Aidun, Hillary 11/25/2019
For Educational Use Only

***111 R (on the application of McLennan) v. Medway Council**


Image 1 within document in PDF format.

Queen's Bench Division
10 July 2019

[2019] EWHC 1738 (Admin)

[2020] Env. L.R. 5

Lane J
10 July 2019

Analysis

Daylight and sunlight; Error of law; Irrationality; Material considerations; National Planning Policy Framework; Planning permission; Planning policy; Residential property; Solar power;

H1 Climate change—Town & Country Planning—solar power—proposed development with adverse impact on ability to generate electricity from solar panels—Planning Officer's report stating such interference not a material consideration—statement that nevertheless considered—whether view that not a material planning consideration Wednesbury unreasonable—whether need to mitigate climate change through use of renewables a public interest matter

The claimant (M) had been granted planning permission to install solar panels on the south-facing wall of his residential property. Twelve months later, M's next-door neighbour (K) applied to the first defendant (C) for planning permission for an extension. M objected on a number of grounds, including that the proposed development would adversely his ability to generate electricity from his solar panels. Despite the objections, C granted the planning permission. M sought judicial review on grounds including criticisms of delegated case officer's report in connection with the planning application. The report noted objections including loss of sunlight; loss of privacy; deliberate impairment of solar panels; and increase of carbon footprint. After the grant of permission for the judicial review, K made a further application for planning permission. The Officers' Report for this stated that:

> "Officers do not consider that potential interference with the solar panels on the neighbouring property … caused by the proposed development is a material planning consideration in this instance because it involves a purely private interest which does not require protection in the public interest on the facts of this case. Notwithstanding [that] officers have considered this matter for completeness."

M argued that C's failure to treat the interference with the solar panels as a material planning consideration was Wednesbury unreasonable, having regard to what was said in the relevant provisions of the local plan and, particularly, in the National Planning Policy Framework (NPPF). In particular, M submitted that it was perverse to say that the promotion of renewable energy systems in order to ***112** mitigate climate change was a material planning consideration but that the adverse effects of development on the operation of such a system was not capable of being a material consideration. M further submitted that the need to mitigate climate change by, amongst other things, promoting the use of renewable energy technology was not a private interest matter.

Held , in allowing the claim:

(1) The essential point was that both the local plan and, more recently and much more particularly, the NPPF recognised the positive contribution that could be made to climate change by even small-scale renewable energy schemes. Under s.19(1A) of the Planning and Compulsory Purchase Act 2004 mitigation of climate change was a legitimate planning consideration. The fact that both s.19 and the NPPF spoke in broad terms could not mean their message vanished at the very point where consideration

had to be given to a specific proposal. Such an approach would render the provisions a dead letter. Nor did the fact that they related to new rather than existing development defeat the rationality challenge. If the issue of climate change was regarded as having a material planning bearing on particular proposed development, it was illogical to regard that issue as suddenly becoming immaterial, once the development had taken place. Accordingly, C had not been entitled to reject as immaterial, in planning terms, the effect that another development proposal may have upon a renewable energy system, such as the M's solar panels. That stance was one that no reasonable authority could take.

(2) Insofar as the officer's reports were based on the categorisation of M's solar panels as a purely private interest, that conclusion was also flawed. No consideration had been given to why a person's ability to use the sunlight reaching his property to generate electricity fell into a materially different category from the same person's ability to enjoy sunlight falling into his living room or garden. Submissions that the solar panels were for the use of a single household, rather than being part of an industrial production of renewable energy, were nothing to the point. They contributed to the reduction in reliance on non-renewable energy and the fact that, viewed on their own, did so in a very modest way did not entitle C to treat the matter as immaterial.

(3) The court would not exercise its discretion under s.31 of the Senior Courts Act 1981 to deny M the relief which ordinarily flowed from a finding that the decision under challenge was unlawful. The problem with the Officer's statement that, despite the view that interference with the solar panels was not a material planning consideration, the extent of additional overshadowing of the solar panels had been considered and conclusion reached that any additional overshadowing would be negligible was that M had made submissions with which the report failed to engage. The conclusion that the effect of the proposed development on the solar panels would be negligible also lacked reasoning.

