

Robert Hunter v Secretary of State for Levelling Up, Housing & Communities, Buckinghamshire Council



No Substantial Judicial Treatment

Court

King's Bench Division

Judgment Date

5 May 2023

Case No: CO/3377/2021

High Court of Justice King's Bench Division Planning Court

[2023] EWHC 1068 (Admin), 2023 WL 03260866

Before: Mr Tim Smith (sitting as a Deputy High Court Judge)

Date: 05/05/2023

Hearing date: 28th March 2023

Representation

The Claimant in person.

Michael Fry (instructed by Government Legal Department) for the First Defendant.

The Second Defendant did not appear and was not represented.

Approved Judgment

Mr Tim Smith (sitting as a Deputy High Court Judge):

Introduction

1. This claim is a challenge by the Claimant to an appeal decision by one of the First Defendant's Planning Inspectors. The Second Defendant, Buckinghamshire Council ("the Council"), is the local planning authority to whom the Claimant submitted the planning application that led to the appeal in question.

2. On 22nd April 2020 the Claimant submitted a planning application to the Council seeking permission to change the use of some agricultural land at Hillhead Farm, near the hamlet of Pitchcott ("the Land"), to allow the siting of a temporary dwelling. The Land is farmed by the Claimant with a herd of over 60 breeding cows. He proposes to increase the size of his herd to over 100 cows within a three year period. His application stipulated that the dwelling was intended to house a rural worker – namely the Claimant himself and his family – and permission was sought for a temporary period of 3 years.

3. The Council failed to determine the application within the permitted period and the Claimant appealed against this deemed refusal of the application to the First Defendant.

4. The appeal was heard by Mr Patrick Whelan ("the Inspector"), a Planning Inspector appointed to decide the appeal on behalf of the First Defendant. The appeal was conducted according to the hearing procedure on 20th July 2021. It was heard remotely. The hearing took up the majority of a day and the Inspector undertook a site visit on the following day.

5. Following the hearing the Inspector dismissed the appeal. His decision letter ("DL") was dated 23rd August 2021.

6. The Claimant challenged the Inspector's decision under [section 288 of the Town & Country Planning Act 1990](#) . He cited five grounds of challenge.

7. On 14th June 2022 permission to proceed with the claim was refused by Choudhury J on all five grounds.

8. On 21st June 2022 the Claimant renewed his claim for statutory review on two of the five grounds. The oral renewal application came before James Strachan QC (sitting as a Deputy High Court Judge) on 16th August 2022. He refused permission to proceed on the Claimant's renewed Ground 1 but granted permission to proceed on renewed Ground 2. Further details of the successful ground are given below but, in brief summary, the ground relates to whether it was lawful for the Inspector to conclude that the Claimant had failed to establish the financial viability of his business as the relevant planning policy required.

9. The substantive hearing of the claim took place before me on 28th March 2023. The Claimant appeared in person. Mr Fry appeared for the First Defendant. The Council (as Second Defendant) did not appear and was not represented.

Procedural Matters

10. In advance of the hearing the Claimant made two applications and the First Defendant made one further application.

11. The First Defendant's Detailed Grounds of Resistance were technically filed outside the time permitted by the Court's Order following the grant of permission, and hence the First Defendant's application was for an extension of time to file his Detailed Grounds of Resistance. I heard brief oral argument on this at the outset of the hearing. The application was not resisted by the Claimant, who had seen and commented on the Detailed Grounds as part of his case, and as no party could be said to be prejudiced by the short extension, I granted the application and accepted the First Defendant's Detailed Grounds of Resistance.

12. The Claimant's first application was for permission for Mr Goodson, a vet engaged by the Claimant, to give evidence at the hearing remotely. I refused that application by my Order dated 24th March 2023. In my reasons I noted that it would be very unusual for any oral evidence to be given in a judicial review hearing, whether in person or remotely.

13. The Claimant's second application was for permission to rely on additional witness evidence. This application was resisted by the First Defendant. I had adjourned that application to hear oral argument at the outset of the hearing on 28th March. I reminded the parties of the single ground of claim for which permission had been given and of the fact that this set the boundaries for the arguments I was able to hear. Mr Fry for the First Defendant maintained his objection to the application. I concluded that in the circumstances it would be appropriate and proportionate to admit the additional evidence but in doing so I made clear that, to the extent it introduced evidence beyond the confines of the single permitted ground of challenge, I would not have regard to it. On that basis I granted the Claimant's second application.

Policy and Factual Background

14. The development plan for the purposes of the appeal was, at the time, the emerging Vale of Aylesbury Local Plan ("the Local Plan"). It was subsequently adopted in September 2021, shortly after the decision letter the subject of this claim. The policies relevant to the appeal and to this claim were unchanged.

