgment was handed down remotely at 10 am on 25 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lang:

1. The Claimant applies for judicial review of the decision of the Defendant (“the Council”) that the proposed demolition of the Old School, Garway, Herefordshire HR2 8RQ (“the School”) was within permitted development rights. The decision was made in March 2022, though the precise date of the decision is in dispute.
2. The Claimant is a charity which campaigns for the conservation of historic buildings. The Council is the local planning authority and the Interested Party (“Mr Davies”) is the owner of the School, and the applicant for prior approval of demolition of the School.
3. On 17 June 2022, I adjourned the application for permission to be listed as a ‘rolled-up’ hearing, on the basis that, if permission was granted, the Court would proceed immediately to determine the substantive claim.

Grounds of challenge

4. The Claimant submitted that the Council’s decisions, and the proposed demolition, were unlawful on the following grounds:
 - i) The Council erred in its interpretation and application of paragraph B.1(a) of Class B, Part 11 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (“the GPDO 2015”), hereinafter referred to as “Class B”, and so its determination as to whether the proposed demolition was excluded from the permitted development rights for demolition was unlawful.
 - ii) The Council failed to provide an adequate and intelligible record of the decision and its reasons, as required by the Openness of Local Government Regulations 2014, instead producing contradictory decisions with inconsistent reasons and dates.

Planning history

5. The School, which was built in 1877, served as the village primary school until 1980. In the delegated decision report dated 7 March 2022, the planning officer (Mr Withers) described the School as follows:

“The Old School, Garway is an attractive Victorian stone built, former school house located in a visually prominent roadside location at the western end of the village and in close proximity to the school and community hall.

It is unlisted but is certainly of sufficient architectural quality to be considered a non-designated heritage asset and it occupies a prominent roadside location at the western end of the village close to the Primary School and Community Centre.”

6. The School was purchased by Mr Davies on 25 September 1981. A 2013 Design and Access Statement submitted on his behalf stated:

“The site was then purchased by the applicant in 1980 when it became agricultural and commercial workshops with a large steel framed building being erected immediately behind the school for the maintenance and repair of vehicles. The yard area was used for the parking and refuelling of vehicles, whilst the school rooms were used for the storage of spare parts. This use ceased in 2002. In recent years the buildings became vandalised and the site became quite overgrown.”

7. In 2013, planning permission was granted for the conversion of the school rooms to two dwellings, but that permission was allowed to expire. Part of the overall site, but outside the 2013 application boundary, was the school house, which was part of the School building. That was in use as a single dwelling with the intention to retain it as such. However it appears that the school house was vacated in about 1997. Since then it has remained vacant and boarded up.

The 2021 prior approval application

8. On 19 May 2021, Mr Davies submitted a prior approval application for the proposed demolition of the building. The Claimant objected to the application on 16 June 2021.
9. The Council’s delegated decision report was produced by the officer on 16 June 2021. He conducted a site visit in June 2021. He advised that the proposed demolition was permitted development. The report stated that the building was “in good structural condition and gives no impression of being neglected” and so was not “intentionally rendered unsafe or uninhabitable by inaction”. The officer went on to advise that prior approval was required, and that the information provided so far by Mr Davies was insufficient. On 16 June 2021 the Council formally determined that prior approval was required.
10. The Council submitted a detailed request for the listing of the building. This request was turned down by the Secretary of State, on advice from Historic England, on 15 July 2021. Historic England’s report found that the School was of “strong local interest”.
11. On 3 December 2021, the officer produced a further delegated decision report. He considered first whether the proposal was within the permitted development rights, stating:

“In the light of a number of well-made objections, I have revisited my initial assessment and sought further legal advice. This has corroborated position *sic* already taken that with all due respect to many of the objections raised, it is not the case that the building has been rendered unsafe and in my view whilst it may not be habitable in its current condition, it could be made so with limited works that would amount to what might be rationally described as repairs and maintenance outside the scope of

planning control As such, I do not consider that the proposal falls outside the scope of the definition.”