H8 Cases referred to:

- Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947) 63 T.L.R. 623
- Buxton v Minister of Housing and Local Government [1961] 1 Q.B. 278; [1960] 3 W.L.R. 866; (1960) 124 J.P. 489
- DLA Delivery Ltd v Baroness Cumberlege of Newick [2018] EWCA Civ 1305; [2018] P.T.S.R. 2063; [2018] Env. L.R. 34 ***113**
- E v Secretary of State for the Home Department [2004] EWCA Civ 4; [2004] Q.B. 1044; [2004] 2 W.L.R. 1351
- Elsick Development v Aberdeen City & Shire Strategic Development Planning Authority [2017] UKSC 66; [2016] CSIH 28; 2017 S.C. 629
- Findlay, Re [1985] A.C. 318; [1984] 3 W.L.R. 1159; [1985] Crim. L.R. 154
- Forest of Dean DC v Wright [2017] EWCA Civ 2102; [2018] J.P.L. 672
- I (Children) [2019] EWCA Civ 898; [2019] 3 F.C.R. 128
- R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government [2011] EWHC 97 (Admin); [2011] 1 P. & C.R. 22; [2011] J.P.L. 887
- Tata Steel UK Ltd v Newport City Council [2010] EWCA Civ 1626
- Westminster City Council v Great Portland Estates Plc [1985] A.C. 661; [1984] 3 W.L.R. 1035; (1985) 50 P. & C.R. 34
- Wood-Robinson v Secretary of State for the Environment, Transport and the Regions [1998] J.P.L 976

H9 Legislation referred to:

- Senior Courts Act 1981 s.31
- Town and Country Planning Act 1990 s.70
- Planning and Compulsory Purchase Act 2004 ss. 19 & 38
- Planning Act 2008

H10 Representation

• Mr R. Green , direct access, appeared on behalf of the claimant
• Mr M. Henderson , instructed by Medway Council and Gravesham Borough Council Shared Legal Service, appeared on behalf of the first defendant
•The second defendant did not appear and was not represented

Judgment
Lane J:

The presence of solar panels on the exteriors of residential properties, especially houses and bungalows, is an increasingly common sight, as householders seek to generate electricity by renewable means. The present case concerns the relationship of such domestic solar panels with the planning system.

The challenged decision

In October 2017, the claimant was granted planning permission to install solar panels on the south-facing wall of his residential property in Rochester, Kent. In September 2018, the claimant's next-door neighbour, whose detached residence lies immediately to the south of that of the claimant, applied to the first defendant for planning permission for the "construction and extension to rear, dormer window to side (demolition of part existing rear extension, conservatory and garage)". The claimant submitted a written letter of objection to the second defendant's application. The letter objected to the grant of planning permission on a number of grounds, including that the proposed development would adversely affect the claimant's ability to generate electricity from his solar panels. The objection letter said: ***114**

> "Micro-generation solar panel systems are significantly impaired by shadowing and indirect sunlight. The 9 panel 2.02Kw system generates up to 11Kw per day subject to the intensity of the direct sunlight on the panels.
>
> During September 2018 the system generated 186.52Kw hours of electricity with typical Autumnal weather conditions throughout the month.
>
> While the different mounting orientation of the panels lowers the overall system efficiency the vertical end gable panels output more electricity as the azimuth of the sun lowers during the later part of the year.
>
> From a solar performance perspective any protrusion or change to the ridge height of the northern side will severely degrade the power output of the micro-generation system.
>
> The sunlight on the panel locations has prevailed for well over 20 years and in excess of 35 years of our ownership of the property.
>
> The façade and rear roof mounted panels make up 66% of the total system all of which will be affected by the proposal.
>
> Our solar panels are visually prominent on the south side of the property yet sympathetically mounted to not detract or significantly impact the visual aspects of neighbours across the road.
>
> It would be disingenuous for the new owners of 260 to claim they were not aware of the solar panels prior to their purchase of the property or during their architect's instruction and survey. They are visually striking with black frames.

> Not only will the direct sunlight light [sic] to the windows below the solar panels be significantly impaired but the performance of the entire solar energy system comprised which will vary in severity throughout the year.
>
> The deliberate obstruction of sunlight to the solar energy panels acts contrary to targets and objectives outlined in the Medway Local Plan Sustainability Appraisal April 2018."

Notwithstanding the claimant's objections, the first defendant granted the second defendant planning permission on 6 December 2018.

In an application for judicial review filed on 14 January 2019, the claimant sought to challenge the first defendant's grant of planning permission. Amongst other things, the grounds took issue with the delegated case officer's report in connection with the planning application. The report noted objections in respect of (amongst other matters) loss of sunlight; loss of privacy; "deliberate impairment of solar panels"; and "increase of carbon footprint".

The officer's report observed that a number of properties in the road in question had been altered by adding dormers within the roof. Given the presence of similar development within the street scene, it was not considered that the proposed development would be unacceptable or introduce new features.