15. The Land falls within an area that the Local Plan designates as an "Area of Attractive Landscape". As such policies BE2 and NE4 of the Local Plan are engaged.

16. Policy BE2 provides as follows:

"Be2 Design of new development

All new development proposals shall respect and complement the following criteria:

- a. The physical characteristics of the site and its surroundings including the scale and context of the site and its setting
- b. The local distinctiveness and vernacular character of the locality, in terms of ordering, form, proportions, architectural detailing and materials
- c. The natural qualities and features of the area, and
- d. The effect on important public views and skylines.

More guidance on the detail for the application and implementation of this policy will be provided in the Aylesbury Vale Design SPD"

17. Policy NE4 provides as follows:

"Ne4 Landscape character and locally important landscape

Development must recognise the individual character and distinctiveness of particular landscape character areas set out in the Landscape Character Assessment (LCA), their sensitivity to change and contribution to a sense of place. Development should consider the characteristics of the landscape character area by meeting all of the following criteria:

- a. minimise impact on visual amenity
- b. be located to avoid the loss of important on-site views and off-site views towards important landscape features
- c. respect local character and distinctiveness in terms of settlement form and field pattern, topography and ecological value
- d. carefully consider spacing, height, scale, plot shape and size, elevations, roofline and pitch, overall colour palette, texture and boundary treatment (walls, hedges, fences and gates)
- e. minimise the impact of lighting to avoid blurring the distinction between urban and rural areas, and in areas which are intrinsically dark and to avoid light pollution to the night sky
- f. ensure that the development is not visually prominent in the landscape, and
- g. not generate an unacceptable level and/or frequency of noise in areas relatively undisturbed by noise and valued for their recreational or amenity value

The first stage in mitigating impact is to avoid any identified significant adverse impact. Where it is accepted there will be harm to the landscape character, specific on-site mitigation will be required to minimise that harm and, as a last resort, compensation may be required as part of a planning application. This reflects the mitigation hierarchy set out in paragraph 152 of the NPPF (2012). Applicants must consider the enhancement opportunities identified in the LCA and how they apply to a specific site.

The Policies Map defines areas of attractive landscape (AALs) and local landscape areas (LLAs) which have particular landscape features and qualities considered appropriate for particular conservation and enhancement opportunities. Of the two categories, the AALs have the greater significance. Development in AALs and LLAs should have particular regard to the character identified in the report 'Defining the special qualities of local landscape designations in Aylesbury Vale District' (Final Report, 2016) and the LCA (2008).

Development will be supported where appropriate mitigation to overcome any adverse impact to the character of the receiving landscape has been agreed.

Where permission is granted, the council will require conditions to best ensure the mitigation of any harm caused to the landscape"

18. As a proposal for a temporary rural worker's accommodation Policy H3 of the Local Plan is also engaged. It provides as follows:

"H3 Rural workers dwellings

Requirements for all rural workers' dwellings

All new dwellings for an agricultural, forestry or rural worker will only be permitted if all of the following criteria are met:

- a. The need relates to a full-time worker (someone employed to work solely or mainly in the relevant occupation) and does not relate to a part-time requirement
- b. There is a functional need for a worker to live at, or in the immediate vicinity of, their place of work (considering the requirements of the activities, operations and security of the enterprise and not personal preferences or circumstances). For a temporary dwelling, the need is essential to support a new rural business activity and for a permanent dwelling, there is an essential existing functional need. By itself, the protection of livestock from theft or injury by intruders does not establish need, nor do requirements arising from food processing or agricultural contracting, and nor does a retirement home for a former farmer. Conventional methods of forestry management are unlikely to give rise to an essential functional need.
- c. The functional need could not be fulfilled by any other means. For example, applicants will need to demonstrate why agricultural, forestry or other essential rural workers could not live in nearby towns or villages, or make use of accommodation already existing on the farm, area of forestry or business unit. Where applicable, the council will take into account the [Town and Country Planning \(General Permitted Development\)\(England\) Order 2015 Schedule 2 Part 3 Class Q](#) for changes of use from agricultural buildings to dwellings.
- d. It is sited so as to meet the identified functional need and is related to existing farm, forestry or rural business buildings, or other dwellings where these exist on or adjacent to the unit for which the functional need has been established
- e. Suitable accommodation has not been sold separately from the land within the last five years, including that which might have been converted

Temporary rural workers' dwellings

The council will not normally give temporary permission in a location where a permanent dwelling would not be permitted. New temporary dwellings for an agricultural, forestry or rural worker will only be permitted if all of the following additional criteria are also met:

- f. The future economic viability of the enterprise to which the proposed dwelling relates can be demonstrated by a sound business plan. This should demonstrate that the proposed enterprise has been planned on a sound financial basis with a reasonable prospect of delivering a sustainable profit before or by the expiry of the temporary period that the proposal seeks to secure.

g. It takes the form of a caravan, a wooden structure, or other temporary accommodation of the minimum size required to support the proposed new rural business activity ...