12. The officer further advised that the proposal still contained inadequate details of the method of demolition and the proposed restoration of the site and so should be refused.
13. On 3 December 2021, the Council decided to refuse prior approval, for the following reason:

“In the continued absence of any of the information required in its previous determination that Prior Approval was Required, and in view of the visual prominence of the site, its close relationship with sensitive receptors; the potential implications/risk associated with the contamination of land within the application site and the potential impact on protected species the Prior Approval is Refused.”

The 2022 prior approval application

14. On 9 February 2022 Mr Davies submitted a further prior approval application for the demolition of the School. On the issue of the permitted development rights, his planning consultants, Tompkins Thomas Planning (“TTP”) stated:

“TTP Comment: The building is not made unsafe or uninhabitable by the action or inaction of a person having an interest in the land. The applicant previously achieved planning permission at the site for the conversion of the buildings to dwellings but has been unable to sell the site at a price reflective of market value. During this time, he has maintained the building as best he can and ensured that it remains as safe as can be whilst appreciating that the building has no current use. Through the action of others some vandalism has taken place.

Although in our view the building is safe, even if a contrary view were taken, it could certainly be made safe through the carrying out of repair works and/or temporary supports.

This is agreed by the Council in their officer’s reports.”

15. The Claimant objected to the application on 18 March 2022. Its solicitors, Harrison Grant, also sent a letter to the officer on 18 March 2022 explaining why, in their view, the proposal did not have permitted development rights. The letter said of paragraph B.1(a) of Class B:

“This has three elements:

The building being unsafe or uninhabitable;

This state arising from the action or inaction of any person having an interest in the land; and

It being practicable to remedy the situation on a permanent or temporary basis.”

16. Harrison Grant continued:

“The uninhabitable nature of the building arises from Mr Davies’ failure to maintain it.

Consequently, the building has been ‘rendered unsafe or otherwise uninhabitable by the action or inaction of any person having an interest in the land’.

As the Council’s 2021 assessment identifies, the building could be rendered habitable by repairs and maintenance.

Consequently, the three elements of the exclusion from demolition permitted development rights in paragraph B.1(a) apply. The proposal does not have permitted development rights. The Council’s 2021 report failed to address the second element – the owner’s responsibility for the state. That it could be repaired means that the third element of the exclusion is satisfied. It is not the case that the ability to carry out repairs and maintenance without a further planning permission means that the permitted development rights apply. On the contrary, that prohibits demolition.”

17. The officer produced a delegated decision report dated 7 March 2022. However, it was not on the Council’s website when the Harrison Grant letter was sent on 18 March 2022. The properties on the pdf file state it was created at 12:06 on 28 March 2022. The Council’s website records a consultation end date of 7 March, a target date of 8 March and a decision date of 22 March.
18. The officer did not make a further site visit on this occasion. His report considered the permitted development rights as follows:

“Does the building qualify?

The first consideration relates to whether there is any evidence to suggest that the building has been intentionally rendered unsafe or uninhabitable by inaction. This provision would only be relevant were the building in a more deleterious state that might be prevented by works to stabilise it. From my observations the building is in good structural condition and gives no impression of being neglected to the level inferred by the legislation. It continues to make a generally positive contribution to the site and wider locality and it is explained in the supporting submission that the site owner has simply sought to secure the building to a limited extent but it has been subjected to some vandalism. As such, and whilst acknowledging the sheer volume and strong views of the local community, I do not

consider that the proposal falls outside the scope of this definition.”

19. The officer was satisfied with the proposed method of demolition and restoration of the site, set out in the documentation submitted by TTP. Therefore he recommended that prior approval be granted.
20. The officer’s recommendation was approved by Mr Kevin Bishop, Lead Development Manager, on 8 March 2022 when he completed and signed the form at the back of the delegated decision report. It read: “DECISION: PERMIT ”. Mr Bishop then signed the formal notice of the Council’s decision headed “Demolition of Buildings – Prior Approval” on 22 March 2022.
21. The Council’s solicitor responded to Harrison Grant’s letter on 24 March 2022. The letter did not refer to the delegated decision report or the formal notice of the Council’s decision. The letter set out the text of both paragraph B.1(a) and paragraph B.2(a) of Class B, and then stated as follows:

“The above paragraphs apply where no decision on whether prior approval is required is sought from the Council or demolition of the building is not required and works to provide temporary support would be sufficient for the building to remain. Furthermore, for the provisions in Schedule 2 Part 11 Class B Paragraph B1(a) GPDO 2015 to apply the building would need to be in a significant state of structural disrepair which would render the building as currently standing unsafe or a risk to health. Neither of these apply to the present application.