The report indicated that no shadow would be cast into the rooms of the claimant's property nor any shadow into its garden. The report said:

> "The proposed rear extension would increase the height of the existing rear projections and together with the side dormers, would result in an increased level of overshadowing. However, due to the orientation of the property and rise and fall of the sun, the majority of this overshadowing would be over the host dwelling and is not considered to result in a detrimental impact on the neighbouring properties.
>
> … ***115**
>
> It is therefore considered that whilst the proposal would alter the existing overshadowing, light and overlooking, it would not be significant or detrimental to warrant a refusal and is therefore in accordance with Policy BNE2 of the Medway Local Plan 2003."

The grounds identified that the delegated officer's report incorrectly had the road on which the claimant's and second defendant's properties are situated aligned on an east/west basis; whereas the correct alignment was north/south. The planning officer acknowledged this error in her witness statement of 6 February 2019:

> "4. Upon receipt of the claim for judicial review it became apparent that the submitted site location plan received 26 November 2018 had the incorrect orientation annotated on it. The result of this is that the statement in my report in the design section relating to which direction the projections of the proposal face is factually incorrect. Furthermore, the Amenity section regarding overshadowing into the garden is also incorrect.

> 5. Having realised that the incorrect orientation had been used and that the proposal would result in some overshadowing into the garden, the first Defendant undertook a shadow assessment based on the correct sun ark [sic] …
>
> 6. Taking into consideration the impact of the existing property in terms of overshadowing and loss of light it is not considered that the proposed development would have an unacceptable impact on the amenities of the occupiers of the adjacent property to an extent that would justify a refusal of permission.
>
> 7. All other matters in my assessment remain unchanged. The outcome of the decision on the application would not have altered and permission would still have been granted."

In the first defendant's summary grounds of defence we find the following:

> "5. The Claimant submits that the first Defendant's decision is in breach of Policy BNE2 which states that the design of development should have regard to privacy, daylight and sunlight.
>
> 6. The Claimant's contention that the [first defendant] failed to consider the effect the extension would have on his solar panels is unarguable and completely without merit. The effect of daylight on the Claimant's solar panels is not a material planning consideration and therefore the first Defendant is not required to consider the effect of the development on them.
>
> 7. In response to the claim that the Council has used the incorrect orientation of the property it is accepted that the original report was drafted with reference to the incorrect orientation of the property.
>
> …
>
> 9. It is accepted that the error is substantial [but] this is not in and of itself enough for the Court to quash the decision. The test is whether or [not] notwithstanding the error of fact the first Defendant would have come to the same conclusion. On receipt of the claim form the officer who undertook the original report reassessed the impact of the proposed development in terms of overshadowing and loss of light to the Claimant's property. The officer ***116** has assessed that *"the proposed development would not have an unacceptable impact on the amenities of the occupiers of the adjacent property to an extent that would justify a refusal of permission* " (original italics).
>
> 10. The first Defendant submits that as the outcome would have been the same irrespective of the error the Court should decline to intervene in the decision and permission for judicial review on this ground should be refused."

On 27 February 2019, Lieven J granted permission to apply for judicial review. In her observations, she said:

> "The Defendant accepts that it made an error in its consideration of the orientation of the proposed building. It is certainly arguable that this is a material error. It is also arguable that the impact of a proposal on existing solar panels is a material planning consideration."

The second application for planning permission

In March 2019, after the grant of permission by Lieven J, the second defendant made a further application for planning permission in respect of his residence. Although not identical to the first application, the outline and massing of the built form of the development proposed by the second application are identical to that of the development for which planning permission was granted by the first defendant.

A different planning officer of the first defendant prepared a report for the first defendant's planning committee, which met in May 2019. The second officer recommended approval of the application. She observed that:-

> "Objections were also received on the grounds of party wall matters and interference with solar panels. These are not considered to be material planning considerations. See discussion further below."

The second planning officer recorded that Policy BNE2 of the Medway Local Plan states that "all development should secure the amenities of its future occupants, and protect those enjoyed by nearby and adjacent properties. The design should have regard to daylight, sunlight and privacy, including noise and activity levels generated by traffic".

In terms of daylight and sunlight, the report stated that:

> "A sun on ground test has been carried out on the existing built form and the proposed development. The result confirms that, whilst there would be some additional overshadowing to the north from the proposed extension, this would be negligible and given the overall context and amount of daylight or sunlight received by the neighbouring occupiers to the north, it would not be at unacceptable levels. In respect of the occupiers to the south, the existing situation would not change".

The report then turned to overlooking and loss of privacy, concluding that the proposal would be acceptable in terms of these matters.

So far as solar panels were concerned, the report had this to say:-

> "Officers do not consider that potential interference with the solar panels on the neighbouring property … caused by the proposed development is a material ***117** planning consideration in this

instance because it involves a purely private interest which does not require protection in the public interest on the facts of this case.

Notwithstanding the fact that officers do not consider that potential interference with solar panels is a material planning consideration, officers have considered this matter for completeness.