... [There then follows a section dealing specifically with policies on permanent rural dwellings, including sub-paragraphs (h) and (i), which are not relevant to this case. The policy continues] ...

Occupancy conditions and removal of conditions

Planning permission will be granted subject to a planning condition or S106 protecting its continued use by agricultural, forestry and other rural workers. An agricultural, forestry or rural worker occupancy condition will only be lifted if it can be demonstrated that both of the following criteria are met:

j. A suitable sustained attempt has been made to advertise and market the dwelling for sale or rent without any unreasonable restriction and with amenity land proportionate to its size and at a price that reflects the occupancy restriction for a continuous period of at least 12 months or an appropriate period as agreed with the Local Planning Authority. This should be evidenced through relevant documents such as marketing and valuation reports, which have been independently assessed* before submission to the council

k. The rural worker dwelling no longer serves a need in connection with the holding to which it relates and there is no agricultural, forestry or rural worker occupational need elsewhere that it could reasonably service, nor is it likely that any such needs will arise in the foreseeable future.

The council would not expect an occupational dwelling for an essential rural worker to be severed from the business unit to which it is tied, unless the business fails. In particular, the council would be unlikely to support any subsequent application to remove an occupational condition on such a severed dwelling or any future application for a new dwelling relating to the business. Even if the business to which the dwelling relates fails, the council would expect every reasonable effort to be made to retain the occupational dwelling. The council would apply the same principles as it would to a proposal to remove an agricultural or forestry condition.

Proposals for the removal of an agricultural or forestry condition will be considered on the basis of an up-to-date assessment of the demand for farm or forestry dwellings in the locality and not just on the particular farm or forestry holding. When considering proposals to remove the occupancy condition for an essential rural worker, the council will need to be convinced that the dwelling is no longer needed for the continuing rural enterprise. Alternatively, in the event that the enterprise fails, it will need to be demonstrated that the dwelling is not needed for any proposed new use with planning permission or to meet a wider need in the locality for an occupational dwelling for an agricultural, forestry or essential rural worker.

* the independent assessment should be by an assessor approved by the council"

19. Supporting text below the policy wording notes, in relation to the financial viability element of policy H3, that:

"Financial test for rural workers' dwellings"

5.22 Occupational accommodation cannot be justified on agricultural, forestry or business grounds unless the business enterprise is economically viable. A financial test is necessary to establish whether this is the case for both temporary and permanent dwellings. New temporary dwellings will only be justified if the new enterprise is realistically expected to be profitable within a determined period. To justify a new permanent dwelling as sustainable development, the rural business enterprise must be well established. Applying the financial test can also help to establish the size and design of the dwelling which the farming, forestry or rural business unit can sustain"

20. Paragraph 79 of the National Planning Policy Framework ("NPPF") was also relevant. The NPPF has since been updated, with the result that some of the paragraph numbering has changed, but at the date of the Council's consideration of the decision paragraph 79 from the then current version of the NPPF (March 2012) provided as follows:

"79. To promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. Planning policies should identify opportunities for villages to grow and thrive, especially where this will support local services. Where there are groups of smaller settlements, development in one village may support services in a village nearby"

21. In June 2018 the Claimant had submitted a planning application to the Council in relation to the Land, for "Change of use of land for siting of temporary mobile home for a period of 5 years and new internal access track".

22. The Council obtained advice on this 2018 planning application from specialist consultants Bourne Rural Planning Consultancy Ltd ("Bourne Rural") who carried out an agricultural appraisal of the application. The appraisal assessed the application against the various criteria in Local Plan policy H3.