The provisions included in Part 11 paragraph B1(a) GPDO 2015 only apply where the building is in a significant state of disrepair and is a danger to health or safety. These provisions cross over with the provisions in Schedule 2 Part 11 Class B Paragraph B2(a) GPDO 2015 which allow for notice to be given to the local authority instead of an application for prior approval where the demolition of the building is immediately necessary for reasons of health and safety.

The building which is the subject of the application is not in a state of disrepair to satisfy the requirements of Part 11 paragraph B1(a) GPDO 2015. There have been no reports of dangers or issues with the building from the Council’s building control department nor does the building appear to be in a state of disrepair to meet the requirements of the criteria as set out above. Furthermore the building does not fit within any of the definitions set out in Schedule 2 Part 11 Class B Paragraph B2 GPDO 2015.

For the reasons set out in this letter the Council considers that the demolition falls within the requirements of the demolition of buildings as set out in the GPDO 2015 and therefore does not require prior approval.”

22. On 1 April 2022, Harrison Grant sent a pre-action protocol letter, accompanied by a draft Statement of Facts and Grounds, to the Council. The Council replied on 12 April 2022. As a preliminary point, the Council submitted that the proposed claim was academic since the Council had issued the decision notice after the 28 day deadline in paragraph B.2(b)(vii)(cc) of Class B had expired, and so it was open to Mr Davies to commence the development even if the Council's decision was quashed. The Council then set out its defence to the proposed grounds of challenge.

Legal framework

23. Planning permission is required for the demolition of a building: Town and Country Planning Act 1990, sections 55(1) and 57(1). The Town and Country Planning (Demolition – Description of Buildings) Direction 2021 does not exclude buildings of the size of the School from the definition of development.

24. Planning permission is granted by permitted development rights under Schedule 2, Part 11, Class B of the GPDO 2015.

25. The permitted development in Class B is:

“B. Permitted development

Any building operation consisting of the demolition of a building”

26. Paragraph B.1. sets out limitations and exclusions where development is not permitted:

“B.1. Development not permitted

Development is not permitted by Class B if—

(a) the building has been rendered unsafe or otherwise uninhabitable by the action or inaction of any person having an interest in the land on which the building stands and it is practicable to secure safety or health by works of repair or works for affording temporary support;

.....”

27. The permitted development right is subject to conditions, as set out in paragraph B.2 Conditions of Class B (see also article 3(2) of the GPDO 2015). Subject to exceptions, a proposal to demolish a building under Class B rights is subject to “a determination as to whether the prior approval of the authority will be required as to the method of demolition and any proposed restoration of the site” (condition B.2(b)).

28. By condition B.2(b)(vii):

“the development must not begin before the occurrence of one of the following—

(aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(bb) where the local planning authority give the applicant notice within 28 days following the date of receiving the application of their determination that such prior approval is required, the giving of such approval; or

(cc) the expiry of 28 days following the date on which the application was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;”

29. The 28 day period for determining whether prior approval is required can be extended by the agreement of the applicant and the authority in writing: GPDO 2015, article 7(c); *Gluck v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 1756, [2021] PTSR 1004, at [28]-[32] per Newey LJ.

30. The relevant provisions in section 31 of the Senior Courts Act 1981 read as follows:

“(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.

...

(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.”

