Neutral Citation Number: [2024] EWHC 2607 (Admin)

Case No: AC-2024-CDF-000038
AC-2024-CDF-000039

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF64 2UA

Date: 18/10/2024

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

PAUL EVANS	**Claimant**
- and -	
BRIDGEND COUNTY BOROUGH COUNCIL	**Defendant**

- -
- -

The **claimant** appeared in person
Mr Wayne Beglan (instructed by **Legal Services**) for the **defendant**

Hearing dates: 12 October 2024
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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. The claimant in 2023 made two applications for outline planning permission for the construction of dwellings on a green space known as land North of Underhill Cottages, Tondu Road, Bridgend (the site). One application was for the construction of nine dwellings on what was termed parcel A of the site. The other was for the construction of nine dwellings on the remainder of the site, referred to as parcel B.

2. The defendant planning authority (the authority) by letters dated 23 January 2024 notified the claimant that it declined to determine both applications. Each letter was signed by Rhodri Davies as the authority's development and building control manager. In respect of both parcels, the letter said this:

> "This Local Planning Authority is exercising its right under Section 70A of the Town and Country Planning Act 1990 (as amended) to decline to determine this application as a similar proposal has recently been refused by Bridgend County Borough Council and dismissed on appeal by Planning and Environment Decisions Wales (PEDW).
>
> The Local Authority is of the view that there has been no significant change in the development plan (so far as relevant to the application) nor any other material considerations since the similar application was refused and dismissed on appeal."

3. The claimant commenced separate judicial review claims in respect of each parcel seeking on five grounds orders quashing each decision, mandatory orders that the authority determine each application, and damages. In May 2024, on the direction of Holgate J, as he then was, the claims were consolidated. His Honour Judge Keyser KC gave permission to bring the claims on just one ground, which he articulated as follows:

> "That it was irrational of the Defendant to form the opinion, in each case, that the development and the land to which the application related were the same or substantially the same as the development and the land to which the 2021 application related."

4. Judge Keyser, when granting limited permission, observed as follows:

> "The real issue, spread across five grounds in the Statement of Facts and Grounds, is (in my view) whether it was open to the defendant to form the opinion in section 70A(2). To a large extent this comes down to a matter of planning judgement, with which the court will not normally interfere. The arguable point (in my view) is whether the defendant was entitled to invoke section 70A on the basis, in effect, that the division of the

> development into two separate applications was a mere ruse to circumvent section 70A.The land and development in each of the present applications were, it would seem, significantly different from those in the 2021 application; the similarity comes from viewing the two present applications together. However, it would have been open to the defendant, in principle, to grant one application but not the other. It is not immediately apparent (though on detailed argument it might possibly become so) that this could not be a practical possibility and that the division into two applications had no effect other than to seek to circumvent section 70A. It is arguable that the "abuse of process" argument in paragraph 48 of Mr Davies's witness statement in 000038 goes beyond the limits of section 70A."

5. There was no renewed application for permission in respect of any other ground. Insofar as the claimant, in his written and oral submissions at the substantive hearing, sought to go beyond the confines of the ground upon which permission was given, then in my judgment such extension is impermissible. I confine myself to the consideration of that ground.

6. The 2021 application referred to is an application made by the claimant in 2021 for the development of the site for housing, his sixth such application, which had all been refused by the authority. Two appeals had been dismissed. The 2021 application was also refused, and also dismissed by an inspector on appeal in the decision letter dated 2 August 2023. That inspector described the site as a linear parcel of land located on the south-western side of the A4063 Tondu Road with a relatively steep gradient and comprising a largely wooded area incorporating a number of mature trees.

7. The description of the development with which the inspector was dealing was outline consent for the erection of 15 dwellings with approval for access on land off Tondu Road, Bridgend, with other matters such as appearance, landscaping, layout and scale reserved for future consideration. The 2021 application sought approval for vehicular access onto the site within the red line of the site and included on site car parking provision of 15 car spaces, plus 3 visitor car spaces and bin collection points.