23. Having regard in particular to criterion (f) of policy H3 the advice from Bourne Rural to the Council was as follows:

"The financial information submitted in support of this application is not sufficiently robust to demonstrate that the enterprise is capable of achieving financial viability and sustainability"

24. Faced with an unfavourable report from Bourne Rural the Claimant then commissioned a rebuttal report from his own consultants, Acorus Rural Property Services ("Acorus"), but this did not persuade the Council of the acceptability of the proposals. The planning application was therefore refused by the Council. There were two grounds of refusal. The first ground included the following passage which is germane to the later planning application and to this claim:

"The business is not considered to be based on a sound financial basis, with the financial viability and sustainability of the enterprise not demonstrating a reasonable likelihood that there is a reasonable prospect of sustainable profit before the expiry of the temporary period and no circumstances have been provided that justifies a five year temporary consent ... The policy [sic.] therefore conflicts with policy H3 of the emerging [Local Plan] and the requirement to provide sustainable development as derived from the NPPF"

25. Thereafter on 22nd April 2020 the Claimant applied to the Council a second time for planning permission, this time for "Change of use of land for siting of temporary mobile home for a period of 3 years" ("the Application") . The Application again related to the Land.

26. In view of local plan policy H3 the Application was accompanied by a Planning Report prepared by Acorus and dated April 2020. It included various submissions in support of the Application including section 7.3 "Evidence the business is financial sustainable". That section referred in turn to a series of financial projections in Appendix 1 to the report. One such table was headed "Annual Gross Margin & Profit Projection" which, it is relevant to note:

- a) Included financial projections for each of Years 1, 2 and 3,
- b) Included an input for "Paid Labour" in each of Years 1-3 at £2,125, £2,375 and £2,625 respectively,
- c) Made an allowance within the calculations for "Potential cost of Agricultural Dwelling, say £140,000 amortized @ 3% over 30 years = £51 per £1,000" resulting in a deduction to the net profit figure of £7,140 in Year 3, and
- d) Concluded that in Year 3 the business produced a net profit of £22,907

27. The Council did not determine the application within the statutory period. The Claimant therefore appealed against this failure to determine.

28. After the appeal was made the Council considered what its decision would have been had it had the opportunity to determine the application. The analysis by the Council's planning officer was contained in a delegated officer report. That report contained this passage:

"The proposed development does not fully address all strands of sustainable development; the proposed development is not in a sustainable location in terms of transport or promoting healthy communities. In addition, there would be negative landscape harms associated with a dwelling in this location, whether permanent or temporary in nature. Furthermore, the applicant has failed to demonstrate that the proposed dwelling would support a rural business that is financially viable. As such, whilst the dwelling is not 'isolated' in the literal sense, there are buildings and dwellings in the immediate surrounds, in terms of paragraph 79 of the NPPF, the proposed development would conflict with the general principle that isolated (or dwellings in the countryside) may be acceptable if there is an essential need for a rural worker. This has not been demonstrated.

...

Policy H3 Temporary rural worker's dwellings, sets out that temporary permission would not be granted in a location where a permanent dwelling would not be permitted. In addition, the proposal would need to demonstrate that the proposal is based on a sound financial basis and that permission would not normally be granted for a time period in excess of 3 years. Whilst the mobile home would be for a temporary period of three years, the proposed development would conflict with the other requirements of Policy H3. Furthermore, it would conflict with the requirement of there being functional requirement to be on site"

29. The Council resolved that it would have refused the application on three grounds, as follows:

"1) There is insufficient land available at the application holding to support an enterprise of the scale and nature proposed. The applicant has failed to demonstrate that there is a functional need to live on the site, and it is considered that the welfare requirements of the cattle could be met from a worker living in a dwelling nearby. The business is not considered to be based on a sound financial basis, and the applicant has failed to demonstrate that there is a reasonable prospect that the proposed enterprise would be financially viable and sustainable before the expiry of the temporary period. The applicant has failed to provide any information in relation to the size and/or construction methods of the mobile home to adequately assess whether it would comply with the definition of a mobile home and therefore would be considered suitable temporary accommodation. The policy therefore conflicts with policy H3 of the emerging VALP and the requirement to provide sustainable development as derived from the NPPF.

2) The proposed development would lead to an alien and strident feature within the site that would adversely impact upon the character and appearance of the immediate site and wider area which forms part of an Area of Attractive Landscape. The mobile home would be sited in a location that would relate negatively to its surroundings, and poorly integrates with the landscape and topography as well as failing to integrate with adjacent dwellings and buildings on adjacent land. The mobile home would have an unacceptable harmful and degrading impact on the openness of the site and the contribution it plays to the overall character, appearance and setting of the area which is designated as an Area of Attractive Landscape. The proposal therefore conflicts with policies GP35, GP38 and RA8 of the Aylesbury Vale District Local Plan 2004, policies H3, BE2 and NE4 of the emerging Vale of Aylesbury Local Plan and the requirements of the NPPF.