Identifying the Council’s decision/s

31. The Claimant contended that the Council produced three decisions that the proposed demolition would be within permitted development rights, namely, in a delegated decision report dated 7 March 2022; in a prior approval decision notice, dated 22 March 2022; and in a letter from the Council’s solicitor dated 24 March 2022. The Council submitted that the decision was only contained in the prior approval decision notice dated 22 March 2022.
32. In my judgment, the officer who produced the delegated decision report dated 7 March 2022, was making a recommendation, not a decision. He was not authorised to make the delegated decision. The delegated authority to make the decision was exercised by a more senior officer – Mr Kevin Bishop, Lead Development Manager. On 8 March 2022, Mr Bishop decided that the Council should grant approval. He gave effect to that decision by signing the Council’s formal decision notice headed “Demolition of Buildings – Prior Approval” on 22 March 2022. Therefore, 22 March 2022 was the date upon which the Council made the decision.
33. In my view, this analysis is in accordance with standard practice in planning decision-making. The formal decision notice is, in law, the decision of the authority. It may well be, as here, that the officer with delegated authority to make the decision on behalf of the authority, has decided at an earlier date what action will be taken. The formal decision notice will then have to be generated, and in due course signed by the officer at a later date.
34. The Council’s solicitor’s letter, dated 24 March 2022, was a reply to a letter from the Claimant’s solicitors. It did not purport to be a decision of the Council. The solicitor was not authorised to make this delegated decision. Indeed, the delegated decision had already been made by the date on which the letter was sent.

The application of paragraph B.2(b)(vii)(cc) of Class B and section 31 of the Senior Courts Act 1981

35. Paragraph B.2(b)(vii) of Class B provides:

“the development must not begin before the occurrence of one of the following—

.....

(cc) the expiry of 28 days following the date on which the application was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;”

36. Both parties agreed that, as the application was received on 8 February 2022 and was not determined until more than 28 days later, on 22 March 2022, the prohibition on the commencement of development afforded by paragraph B.2(b)(vii) had expired by virtue of sub-paragraph B.2(b)(vii)(cc).
37. The Council submitted that therefore the claim was academic, and section 31(2A) of the Senior Courts Act 1981 applied, since the quashing of the Council’s decision dated 22 March 2022 would not prevent Mr Davies from carrying out the demolition. The Council submitted that permission to apply for judicial review should be refused for these reasons.
38. In response, the Claimant submitted that the Council’s view that permitted development rights applied in this case was not legally conclusive, and if it was flawed, it ought to be quashed.
39. The Claimant relied on *Westminster City Council v Secretary of State for Housing, Communities and Local Government & New World Payphones Ltd* [2019] EWCA Civ 2250, where the operator of an electronic communications network applied to Westminster Council for a determination as to whether prior approval for the replacement of two telephone boxes with a single new kiosk was required under paragraph A.3(4), Part 16, Schedule 2 GPDO 2015. It also applied for consent for the display of an advertisement panel. Westminster Council refused both applications. In a decision notice dated 6 September 2017, it determined that (1) prior approval was required; and (2) that approval was refused because the kiosk would be harmful to visual amenity. On the operator’s appeal to the Secretary of State, Westminster Council was granted permission to rely on an additional ground of refusal, namely, that the application for prior approval did not meet the definitional requirements in Part 16 as it was not for the purposes of the operator’s communication network. The inspector allowed the operator’s appeal.
40. On an application for statutory review by the local planning authority under section 288 of the Town and Country Planning Act 1990, the High Court quashed the inspector’s decision on the basis that the new kiosk was not wholly “for the purpose of the operator’s electronic communication network”, being partly also for the purpose of advertising. Therefore it fell outside the scope of paragraph A of Part 16.
41. The Court of Appeal upheld the judgment of the High Court, dismissed the operator’s appeal, and quashed the grant of prior approval because the proposed development fell outside the scope of the GPDO 2015. Hickinbottom LJ said, at [48] and [49]:

“48

(i) The GPDO describes classes of “permitted development” for which planning permission is granted without the requirement for a planning application to be made under Part 3 of the 1990 Act. To fall within a class, development not only has to comply with a class description, but also has to satisfy a series of conditions and limitations unique to that class. If it does not do so, then it is not permitted under the GPDO; and planning permission can only be obtained on the basis of a full application.

(ii) To take the advantage of being permitted development, the proposed development must fall entirely within the scope of the GPDO...

49. I should deal specifically with the strands of argument relied upon by Mr Stinchcombe which I have already identified. I do so in the same order.