The representations received from the occupiers … assert that there will be a severe impact arising from overshadowing of their solar panels. Officers have considered the extent to which there will be additional overshadowing (if any) of the solar panels by way of sun on ground tests and have concluded that … any additional overshadowing of the solar panels will be negligible. Accordingly, because any additional overshadowing would be negligible, officers do not consider this would be unacceptable or a factor which would be sufficient to indicate that the determination should not be in accordance with the development plan (with which the proposed development fully accords, for the reasons above and below).

Conclusions and reasons for approval

The application has been assessed in accordance with s.38(6) of the Planning and Compulsory Purchase Act 2004 which requires that planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise.

Applying this approach, the proposed development would not detract from the host property or the character of the area. It would not result in a detrimental impact in terms of neighbour amenity or highways and would accord with Policies BNE1, BNE2, T1 and T13 of the Medway Local Plan and paragraphs 124 and 127 of the NPPF 2019. As such, the proposed development is in accordance with the development plan and there are no material considerations which indicate that the determination should not be in accordance with the development plan.

The application would normally be determined under delegated powers but is being referred for Committee determination due to the number of representations received expressing a view contrary to officers' recommendation and at the request of the local ward Councillors."

The statutory scheme

So far as relevant, s.70 (Determination of applications: general considerations) of the Town and Country Planning Act 1990 provides as follows:

"2. In dealing with … an application the authority shall have regard to—
(a) the provisions of the development plan, so far as material to the application,
…

(c) any other material considerations."

Section 38 (Development plan) of the Planning and Compulsory Purchase Act 2004 contains the following subsection:- ***118**

"(6) If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Section 19 (Preparation of local development documents) of the 2004 Act has been amended by the Planning Act 2008 by, *inter alia* , the insertion of the following subsection:-

"(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaption to, climate change."

The development plan

We have already encountered Policy BNE2 of the Medway Local Plan, adopted in May 2003. The first defendant contends that the development approved in the grant of planning permission under challenge, and that approved in May 2019, were in accordance with the development plan, in particular the Policies BNE1 and BNE2:

"BNE1: General Principles for Built Development

The design and development (including extensions, alterations and conversions) should be appropriate in relation to the character, appearance and functioning of the build and national environment by:
(i) Being satisfactory in terms of use, scale, mass, proportion, details, materials, layout and siting; and
(ii) respecting the scale, appearance and location of buildings, spaces and the visual amenity of the surrounding area; and
(iii) where appropriate, providing well-structured, practical and attractive areas of open space."

BNE2: Amenity Protection

All development should secure the amenities of its future occupants, and protect those amenities enjoyed by nearby and adjacent properties. The design of development should have regard to:
(i) Privacy, daylight and sunlight; and
(ii) noise, vibration, light, heat, smell and airborne emissions consisting of fumes, smoke, soot, ash, dust and grit; and
(iii) activity levels and traffic congestion."

The claimant, whilst describing the Medway Local Plan as "woefully out of date" highlights the following provisions from its text:

> "3.4.20. Non-renewable fossil fuels such as gas, oil and coal are burnt to yield energy directly, or are used in power stations to produce electricity. A reduction in the demand for energy from these sources will help in reducing harmful atmospheric emissions. These emissions include greenhouse gases and gases which contribute to "acid rain" and "smog".
>
> … ***119**
>
> 3.4.23. The use of solar panels also provides a direct means of utilising the sun's energy. Whilst their wider use will generally be appropriate, particularly in new buildings, their visual impact will need to be taken into account …"

The claimant also points to the following provision of BNE4 (Energy Efficiency):

> "Energy efficiency measures will be sought within development proposals, providing there is no detrimental impact on amenity. In particular, the proposals should have regard to
>
> …
>
> (iii) Energy efficient technology including solar panels, combined heat and power/district heating schemes and district wind power schemes …"

National Planning Policy Framework 2018

The claimant draws attention to the following provisions of the National Planning Policy Framework ("NPPF"):

> "148. The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.
>
> …
>
> 153. In determining planning applications, local planning authorities should expect new development to:
> (a) comply with any development plan policies on local requirements for decentralised energy supply unless it can be demonstrated by the applicant, having regard to the type of development involved and

its design, that this is not feasible or viable; and
(b) take account of landform, layout, building orientation, massing and landscaping to minimise energy consumption.
…

154. When determining planning applications for renewable and low carbon development, local planning authorities should:
(a) not require applicants to demonstrate the overall need for renewable or low carbon energy; and recognise that even small-scale projects provide a valuable contribution to cutting greenhouse gas emissions; and

…"

The glossary to the NPPF defines "renewable and low carbon energy" as including "energy for heating and cooling as well as generating electricity. Renewable energy covers those energy flows that occur naturally and repeatedly in the environment – from the wind, the fall of water, the movements of the oceans, from the sun and also from biomass and deep geothermal heat …". ***120**

The parties' positions in outline

For the first defendant, Mr Henderson submits that it was correct not to treat the alleged interference with the claimant's solar panels as a material planning consideration in determining the application which led to the challenged grant of permission.