3) Notwithstanding the fact that the access onto Pitchcott Road remains unauthorised, no details have been provided to show how the dwelling would be accessed from the highway entrance given the lack of an internal access track. Such a track was previously proposed (Planning Application - 18/02123/APP) and its introduction was considered to lead to an alien and strident feature within the landscape that would adversely impact upon the character and appearance of the immediate site and wider area which forms part of an Area of Attractive Landscape. However, the removal of the track means that there is no proper means of getting access from highway entrance to the proposed location of the mobile home. The lack of a proper track will be exacerbated by the fact there is a significant slope to traverse to access the mobile home. Also, the lack of an internal access track, means that there is no means of demonstrating that adequate accessible parking can be provided on the site to serve the needs of the residents and visitors. In these circumstances it is likely that there would be a subsequent requirement for an internal access track, and both aspects of the development, the mobile home and the access track should be fully considered at this outset stage. In these circumstances the Local Planning Authority cannot be assured that the development can be properly accessed and would not lead to harm in terms of to the safety and convenience of occupants and visitors to the site. The application therefore fails to comply with Policy GP24 of the AVDLP and the adopted SPG Parking Standards, policies T5 and T6 of the emerging VALP and the NPPF"

30. As part of his appeal the Claimant submitted the required Statement of Case. Of relevance to the issues the subject of this claim the Statement of Case stated as follows:

"I have included the cash flow forecast produced by Acorus ... which clearly show the economic viability of my plans going forward. There is an additional opportunity to sell hay next year, which will add £20,000 to my turnover. My business proposal is financially viable and by selling our own produce will create employment and locally produced food. This is a Government objective for rural businesses"

and the Summary section at the end of the Statement of Case included the following two bullet points:

"• I satisfy the requirements of policy H3 of the Emerging Vale of Aylesbury Local Plan as a farmer in need of a temporary agricultural dwelling ...

- The cash flow forecasts, business plan and the fact that we do not owe money against the site at Hillhead Farm proves that we are economically viable and will show a sustainable business over the next three years"

31. The Council once again engaged Bourne Rural to assist its case at appeal. The Council's Statement of Case for the appeal included the following passage:

"Bourne Rural were commissioned to provide an independent agricultural assessment of the Acorus report to assess the essential need for a worker to live on site and to analyse the business plan to assess the financial viability and sustainability of the business. Bourne Rural are familiar with the site, having provided an agricultural assessment in relation to application 18/02123/APP. Due to the similarities between the two applications and the relatively recent site visit undertaken by Bourne Rural in relation to the 2019 assessment, the latest appraisal has been undertaken as a desk-based assessment.

The independent assessment sets out that the financial projections have been amended from those submitted in support of application 18/02123/APP and are based on year-round calving rather than spring calving. Whilst the changes result in increased net profits the source of the data is not cited and inaccuracies are apparent. The future economic viability of the enterprise should be demonstrated by a sound business plan.

Bourne Rural have requested accounts for the past three years from the applicant but these have not been provided. The applicant has questioned why these are necessary when the application relates to future trading and not past trading. The appraisal from Bourne Rural notes that when considering the future viability of an existing enterprise it is usual for accounts for the existing enterprise to be submitted as these verify the current financial status of the enterprise and allow for real figures to be used as the basis for the financial projections going forwards. Since no farm business accounts, or any other relevant financial data, has been provided it has not been possible to establish that the proposed enterprise is capable of achieving financial viability and sustainability in its own right rather than relying on other monies introduced from elsewhere.

The Bourne Rural report concludes that the proposed enterprise has not been planned on a sound financial basis and the applicant has failed to demonstrate that the proposed enterprise is capable of achieving financial viability and sustainability over the next three/five years.

As such, in light of the information provided and the independent assessment made, the proposal is not considered to have been based on a sound financial basis and therefore conflicts with criterion f) [of Local Plan policy H3]"

32. In advance of the appeal hearing the Inspector circulated a draft agenda to the parties which, the Inspector records in his witness statement in these proceedings, the hearing then followed. It included the following agenda item:

"2. Main issues for discussion:

...

b) whether there is an essential need for a rural worker to live at or near their place of work in the countryside;

i) functional need:

...

(3) viability re business plan"

33. As I note above the appeal hearing took place remotely using the Microsoft Teams video platform. Participating in the hearing for the Claimant were Mr Jonathan Goodson (a vet) and Mr Michael Harris (whom the Claimant described to me as a "safety adviser") as well as the Claimant himself. Participating for the Council were Mrs Rebecca Jarratt (a senior planning officer) and Mrs Jill Scrivener (of Bourne Rural).

34. The Inspector took a contemporaneous hand-written note of the evidence. He has put this in evidence as an attachment to a witness statement. Although hand-written it is tolerably clear what the notes record. In particular I see that in the section of his notes headed "Financial Forecasts" the Inspector has recorded the following:

"A: labour costs not shown: it's just him 80-100 hrs/week ...