(i) It is, rightly, common ground that NWP’s subjective purpose in pursuing the development is irrelevant: what is relevant is the use or purpose of the proposed physical structure that comprises the development. In any event as I have explained, the form of the application cannot determine whether any proposal falls within a permitted development class. In *Keenan* (at para 36), Lindblom LJ said that an application to a local planning authority for a determination as to whether its “prior approval” would be required does not impose on the authority a duty to decide whether the proposed development is in fact permitted development under the GPDO. But the thrust of that paragraph of Lindblom LJ’s judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. On an application to an authority for a determination as to whether its “prior approval” is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development.”

42. In *Keenan v Woking Borough Council* [2017] EWCA Civ 438, [2018] PTSR 697, the Court of Appeal held that a failure by the local planning authority to make a determination on a prior approval application within the 28 day period enables the developer to proceed with the proposed development, under the relevant provision, but he did not thereby gain planning permission by default and so he did not have planning permission for development that was not “permitted development”: per Lindblom LJ at [36] and [41].
43. In *Westminster* the grant of prior approval was quashed on the basis that the proposed development fell outside the scope of the GPDO 2015. In principle, a quashing order could also be made in this case, if the Court found that the Council had misdirected

itself in law, even though, unlike this case, *Westminster* was a case in which no exercise of planning judgment was required to make the determination.

44. If the Court were to find in these proceedings that the Council had erred in deciding that the proposed demolition was permitted development and proceeded to quash the grant of prior approval, the Council could then be ordered to re-consider its decision, in accordance with the judgment of the Court. If it reversed its previous view, and decided that the proposed demolition was not permitted development, it could (if necessary), take action against Mr Davies to prevent the demolition by enforcement proceedings and/or an application for an injunction under section 187B of the Town and Country Planning Act 1990.
45. Therefore, in my view, this claim is not academic. Furthermore, applying section 31(2B) or (3E) of the Senior Courts Act 1981, this could be a case in which there was an exceptional public interest, namely, ensuring the lawful exercise of planning controls, which meant that the requirements of section 31 of the Senior Courts Act 1981 should be disregarded.

Ground 1

Submissions

The Claimant

46. The Claimant submitted that the Council erred in its interpretation and application of paragraph B.1(a) of Class B. The Claimant identified a number of findings in the delegated decision report dated 3 December 2021, which it submitted fed into the 2022 decision, as the planning officer was the same person, and he did not conduct a second site visit in 2022.
47. The Claimant submitted that the officer found that the School was uninhabitable (“whilst it may not be habitable in its current condition” at paragraph 11 above), thus meeting the first limb of the test in paragraph B.1(a), but he failed to address Mr Davies’ responsibility for the state of the School. Given Mr Davies’ lengthy ownership and then leaving the School vacant, its uninhabitable state appeared to be down to his inaction, and this should have been considered. The officer also erred by treating the ability to carry out repairs and maintenance as a factor in favour of the existence of permitted development rights, whereas on the contrary, it was the third limb of the test in paragraph B.1(a).
48. The Claimant submitted that the representations made by TTP (paragraph 14 above) served to support the view that permitted development rights were lost. They relied upon the officer’s report of 3 December 2021, including the reference to the School being uninhabitable, without correction. The statement that he tried to keep it “as safe as can be” conceded that safety problems arose from the lack of use. Vandalism was mentioned but not put forward as a reason why the building was uninhabitable.