Such interference is not prescribed, either expressly or impliedly, by the Planning Acts or any other relevant legislation, as a material planning consideration in the determination of applications. Accordingly, Mr Henderson submits that the claimant can only succeed on this issue by demonstrating that the interference with the operation of his solar panels was a consideration that no reasonable decision-maker would have failed to take into account. Such a rationality challenge is, Mr Henderson contends, a high hurdle, which the claimant fails to surmount.

Both the Local Plan Policies and the NPPF merely lay down broad considerations with regard to new development, rather than the effect on existing development. In any event, Mr Henderson says, relying on Forest of Dean DC v Wright [2017] EWCA Civ 2102 and Elsick Development v Aberdeen City & Shire SDPA [2017] UKSC 66 , a planning policy cannot convert something immaterial into a material consideration for planning purposes.

As we have seen, the first defendant regarded any interference with the claimant's solar panels that might be occasioned by the development as interference with a private right. Relying upon Buxton v Minister of Housing and Local Government [1961] 1 Q.B. 278 and Westminster City Council v Great Portland Estates Plc [1985] 1 A.C. 661 , Mr Henderson says that it will only be in a rare or exceptional case that a private right will be a material planning consideration; and the present case is not of this character.

Finally, the first defendant relies upon s.31(2A) of the Senior Courts Act 1981 in support of the proposition that, even if the first planning officer had not made a mistake as to the alignment of the relevant properties, for the purposes of determining the sun's arc over them, the decision is highly likely to have been the same. Relatedly, Mr Henderson submits that, in the light of the second grant of planning permission in respect of the revised development, quashing the first decision would be a merely academic exercise.

For the claimant, Mr Green takes issue with each of the claimant's submissions. He asserts, in terms, that the failure of the first defendant to treat the interference with the claimant's solar panels as a material planning consideration was, indeed, Wednesbury unreasonable, having regard to what is said in the relevant provisions of the local plan and, particularly, in the NPPF. In particular, Mr Green submits that it is perverse to say that the promotion of renewable

energy systems in order to mitigate climate changes is a material planning consideration (as the first defendant must); but that the adverse effects of development on the operation of such a system is not capable of being a material consideration.

The claimant submits that the need to mitigate climate change by, amongst other things, promoting the use of renewable energy technology is not a private interest matter. On the contrary, Mr Green says it "affects us all, as national policy (and, in its own way, local policy) makes clear". In any event, the claimant submits that the first defendant has not explained why overshadowing of his garden or windows is a relevant planning consideration but the overshadowing of his solar panels is not. ***121**

Turning to s.31(2A) , the claimant's position is that if the first defendant had correctly understood the factual position, it cannot be said that it is highly likely the same decision would have been reached, given the first defendant's erroneous approach to the issue of solar panels, which the first defendant continues to follow. For the same reason, Mr Green submits that the recent grant of planning permission in response to the second defendant's revised application does not render the claimant's challenge academic.

Discussion

The distinction between what materiality means, in a particular planning context, and the weight (if any) to be ascribed to a material consideration is set out in the judgment of Lindblom J (as he was then was) in Cala Homes (South) Ltd v Secretary of State for Communities and Local Government and Winchester City Council [2011] 1 P. & C.R. 22 :

> "29. The law has always distinguished between materiality and weight. The distinction is clear and essential. Materiality is a question of law for the court; weight is for the decision-maker in the exercise of planning judgment.

Thus, as Lord Hoffmann stated in a well -known passage of his speech in Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W.L.R. 759; (1995) 70 P. & C.R 184 (at p.657G-H):

> 'This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning

> judgment are within the exclusive province of the local planning authority or the Secretary of State.'

So long as it does not lapse into perversity, a local planning authority is entitled to give a material consideration whatever weight it considers to be appropriate. Under the heading *'Little weight or no weight?'* Lord Hoffmann observed (at p.661B-C):

> '… If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in Safeway Properties Ltd v Secretary of State for the Environment [1991] JPL 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it.'

30. Thus, in appropriate circumstances, a local planning authority in the reasonable exercise of its discretion may give no significant weight or even no weight at all to a consideration material to its decision, provided that it has had regard to it.