A: just him all 3 yrs – has a son who helps.

LPA – Needs to meet its labour costs ... prob at least 1.5 workers to 110 cows"

35. The DL was issued on 23rd August 2021.

36. In the DL, having identified the "main issues" in the case as:

"the effect of the development on the Area of Attractive Landscape; and

whether the development would meet the criteria for a rural worker to live at or near their place of work in the countryside"

the Inspector went on to analyse those issues by reference to policy and to the written and oral evidence he had seen and heard.

37. In relation to the first of the main issues the Inspector concluded that the proposed development would be contrary to policy, both saved policies of the former local plan and policies in the Local Plan (which in his DL he abbreviated to "eLP" to signal that it was at that stage still an emerging Local Plan). In relation to the latter he concluded as follows (DL14):

"14. The proposal would also run against policies NE4 and BE2 of the eLP. These require development to respect and complement the physical characteristics of the site and its surroundings, to recognise the character and distinctiveness of the landscape character areas set out in the [Landscape Character Assessment], their sensitivity to change, and their contribution to a sense of place, to minimise impact on visual amenity and to respect local character and distinctiveness in terms of settlement form, field pattern and topography, and to ensure that development is not visually prominent in the landscape"

38. On the same issue the Inspector concluded that the proposals would also be contrary to paragraph 174 of the NPPF.

39. Turning to the second main issue the Inspector analysed the proposals against the criteria in Local Plan policy H3. He found that two of the criteria in policy H3 were not met – (d) and (f).

40. The Inspector's conclusion on criterion (d) was as follows:

"35. Siting of the proposed dwelling : I have already found that the siting of the dwelling would cause significant harm to the landscape character of the area which is an Area of Attractive Landscape. Its isolated siting towards the centre of the field would disrupt the balanced, spatial relationship between the remote buildings of Pitchcott Hill Farm above the field, and the characteristic pattern of development of the dwellings in the hamlet which tend to hug the road through Pitchcott Hill, below the field. The proposal would not satisfy criterion (d), siting, of eLP policy H3"

41. In relation to criterion (f) the Inspector's conclusions were as follows:

"29. Future economic viability : Policy H3 of the eLP also requires that the future economic viability of the enterprise can be demonstrated by a sound business plan. Financial projections have been shown over a 3-year period. These indicate a net profit in year 1 of £25,354, in year 2 of £27,244 and in year 3, after adjustment for the cost of the dwelling, of £22,907.

30. However, whereas the appellant's planning statement states that the labour requirement would equate to more than that carried out by a full-time worker, indicating that labour would be provided by Mr and Mrs Hunter, the allowance for paid labour in the projections is less than £3,000 per year. The appellant indicated that managing the present herd can already require him to work 80 to 100 hours per week, with the assistance of a son at the busiest times. There is no allowance included for the projected labour requirement, whereas the Council indicated that the average wage for a farm worker is £16,500 per year.

31. As the herd expansion reaches 110 cows in year 3, it is unlikely for the enterprise based on this model to be sustainable as a single-handed operation. I appreciate that the appellant may cover labour costs from the profit. However, the enterprise would not be viable, especially at year 3, when the adjustment for the cost of the dwelling is factored in. The proposal would therefore conflict with the requirement in eLP policy H3 for the future economic viability of the enterprise to be demonstrated by a sound business plan.

32. Moreover, I heard that the projected gross profits do not incorporate the changes to the Basic Payment Scheme, which will diminish progressively to year 3, reducing by 50% the allowance in year 3. If this is the case, this will further reduce the availability of profit to meet labour costs. I appreciate that alternatives to the Basic Payment Scheme may materialise. However, there is no evidence of these, or their effect on the gross profit of the enterprise. This factor would compound the viability conflict identified above.

33. I note that hay sales could add to turnover. However, there are no details of where this would come from, whether it is connected with this enterprise and the essential need for a dwelling here, the effect on profit, nor any account of the cost of the hay barn which has not yet been built. I acknowledge that the average price per head may increase. However, prices can fluctuate in both directions. In any event, the projected returns are based on the appellant's own price assumptions.

34. I recognise the long dedication of the appellant to farming, his success with the herd and his care for the animals as well as the desire to expand his enterprise. However, in accordance with the PPG, I have to be confident that the proposed enterprise will remain viable for the foreseeable future. For the reasons above, it has not been demonstrated that the future enterprise has been planned on a sound financial basis with a reasonable prospect of delivering a sustainable profit by the end of the temporary period, as required by eLP policy H3(f)"

42. The appeal was therefore dismissed.

43. The Claimant brought a challenge against the appeal decision on five grounds. All five grounds were rejected by Choudhury J and he refused permission to proceed by his Order dated 14th June 2022. (I note in passing that Choudhury J's Order was amended under the Slip Rule on 11th August 2022 but nothing turns on that fact).