49. In regard to the delegated decision report of 7 March 2022, the Claimant alleged that the officer misdirected himself on the statutory test and failed to apply it properly, in the following respects:
- i) Finding that the building must have been ‘intentionally rendered unsafe or uninhabitable by inaction’ (emphasis added). The condition does not need to be intentional, indeed the owner does not need to have any particular state of mind. The test is purely objective: was the relevant state of the building due to the owner’s action or inaction?
 - ii) The exclusion being said to only apply if “the building in a more deleterious state”, however the question on the condition of the building was whether it was uninhabitable;
 - iii) A need for works of repair is sufficient, without being of the scale of “works to stabilise it”;
 - iv) A “good structural condition” is irrelevant if the building is uninhabitable;
 - v) In the light of the previous statements, the “level inferred by the legislation” was misunderstood;
 - vi) Understanding that “the site owner has simply sought to secure the building to a limited extent” indicates inaction when the building has been vacant for up to 9 years.
50. The Claimant also submitted that the Council solicitor’s letter of 24 March 2022 letter (paragraph 21 above) contained a series of legal errors, namely:
- i) Having cited condition B.2(a) (on urgent demolition) and paragraph B.1(a) (exclusion of permitted development rights) the letter said “The above paragraphs apply where no decision on whether prior approval is required is sought from the Council or demolition of the building is not required and works to provide temporary support would be sufficient for the building to remain”. The latter part is erroneous: the permitted development rights neither arise nor are excluded where “demolition is not required”. Temporary support is only one option. The comment fails to deal with the paragraph B.1(a) at all, since that excludes permitted development rights.
 - ii) The test for the condition of the building is “unsafe or uninhabitable” not “significant state of structural disrepair” or “significant state of disrepair”.
 - iii) Risks or dangers to health are only correctly understood if applied to any building which has become uninhabitable. A building might be uninhabitable but not dangerous to health. That is not the approach in the Council’s letter;
 - iv) There is no cross-over between paragraph B.1(a) and condition B.2(a): in the former case there are no permitted development rights; in the latter, permitted development allows demolition without securing prior approval;
 - v) In those circumstances, the wrong test was applied with regard to disrepair;

- vi) The solicitor's letter failed to deal with the Council's own December 2021 finding that the building was inhabitable;
- vii) Finally, the letter asserted that the demolition was within the GPDO 2015 requirements "and therefore does not require prior approval". That assertion failed to take into account the prior approval process and flatly contradicted the 2022 decision notice and delegated decision report which said that prior approval was required.

The Council

- 51. The Council submitted that the only relevant report was the delegated decision report of 7 March 2022, which set out the reasons for the decision to grant prior approval, on 22 March 2022. The earlier reports were immaterial, as was the solicitor's letter of 24 March 2022.
- 52. In the delegated decision report, the officer plainly considered whether paragraph B.1(a) of Class B applied. In the exercise of his judgment, he found that the building was not unsafe or uninhabitable. He noted that "the building is in good structural condition and gives no impression of being neglected to the level inferred by the legislation." That analysis could only sensibly be understood as an exercise by the officer of a judgment as to whether the building was unsafe or uninhabitable and a finding that it was neither unsafe, nor uninhabitable.
- 53. Having found that the building was neither unsafe nor uninhabitable, it was thereafter irrelevant whether the state of the building was caused by the action or inaction of the owner or whether it was practicable to secure safety or health by works of repair or works for affording temporary support.
- 54. Furthermore, having found that the building was neither unsafe nor uninhabitable, the Council was unarguably correct to find that the proposed work was not excluded from the permitted development right.
- 55. The Council submitted that the Claimant's criticisms of the report were unduly semantic and legalistic. The officer paraphrased the statutory test in paragraph B.1(a) of Class B, perhaps to make the report more readable and accessible. But the fact that he departed from the language of the statutory test did not mean that he misdirected himself as to its meaning, or failed to apply it.
- 56. In response to the specific criticisms, the Council submitted:
 - i) Whilst it was correct that intention is not part of the statutory test, the officer may have used the word "intentionally" as a synonym for "action" in limb 2. In any event, his use of the word "intentional" in the report was immaterial, given that the officer found that the building was neither unsafe nor uninhabitable;
 - ii) The reference to the need for the building to be "in a more deleterious state" in order for paragraph B.1(a) to apply was obviously a reference, albeit using different language to the statutory provision, to the need for the building to be unsafe or uninhabitable before paragraph B.1(a) was engaged;