8. The authority refused the application in a decision dated 22 April 2022 for four reasons. First, it was said that the proposal would constitute an overdevelopment of the site as it is too restricted to accommodate the number of dwellings consistent with accepted standards of space contrary to Policy SP2 of the Bridgend Local Development Plan (BLDP) and advice contained within Planning Policy Wales (PPW). Second, the site is not accessible by a range of different transport modes and will rely on the use of the private motor vehicle and therefor does not accord with PPW. Third, there would be no satisfactory means of access for generated traffic and a likelihood of U turns to or from the A4063 Tondu Road, contrary to policies SP2, SP3 and PLA5 of the BLDP and PPW. Fourth, because of the need to fell protected trees, the development would adversely affect the amenity of the area and biodiversity of the site and the identified Site of Importance for Nature Conservation (SINC) known as Cefn Glass Wood (Graig-y-Casnewydd,) contrary to policies ENV4, ENV5 and ENV6 of the BLDP and Supplementary Planning Guidance 19 (Biodiversity and Development).

9. In the subsequent decision on appeal, the inspector noted at [5] that the previous two appeals in respect of the site had been dismissed for similar reasons. At [6] four main issues were identified: the effect of the proposed development on the character and appearance of the area; the effect of the proposed development on the living conditions of future occupants; whether the development would result in the unacceptable loss of trees and features of importance for local ecology; and the effect of the proposed development upon highway and pedestrian safety.

10. The inspector determined each of those issues against the claimant in dismissing the appeal. Taking the issues in turn, the inspector concluded at [10] that two separate blocks of dwellings on the scale proposed would occupy much of the site frontage in what is otherwise a predominantly verdant wooded setting. In terms of living conditions the inspector at [15] was not satisfied from the limited details before her that there would be sufficient space of a reasonable quality provided for each dwelling that would meet the day-to-day needs of the future occupants. At [20] the inspector dealt with the loss of trees as follows:

> "Even with the removal of a number of trees on account of their condition, I consider those that would remain would contribute to the green backdrop to the urban form that forms part of a wider dense, planted belt alongside the A4063 and is highly visible from a number of public vantage points. They provide a verdant setting to this part of the urban area and contribute positively to the wider locality, playing a significant part in softening public views of the built environment."

11. The inspector went on to deal with ecology and at [25] noted the previous inspector's conclusion that no protected species or other notable habitats were recorded at the time of a survey undertaken in 2020, outside the optimum period, but observed that it was not known the extent to which that had been reassessed. At [28] she indicated that she could not conclude on the basis of the submitted evidence that the proposal would not have an adverse impact on a protected species.

12. Finally, on highway issues, at [30] the inspector noted that unlike the previous applications and appeals, approval of access is sought, as part of the outline application, from the A4063, which is subject to a speed limit of 50 mph. At [39] she concluded that it had not been shown that a satisfactory means of access to serve the traffic generated can be achieved and it is likely to generate vehicular U-turn movements to or from the public highway thereby creating further traffic hazards to the detriment of highway safety along the adjoining A4063. At [41], the inspector observed that even if appropriately designed pedestrian footway links could be achieved, the proposal did not incorporate any cycle friendly infrastructure to link with existing facilities in the area. At [43] she acknowledged that there are bus stops in reasonably close proximity to the site, but in the absence of proposals for footways and safe crossing points to enable pedestrians and cyclists to negotiate a dual carriageway, she considered that the proposal would be detrimental to highway and pedestrian safety.

13. The claimant points to several differences between the 2021 application and the 2023 applications. These include that the red line site areas of the 2023 applications are 0.07 hectares and 0.1 hectares respectively. The site area of the 2021 application was

0.1737 ha. Highway issues and access arrangements in the 2021 application involved vehicular access into the site with parking spaces. Each of the 2023 applications involved only pedestrian and cycle access into the site and a vehicular drop of point adjacent to Tondu Road and outside each of the red lines in the applications. The height of the buildings in the 2023 applications are limited to the height of the adjoining properties at Underhill Cottages. The green backdrop was replicated alongside those cottages. Revised living conditions and garden spaces are shown on the illustrative layout in the 2023 applications. Finally, a bat survey and protected species report was submitted in support of the latter applications.