31. What is capable of being a material consideration for the purposes of a planning decision? This question has on several occasions been considered by the courts. The concept of materiality is wide. In principle, it encompasses ***122** any consideration bearing on the use or development of land. Whether a particular consideration is material in a particular case

> will depend on the circumstances (see the judgment of Cooke J. in Stringer v Minister of Housing and Local Government [1970] 1 W.L.R. 1281; (1971) 22 P. & C.R. 255 (at p.1294G)). In the context of development plan-making and development control decision-taking, the test of materiality formulated by Lord Scarman in his speech in Westminster City Council v Great Portland Estates Plc [1995] A.C. 661; (1985) 50 P. & C.R. 20 (at p.669H to p.670C-E) is whether the consideration in question 'serves a planning purpose', which is one that 'relates to the character and use of land'."

Where the statutory scheme does not make a particular matter a material planning consideration, either expressly or by implication, the element of discretion enters the picture. At this point, the test becomes one of rationality. That much is plain from the judgment of Lindblom LJ in Cumberlege v Secretary of State for Communities and Local Government and Another [2018] EWCA Civ 1305 at [20]–[26], analysing the case law from Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223 to In re: Findlay [1985] A.C. 318 .

Mr Green, in his submissions, was careful not to mischaracterise either the provisions of the Medway Local Plan, regarding renewable energy, or paras 148, 153 and 154 of the NPPF. Both sets of policies are directed towards new development. Furthermore, the provisions of the NPPF are, as Mr Henderson points out, necessarily in general terms. Neither of these observations, however, in my view assists the first defendant. The essential point is that both the local plan and, more recently and much more particularly, the NPPF recognise the positive contribution that can be made to climate change by even small-scale renewable energy schemes.

That point is driven home by s.19(1A) of the 2004 Act . It is unaffected by the submission of Mr Henderson, with which I agree, that one cannot use the NPPF as an interpretative tool to explain what is meant by "climate change" in s.19(1A) . Such a tool is unnecessary in order to extract the relevant meaning from the primary legislation.

What emerges from s.19(1A) and the NPPF is that mitigation of climate change is a legitimate planning consideration. The fact that both s.19 and the NPPF speak in broad terms (as they plainly must) cannot mean their message vanishes at the very point where consideration has to be given to a specific proposal. Such an approach would render the provisions a dead letter. Nor does the fact that they relate to new rather than existing development defeat the rationality challenge. If the issue of climate change is regarded as having a material planning bearing on particular proposed development, it is illogical to regard that issue as suddenly becoming immaterial, once the development had taken place.

There is, therefore, unanswerable force in Mr Green's submission that, particularly given what is now said at national level about climate change in relation to new development, the first defendant is not entitled to reject as immaterial, in planning terms, the effect that another development proposal may have upon a renewable energy system, such as the claimant's solar panels. That, however, is the stance of the first defendant. It is a stance which, I find, no reasonable authority could take. It is, in short, irrational. ***123**

I do not consider the first defendant can derive any relevant support from the proposition, found in the Forest of Dean DC v Wright , that planning policy "cannot convert something immaterial into a material consideration for planning purposes". That case concerned the issue of whether, in an application for development proposed to be undertaken by a community benefit society, a proposed donation to the community of a proportion of the turnover derived from the development was a material consideration. Dove J held that it was not, because it was an untargeted contribution of off-site community benefits that was not designed to address a planning purpose and had no real connection with the development. This conclusion was upheld by the Court of Appeal.

In the present case, the claimant received planning permission to construct solar panels on his land. As I have already found, the planning considerations that are in play when determining whether to grant permission for such a development do not disappear as soon as that development has occurred. Obviously, the claimant's solar panels relate to the use of his land and are not solely for some other purpose (cf. [28(2)]: Hickinbottom LJ).

As can be seen from the officers' reports in respect of both applications, the first defendant adopted the stark position that any interference with the claimant's solar panels would be interference merely with a private right, which it is not the function of the planning regime to protect, at least as a general matter. In support of this stance, the first defendant relies upon the reasoning of Salmon J in Buxton v Minister of Housing and Local Government [1961] 1 Q.B. 278 at [283]:

> "Before the Town and Country Planning legislation any landowner was free to develop his land as he liked, provided he did not infringe the common law. No adjoining owner had any right which he could enforce in the courts in respect of such development unless he could show that it constituted a nuisance or trespass or the like. The scheme of the Town and Country Planning legislation, in my judgment, is to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public, whether they live close to or far from the proposed development."

The first defendant accepts, however, that "in some rare cases, private interests may be material considerations as the exception to the general rule". In this regard, the first defendant makes reference to Westminster City Council v Great Portland Estates Plc [1985] 1 A.C. 661 where Lord Scarman said:

> "Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of the community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it." (670E–H).