- iii) It was wrong for the Claimant to suggest that a need for works of repair was sufficient to engage paragraph B.1(a). Paragraph B.1(a) was only engaged where the building is unsafe or uninhabitable. The officer's reference to "works to stabilise [the building]" could only be understood in the context of the sentence as a whole and the officer's finding that paragraph B.1(a) would only be applicable "were the building in a more deleterious state" than was in fact the case;
 - iv) There was nothing unlawful in the officer taking into account that the building was in a 'good structural condition' in deciding that it was neither unsafe nor uninhabitable;
 - v) The officer's finding that the building had not been "neglected to the level inferred by the legislation" is obviously a finding, albeit again using different language to the statutory provision, that the building was neither unsafe nor uninhabitable;
 - vi) The officer's finding that the owner had sought to secure the building to a limited extent was a finding that was open to the officer on the evidence and did not mean that the officer was bound to find that the building had been rendered unsafe or uninhabitable through inaction. Indeed, as noted above, the officer found that the building was not unsafe or uninhabitable.
57. In regard to the solicitor's letter of 24 March 2022, the Council accepted that it contained a number of errors, namely, those identified by the Claimant at paragraph 49(i), (iv) and (vii) above. However, the Council submitted that the solicitor's letter did not contain the reasons for the Council's decision, and in fact post-dated it. Therefore it was immaterial.

Conclusions

58. Development is not permitted by Class B if paragraph B.1(a) applies. The statutory test in paragraph B.1(a) of Class B contains three limbs, each of which must be satisfied:
- i) the building has been rendered unsafe or uninhabitable;
 - ii) by the action or inaction of any person having an interest in the land; and
 - iii) it is practicable to secure safety or health by works of repair or works for affording temporary support.
59. The reasons for the Council's decision were set out in the officer's delegated decision report dated 7 March 2022, not the earlier delegated decision reports in 2021. However, I allowed the Claimant to refer to the earlier reports as relevant evidence, as they were recently produced by the same officer in respect of the same site.
60. Each limb of the statutory test required the Council to make an evaluative judgment, based upon the available evidence, namely, the application, the objections and the site visit. I agree with the Council's submission that the officer clearly concluded, in the exercise of his planning judgment, that the School was not unsafe or uninhabitable, and

therefore the first limb of the statutory test was not met. It is noteworthy that the officer reached this conclusion on each of the three occasions when he assessed the evidence.

61. I do not accept the Claimant's submission that in the report of 3 December 2021, the officer made a finding that the School was uninhabitable. On my reading of the report, he was raising this as a hypothesis or possibility, in response to the objections that had been made. In my view, if the officer had found that the School was uninhabitable he would have made an unequivocal finding to that effect, in all three reports, as he was clearly well aware that the first limb of the statutory test was that the building had been "rendered unsafe or uninhabitable".
62. In response to the Claimant's criticisms of the officer's approach to the first limb of the statutory test, in sub-paragraphs (ii) to (vi) of paragraph 48 above, I accept the following submissions made by the Council, based on a fair reading of the report:
 - i) The reference to the need for the building to be "in a more deleterious state" in order for paragraph B.1(a) to apply was a reference, albeit using different language to the statutory provision, to the need for the building to be unsafe or uninhabitable before paragraph B.1(a) was engaged;
 - ii) Paragraph B.1(a) was only engaged where the building was unsafe or uninhabitable. The officer's reference to "works to stabilise it" could only be understood in the context of the sentence as a whole and the officer's finding that paragraph B.1(a) would only be applicable "were the building in a more deleterious state" than was in fact the case;
 - iii) It was not unlawful for the officer to take into account that the building was in a 'good structural condition' in deciding that it was neither unsafe nor uninhabitable;
 - iv) The officer's finding that the building had not been "neglected to the level inferred by the legislation" was a finding, again using different language to the statutory provision, that the building was neither unsafe nor uninhabitable;
 - v) The officer's finding that the owner had sought to secure the building to a limited extent was a finding that was open to the officer on the evidence and did not mean that the officer was bound to find that the building had been rendered unsafe or uninhabitable through inaction.
63. In my view, the officer erred in including the word "intentional" when he was paraphrasing the statutory test, since intention is not part of the test in paragraph B.1(a) of Class B. However, as the officer found that the School was not unsafe or uninhabitable and so the first limb of the test was not met, the Claimant cannot succeed by reference to failings in respect of his approach to the second or third limbs. As the Council submitted, they are immaterial.
64. In regard to the solicitor's letter of 24 March 2022, the Council has accepted that it contained a number of errors, namely, those identified by the Claimant at paragraph 49 sub-paragraphs (i), (iv) and (vii) above. I do not consider that the Claimant's criticisms of the solicitor's choice of language in sub-paragraphs (ii) and (iii) amounted to material errors of law; she was entitled to illustrate her understanding of the statutory test in that

way. As to sub-paragraph (v), the wrong test was applied insofar as set out in sub-paragraphs (i) and (iv), but not otherwise. As I have already indicated, I do not accept that there was an earlier finding that the School was uninhabitable, and so sub-paragraph (vi) is without foundation.