14. Mr Davies has filed witness statements in these proceedings in which he sets out the factors which he took into account in deciding that the 2023 applications were similar to the 2021 application. In doing so, it is clear that he considered the two applications as one. Indeed he considered that the division of the site was illogical and simply a ruse to circumvent the application of section 70A of the 1990 Act. He referred to this as an abuse of process. Taking the two 2023 applications together, such factors included the proposed land use, the illogical subdivision of the site, the outline form of the applications, the SINC issues, the serious access issues with no policy compliant solution, the similar number of dwellings, the design / amenity issues, and evidence showing the parcels in the 2023 applications being considered as one site. Such evidence included surveys in support of the applications which considered the site as a whole, for example surveys relating to topography, ecology, trees and bats.

15. Mr Davies also set out what he considered as the impracticality of deciding the 2023 applications separately. This included a vehicular pickup and drop off point just off Tondu Road which point was shown on plans in each application as serving that parcel. These applications allowed only pedestrian and cycle access within the respective parcels. This arrangement was the subject of a supportive road safety audit obtained by the claimant. The other points relied upon by Mr Davies in concluding that there was such impracticability were consecutive numbering of dwellings across the two parcels, the absence of any coherent planning justification for the separation of the parcels, and the view that no serious or realistic attempts had been made to overcome previous reasons for refusal.

16. Section 70A of the 1990 Act, as it applies in Wales, provides:

> "(1) A local planning authority may decline to determine an application for planning permission for the development of any land if—
>
> (a) within the period of two years ending with the date on which the application is received, the Welsh Ministers have refused a similar application made to them under section 62D, 62F, 62M or 62O, or referred to them under section 77, or have dismissed an appeal against the refusal of a similar application: and
>
> (b) in the opinion of the authority there has been no significant change since the refusal or, as the case may be, dismissal mentioned in paragraph (a) in the development plan, so far as

> material to the application, or in any other material considerations.
>
> (2) For the purposes of this section an application for planning permission for the development of any land shall only be taken to be similar to a later application if the development and the land to which the applications relate are in the opinion of the local planning authority the same or substantially the same.
>
> (3) The reference in subsection (1)(a) to an appeal against the refusal of an application includes an appeal under section 78(2) in respect of an application."

17. Guidance, and it is only guidance, as to the implementation of the power set out above is given in Welsh Circular 44/91 (Welsh Office), Annex 2. At [5] it is stated that the government's intention behind the section:

> "… is to prevent repeated planning applications from being used to wear down the resistance of local communities. Authorities should use the power only when they believe that the applicant is intending to exert pressure by submitting repeated similar applications."

18. At [8], in doubtful cases, it is stated that authorities should give the benefit of the doubt to the applicant and determine the application. It is noteworthy that in his witness statements Mr Davies does not directly or expressly address the issue whether the claimant in submitting the 2023 applications was intending to exert pressure.

19. The power to decline to determine can be appropriately used in cases where an applicant is misusing the right to apply for planning permission. In *R. (on the application of Jeeves and Baker) v Gravesham BC* [2006] EWHC 1249 [2006] J.P.L. 1743, Collins J dealt with the issue of similarity in this context and said at [17]:

> "So far as similarity is concerned, Mr Willers accepts, and rightly accepts, that he cannot argue that the applications are not similar. They are both, of course, for permission to site a residential caravan or caravans for the purpose of providing a home for gypsies. Of course, the details differ and the parties differ, but that does not prevent the applications being similar. The statute does not require them to be identical; it would clearly be an abuse of language to suggest that they were not similar."

20. In *R (Harrison) v Richmond-upon-Thames LBC* [2013] EWHC 1677 (Admin) Nicholas Paines KC sitting as a deputy High Court Judge said at [4]:

> "Mrs Harriet Townsend for Mr Harrison submitted, correctly, that this did not amount to a power to determine an application on the grounds that the local authority thinks the application will fail. To be clear, it is not the planning equivalent of a summary judgment dismissing a hopeless application. The

> section does not lead to the consequence that an applicant can never make a fresh application after a refusal, merely that he can be subjected to a moratorium of 2 years. Nevertheless, the merits are not wholly irrelevant. The background to the application of section 70A is that the application being considered under the section is similar to a previous application which was refused because of a lack of merit and the Circular refers at paragraph 4, for example, to undesirable developments and to the question of whether objections have been addressed"

21. At [38], the deputy judge said:

> "The fact that, as in this case, a fresh application shares with the old one a characteristic that was judged fatal to the success of the previous application is, in my view, a relevant point of similarity."