In Wood-Robinson v Secretary of State for the Environment and Wandsworth London Borough Council [1998] J.P.L. 976 , Robin Purchas QC, sitting as a Deputy ***124** Judge, dismissed an application to quash the decision of a planning inspector who had dismissed an applicant's appeal against the refusal to grant planning permission for the erection of a two storey house. The inspector held that the weight to be given to compliance with development plan policies was outweighed by the undesirable effect the development would have on residential amenity. The applicant contended that the reference to residential amenity in the inspector's decision letter was based on the loss of purely private views from

neighbouring dwellings, which it was said was not an issue that was relevant to the public interest.

The following passage from the judgment is of particular relevance:

> "Whether a consideration is capable of being a relevant or material consideration for planning purposes is a question of law for the court. … It is, however, difficult, if not impossible, definitively to resolve the question of relevancy or materiality, as it were, in a vacuum without reference to the facts of the particular case. As a starting point, I accept that the exercise of planning control should be in the public interest. It is not concerned with the creation or preservation of private rights as an end in itself (see Salmon J in Buxton v Minister of Housing and Local Government … and Lord Scarman in Westminster City Council v Great Portland Estates Plc … I do not, however, accept the distinction in principle that Miss Ellis sought to draw between the effect on the use of land through overlooking or overshadowing and that through deprivation of outlook or aspect. The guiding principle seems to me to be in each case whether the private interest in question requires to be protected in the public interest. In that sense detriment to the amenity of residential user through overshadowing or overlooking is far more likely to be something to be resisted in the public interest than interference with a view. Whether or not protection of a view or private amenity is, in the circumstances of the case, in the public interest would be for the decision-maker to determine. Generally, no doubt, that decision would take into account the number of properties or persons whose view or amenity would be affected and to what degree. I respectfully accept, and adopt, the guidance in the judgment of Cooke J in [Stringer v Minister of Housing and Local Government [1971] 1 All E.R. 65] that:
>
> > 'The public interest … may require that the interests of the individual occupier should be considered. The protection of the interests of individual occupiers is one aspect, and an important one, of the public interest as a whole'."

I have already observed that the second planning officer's report to committee said any interference with the claimant's solar panels was not considered by officers to be

"a material planning consideration in this instance because it involves a purely private interest which does not require protection in the public interest on the facts of this case".

As can be seen, this conclusion suffers from the deficiency I have already identified, in that it fails to appreciate that interference with the solar panels is a material planning consideration by reason of the part played by them in addressing (however modestly, on an individual scale) issues of climate change. Insofar as the officer's report (and that in the earlier application) is based on the categorisation of the claimant's solar panels as a purely private interest, the conclusion is also ***125** flawed. No consideration has been given to why a person's ability to use the sunlight reaching his property to generate electricity falls into a materially different category from the same person's ability to enjoy sunlight falling into his living room or garden. The officers treated the latter as a material consideration, albeit finding that the interference was not such as to make it appropriate to refuse permission. This is not to say that, when it comes to ascribing weight, a planning authority may not legitimately conclude that reduced sunlight to a living room deserves greater weight than interference with solar panels; or vice versa. The problem lies in the *in limine* rejection of interference with solar panels as having any material bearing.

It is, of course, the case that the second officer expressly referred to the issue of whether the solar panels were "a purely private interest which does not require protection in the public interest on the facts of this case". The Deputy Judge in Wood-Robinson held the determination of that issue to be for the decision-maker to determine. However, as we can see, the decision-maker in the present case did not have regard to relevant considerations, for the reasons I have just explained. He effectively rejected the possibility that there could be a public interest in protecting the claimant's ability to generate electricity from the solar panels. That led inexorably to the conclusion that the claimant's right to use his solar panels did not require protection in the public interest.

For these reasons, Mr Henderson's attempts to defend this aspect of the first defendant's decision-making are unsuccessful. His submission that the solar panels are for the use of a single household, rather than being part of an industrial production of renewable energy, is nothing to the point. They make a contribution to the reduction in reliance on non-renewable energy. The fact that, viewed on their own, they do so in a very modest way does not entitle the first defendant to treat the matter as immaterial (as opposed to giving that matter little or, indeed, no weight). The first defendant's own policy enables the first defendant to have material regard to the effect on the amenity of only a "single household".

Whilst I agree that, in itself, the fact that the claimant may have to pay increased energy costs, since he is producing less electricity from his solar panels, may not be a material consideration, that is not the basis upon which Mr Green put the claimant's case.