65. The solicitor's letter of 24 March 2022 plainly did not contain the reasons for the Council's decision of 22 March 2022, as it made no reference to it, and indeed post-dated it. It seems that the solicitor had not even seen the decision or the delegated decision report when she wrote the letter, as she wrongly stated that prior approval was not required, whereas in fact the decision of 22 March 2022 granted prior approval, following the recommendation in the report. Whilst the errors in the letter are regrettable, I am satisfied that they did not influence the decision that was made on the application.
66. The officer referred to "further legal advice" received in the report of 3 December 2021 and the Council disclosed the legal advice which was given by the same solicitor to the officer on 21 June 2021. It correctly advised on the statutory test, and so I am satisfied that the errors in the letter of 24 March 2022 were not part of the earlier advice and so did not mislead the officer in 2021.
67. Therefore, for the reasons I have given, Ground 1 does not succeed, although I accept that the Claimant's points were arguable and therefore permission is granted.

Ground 2

68. The Claimant submitted that the Council failed to provide an adequate and intelligible record of the decision and its reasons, as required by the Openness of Local Government Regulations 2014, instead producing contradictory decisions with inconsistent reasons and dates.
69. Where the effect of a decision delegated to an officer is to grant a permission or licence, then the decision-making officer must produce a written record of the decision: Openness of Local Government Regulations 2014, regulation 7(1),(2)(b)(i).
70. By regulation 7(3):

"The written record must be produced as soon as reasonably practicable after the decision-making officer has made the decision and must contain the following information—

 - (a) the date the decision was taken;
 - (b) a record of the decision taken along with reasons for the decision;
 - (c) details of alternative options, if any, considered and rejected;

....."
71. The Council was therefore under a statutory duty to provide reasons for granting the prior approval. Where there is a duty to give reasons, those reasons must be intelligible

and adequate (*R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, per Lord Carnwath JSC at [30]; [35] – [42]).

72. The Claimant made four main complaints:
- i) The published documents were contradictory, as the letter of 24 March 2022 stated that prior approval was not required whereas the delegated decision report of 7 March 2022 and the decision notice of 22 March 2022 stated that prior approval was required and granted;
 - ii) There was an unexplained delay in publishing the delegated decision report of 7 March 2022 and the decision notice of 22 March 2022, and it was not available to the Claimant in good time;
 - iii) There was no discernible reason, other than administrative incompetence, for the delay in issuing the decision notice on 22 March 2022, after the expiry of the 28 day period in B.2(b)(vii)(cc) of Class B.
 - iv) The electronic files for the delegated decision report dated 7 March 2022 and the decision notice of 22 March 2022 were created on 28 March 2022 on pdf files, after the decision was made.
73. In my judgment, the reasons for the decision of 22 March 2022 were adequately set out in the delegated decision report of 7 March 2022, in accordance with standard practice. The statutory duty to give reasons was discharged.
74. The solicitor's letter of 24 March 2022 did not contain the reasons for the decision, as I have explained in paragraph 65 above.
75. The Council was not required to give further reasons to explain the dates on which documents were issued and the reasons for any delays in issuing documents. Nor was it required to give reasons for the contradictions between the delegated decision report and the solicitor's letter of 24 March 2022. The duty to give reasons only exists in respect of a decision. These matters were not decisions.
76. Furthermore, in my judgment, section 31(3D) of the Senior Courts Act 1981 applies, as it is likely that the outcome for the applicant in this claim would not have been substantially different if the conduct referred to at paragraph 72 above had not occurred.
77. Therefore permission to apply for judicial review is refused on Ground 2.

Final conclusion

78. Permission to apply for judicial review is granted on Ground 1, but refused on Ground 2. The claim for judicial review is dismissed.