44. The Claimant renewed his application on two of his five original grounds. The case came before Mr James Strachan QC (sitting as a Deputy High Court Judge) on 16th August 2022. Permission to proceed was refused on Ground 1 (described as "Location and Siting") but permission was granted on Ground 2 (described as "Financial Sustainability"). The recitals to the Order of Mr Strachan QC dated 31st August 2022 included the following words:

"AND UPON the Court noting that there was insufficient material before the Court as to what evidence was before the Planning Inspector at appeal in respect of financial viability of the Claimant's proposed business"

45. It was on this basis that the case came before me.

The Legal Framework

46. There is no dispute between the parties about the relevant legal framework.

47. [Section 288 of the Town & Country Planning Act 1990](#) provides as follows:

"288. Proceedings for questioning the validity of other orders, decisions and directions.

1. If any person-

...

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds-

(i) that the action is not within the powers of [this Act](#) , or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

...

(4A) An application under this section may not be made without the leave of the High Court.

...

(5) On any application under this section the High Court-

(a) may, subject to subsection (6), by interim order suspend the operation of any order or action, the validity of which is questioned by the application, until the final determination of the proceedings;

(b) if satisfied that any such order or action is not within the powers of [the 1990] Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action"

48. The approach of the Courts when reviewing Inspector's decision letters is as summarised by Lindblom LJ in *St Modwen Developments Limited v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6]-[7] :

"6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) (at paragraph 19) I set out the 'seven familiar principles' that will guide the court in handling a challenge under section 288 . This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

'(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P&CR 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953 , at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations 'whatever weight [it] thinks fit or no weight at all' (see

the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P&CR 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).'

...

7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

The Ground and Conclusions

49. At the outset of the hearing I reminded the parties of the Court's narrow remit in the case, as follows: firstly that only the Claimant's renewed Ground 2 had been granted permission to proceed and hence I would not hear

argument that was relevant only to other grounds; secondly that in granting permission to proceed with Ground 2 Mr Strachan QC had accepted no more than that there was an arguable case to be heard on the point; and thirdly that it was not the role of the Court to second-guess the conclusions of the Inspector and hence that the Claimant needed to do more than persuade me that his enterprise was economically viable, he had to persuade me that the Inspector's contrary conclusion was wrong in law.

Submissions

50. The Claimant presented his own case. He did so passionately and capably. If at times his submissions strayed beyond the ambit of the sole ground on which he had been granted permission to proceed then that is perhaps understandable, nevertheless I made clear that these were not submissions I could accept.

51. The Claimant had prepared and exchanged a written skeleton argument. He developed these submissions orally. The elements of the Claimant's complaint about the Inspector's findings against him on criterion (h) of Local Plan policy H3, distilled from both his written and oral case, were as follows:

- a) His evidence to the Inspector demonstrated that his business plan turned a healthy profit in Year 3 and hence was viable;
- b) The Inspector was wrong in his conclusions about the required ratio of farm workers to herd size, and he was wrong to conclude that the size to which the herd was expected to grow in Year 3 would be unmanageable by a single agricultural worker;
- c) The Inspector was wrong to assert that the business plan should have made allowance for paying a second agricultural worker besides the Claimant himself. The Claimant being self-employed had no set wage and he was not required to pay himself one. The evidence of the Claimant and his witnesses demonstrated to the Inspector that small farming businesses like his own regularly relied upon unpaid help and this is what his business plan had assumed. At most he needed occasional help. Generally this was provided by his wife or his son, neither of whom he ever had to pay. The Claimant had nevertheless made financial provision in his business plan for the possibility of needing occasional paid labour in the sum of £2,500-3,000 per year and that was sufficient;
- d) As a separate but related point there was no provenance to the evidence from Bourne Rural at the appeal that a figure of £16,500 should be assumed as the agricultural wage required to pay a second worker. The Bourne Rural witness does not have sufficient expertise to express an expert view. £16,500 is not a figure prescribed by Parliament for agricultural workers, and there is a public interest in showing that this is not a generally accepted figure;
- e) Moreover the evidence about the average agricultural wage to be assumed was introduced by the Council through its witnesses for the first time at the hearing itself and hence the Claimant had no opportunity to respond to it, which amounts to procedural unfairness; and
- f) The fact that permission had been applied for on a temporary basis should have given the Council comfort that if the Claimant was wrong in his confidence about the viability of his enterprise there was little risk to the Council because the temporary dwelling would be removed after the period of 3 years.