I turn to the issue of whether relief should be refused pursuant to s.31(2A) of the 1981 Act . The starting point in this regard is the first officer's accepted error regarding the alignment of the relevant properties. The error in question is one of fact, giving rise to an error of law: E & R v Secretary of State for the Home Department [2004] Q.B. 1044 . The first officer's witness statement, however, explained that her decision would have been the same, in any event, so far as concerns the solar panels. That is reinforced by the way in which the second officer approached his report to the planning committee.

However, s.31(2A) depends upon the Court finding that it is "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred " (my emphasis). As is plain from the above, the conduct complained of; namely, the first defendant's wrongful approach to the issue of materiality, features in the first planning officer's witness statement, regarding the relevance of her error concerning the sun's arc, and in the approach of the second officer in his report to the planning committee. The second officer's report does, indeed, suggest that the first officer's decision would have been the same, irrespective of her error regarding the alignment of the properties and the ***126** sun's arc across them. But it would have been the same because of the erroneous approach to materiality.

This leads me to Mr Henderson's additional submission, which is that, since planning permission has now been granted in respect of the revised application, it would be academic to quash the impugned decision.

Here, it becomes important to consider the alternative basis upon which the second officer approached matters. As I have already set out, notwithstanding the second officer's view of materiality, her report stated that officers had nevertheless considered the extent to which there would be additional overshadowing of any on the solar panels and had concluded that any additional overshadowing would be negligible.

The problem with this, however, is that the claimant (who is a qualified engineer) had made submissions to the first defendant in connection with the second application, with which the second officer's report fails to engage. In a letter of 20 May 2019, the claimant had stated that:-

> "overshadowing of solar panels is complex because it is not a linear detriment between the amount of overshadowing and resulting environmental pollution. A small amount of overshadowing has severe consequences in respect of power reduction which translates to quantifiable CO2 emissions. … A hand drawn overshadowing assessment is useful to rule out any possibility of overshadowing solar panels by development but beyond that it is worthless."

In a further representation of 20 May, the claimant provided drawings, in support of those submissions.

I am conscious that the present proceedings are not a judicial review of the second grant of planning permission, including the report and recommendations leading to it. Since, however, the second officer's report is relied upon by Mr Henderson in his submission regarding withholding relief, I am required to scrutinise the "alternative" basis. I am satisfied that the "alternative" basis upon which the second officer approached the issue of the solar panels cannot assist the first defendant. The way in which the basis is framed leaves much to be desired. Whilst I am emphatically not saying that, as a general matter, a planning authority's consideration of the effect of proposed development on solar panels on a specific property needs to follow any particular form, in the present case the claimant had raised issues that required—but did not receive—proper consideration by the first defendant. The conclusion that the effect of the proposed development on the solar panels would be "negligible" lacks reasoning. There is, in particular, nothing to show that, in so categorising the effect, the second planning officer had turned her mind to the representations of 20 May.

In his response to the draft of this judgment, Mr Henderson sought clarification of whether what I say above about the second officer's report is maintained in the light of the Supplementary Agenda Advice (SAA) to the first defendant's planning committee, which noted the claimant's "further representations" and contained a bullet point that, "even on the impact set out in the further representations, this would not be sufficient to indicate that the application should not be determined in accordance with the development plan".

I have had regard to what is said in I (Children) [2019] EWCA Civ 898 and the cases cited therein, regarding the circumstances in which the Court can go beyond the correction of typographical errors and the like, in response to representations ***127** regarding a draft judgment. The circumstances will be rare and exceptional. I do, however, consider that it is appropriate in the present case to do so, in the interests of attempting to bring finality to this litigation.

Although the last bullet point of the relevant passage in the SAA suggests that the claimant's representations of 20 May 2019 were considered by the second planning officer, after she had produced her report, and the decision therefore reached on the assumption that the claimant's assessment of the effect on the solar panels was as the claimant contended, the bullet point has to be read in the light of the facts that (a) the first defendant's basic position remained (wrongly, as I have found) that any impact on the solar panels was not a material planning consideration; and (b) the actual impact had already been assessed as "negligible". Indeed, as Mr Henderson observes, the opening words of the passage in the SAA that immediately precedes the

Aidun, Hillary 11/25/2019
For Educational Use Only

bullet points state: "In respect of the further representations concerning [the claimant's] solar panels, Officers maintain the analysis set out in the report. In particular …" That flawed analysis thus governed what is said in the bullet points.

I confirm that the second officer's report, read with the SAA, is not a matter that, in the exercise of my discretion, should deny the claimant the relief which ordinarily flows from a finding that the decision under challenge was unlawful (Tata Steel UK Ltd v Newport City Council [2010] EWCA Civ 1626).

Conclusion

The grant of planning permission of 6 December 2018 by the first defendant to the second defendant is quashed. ***128**

[2020] Env. L.R. 5

End of Document © 2019 Thomson Reuters.