22. He then dealt with the relevant circular applicable in England and concluded at [45]:

> "The clearest message I get from the Circular is that the power is to be used to counter repeated applications submitted with the intention of reducing opposition to undesirable development."

23. At [46] he said this:

> "An application that has been amended in a genuine attempt to accommodate objections is an example of an application that is not designed to wear down opposition to an undesirable development. But even in a case where, as here, objections have not been accommodated but are dealt with in a different way, the question whether the application is an attempt to wear down opposition to a development still remains for decision"

24. In my judgment none of the reasons given by Mr Davies as to why it is not a practical possibility to consider each of the 2023 applications separately is good in law. Whilst the plans accompanying each of the applications show the vehicular drop off and pick up point as capable of serving both parcels, the point is not within the red line of either parcel. That the plans show consecutive numbering does not go to the practicability of considering the applications for outline permissions separately. Neither does the view that there is no coherent planning reason for submitting two applications in respect of the site or that no attempts have been made to address previous reasons for refusal. Those matters may show the approach of the authority to the applications but cannot impact on the practicability of considering each one on its own merits.

25. In my judgment the 2023 applications could and should have been addressed separately. That being so, there is no rational basis for concluding that either of them, each involving nine dwellings on part only of the site, was similar to the 2021 application which involved 15 dwellings over the whole of the site. I agree with Mr Paines KC in *Harrison* that section 70A does not give the power to dismiss an

application for planning permission on the basis that one officer regards the application as hopeless. Mr Davies in his witness statements goes into detail as to why in his view certain aspects of the 2023 applications, such as the car free nature of the proposed development, is in breach of national and local plan polices, a theme which was taken up by Mr Beglan, for the authority, in his written and oral submissions. However, in my judgment that focusses on whether the applications are hopeless, rather than upon the question whether either of the applications is the same or substantially the same as one made in the previous two years and whether the claimant's intention in submitting the 2023 applications was to exert pressure by submitting repeat applications.

26. In my judgment an application for outline permission for nine dwellings on approximately half of the area of the site cannot sensibly be regarded as substantially the same as an application for outline permission for 15 dwellings over the whole site. To the extent that planning merits are relevant, it may be, and that is all I need say for present purposes, that either of the 2023 applications cannot be said to be hopeless because the differences between either of them and the 2021 application may be such as to impact upon the reasons for refusal in respect of those and previous applications in respect of the whole site. Whether they do or not will be a matter of detailed consideration on their own merits by the authority, but on the facts of this case in my judgment it is not legitimate to avoid such consideration by treating the two applications as one and then to use section 70A of the 1990 Act so as not to determine them.

27. Mr Beglan submits that the court must consider if section 31 Supreme Court Act 1981 applies, and that even if the authority was not lawfully entitled to take into account the factors identified, having regard to *Jeeves* and *Harrison*, it is highly likely that the result would be the same. The only change caused to the land area (in each case) was a change of under 0.1 ha. It would have been open to the authority to find such a change to mean that the land was still substantially the same. The reasoning as explained by Mr Davies shows that the other criteria of section 70A would have been met, in the opinion of authority, and that it would have exercised its power to decline to determine the applications.

28. For reasons which I hope emerge from the discussion above, I am not persuaded that it is highly likely that the result would have been the same.

29. In my judgment, the high threshold of irrationality is met in this case. The decisions set out in the letters dated 21 January 2023 are quashed which means that the authority must determine them. Nothing I say in this judgment should be taken as any indication as to how they may be determined, which is a matter for the authority.

30. The claimant also claims damages and financial compensation in the sum of £28,876.78. He cites *Harrison*. The sum particularised by the claimant is the precise sum ordered in that case, but by way of costs, not damages or compensation. I cannot see any basis for awarding damages.

31. I invite the parties to file a draft order, agreed as far as possible including on the issue of costs, within 14 days of hand down of this judgment. Any disagreement can be the subject of written submissions, to be filed and exchanged by the same time. Any such issues will then be determined on the basis of any such submissions.