52. For the First Defendant Mr Fry submitted that the Claimant's true complaint was that the Inspector had simply not agreed with him. This, he submitted, did not reveal any error of law. The burden was on the Claimant to persuade the Inspector that the Council was wrong not to grant him planning permission and he had failed to discharge that burden. The conclusions reached by the Inspector were conclusions that he was able lawfully to reach on the strength of the evidence before him.

53. Mr Fry added that the arguments about procedural unfairness were new, had not been pleaded, and had certainly not been given permission to proceed.

54. Finally Mr Fry relied upon the recital to the Order of Mr Strachan QC granting permission for Ground 2 to proceed to a substantive hearing. This, he submitted, revealed that Ground 2 was considered to be arguable because of the lack of information then before the Court about what the Inspector had available to him on the financial viability of the Claimant's business plan. Mr Fry noted that there now was evidence before the Court introduced by the Inspector's witness statement filed following the grant of permission to proceed.

Conclusions

55. I agree with Mr Fry that the burden of proving his case to the Inspector fell on the Claimant as appellant in the appeal.

56. There was ample information available to show the Claimant the importance of demonstrating the financial viability of his business. The wording of Policy H3(f) made it clear that this was one of several essential criteria having to be met. The advice from Bourne Rural to the Council on the Application was that the Claimant's financial information was "not sufficiently robust". The Council's confirmation of the grounds on which it would have refused the Application made clear through ground 1 that it considered financial viability not to have been shown. The refusal of the Claimant's 2018 application, judged against the same policy framework, was also partly on the basis of a lack of demonstrable financial viability for the business. And the Inspector's agenda circulated in advance of the hearing identified "viability re business plan" as one of the areas to be discussed at the hearing.

57. I now have in evidence the Inspector's hand-written notes of the hearing. In his written skeleton argument the Claimant suggested that he had not seen the Inspector taking any notes of the evidence during the hearing and he alleged that "there is no evidence that [the notes he has exhibited] were written on the day of the hearing". That complaint was not pursued before me orally, nor could it credibly have been in light of the Inspector's witness statement (signed under a statement of truth) confirming that the notes he appended were "contemporaneous".

58. One of the Claimant's central complaints was that the figure of £16,500 suggested as the input wage for an agricultural worker had only been volunteered as part of the Council's oral evidence at the hearing, that it had been unheralded in the written evidence exchanged before the hearing, and that the Claimant had therefore been given no opportunity to rebut it. This, he claimed, amounted to procedural unfairness.

59. In response to this complaint Mr Fry submitted that an allegation of procedural unfairness was an impermissible reformulation of the Claimant's one permitted ground. That is fair comment, but in any event I do not regard the adopted procedure to have been unfair for the following reasons.

60. Financial viability was identified as a key issue by the Inspector in advance of the hearing and the Claimant was therefore on notice that it would be discussed. It is in the nature of an appeal conducted by the hearing procedure that there will be an Inspector-led discussion of the issues. The discussion is dynamic. Within the broad framework of the Inspector's agenda evidence is introduced by the parties in real time as part of the discussion. The evidence from the Bourne Rural witness about average farm wages was an example of this. The Claimant contends that Mrs Scrivener, the witness from Bourne Rural, did not have the requisite expertise to offer an expert opinion. I reject that submission. From the content of her evidence, her recorded professional qualifications, and her knowledge of the Land from this application and the previous 2018 application, I am left in no doubt that it was reasonable for the Inspector to conclude she had expertise upon which he could rely.

61. The Claimant maintains that he had no opportunity properly to respond to that evidence. I do not accept that submission. The Claimant was able to choose whom would represent his case at the hearing. He was accompanied by two professional witnesses. It is known from the Application that the Claimant also had access to specialist expertise in the form of Acorus. From what I have seen, Acorus would certainly have been equipped to offer a view on the provenance of the £16,500 average agricultural wage suggested by Bourne Rural. When I asked the Claimant whether he had considered engaging Acorus to present evidence with him at the appeal hearing he said that he had not done so because the costs were "considerable". That, of course, is the Claimant's prerogative. But there is a material difference between not having the opportunity to rebut the Council's evidence and not having the requisite expertise to be able to rebut the Council's evidence. The Claimant did have the opportunity. His real complaint is that he did not have on his side the expertise to rebut it persuasively. That was his choice. It does not amount to procedural unfairness for the Council to deploy expertise which the Claimant could have matched but chose not to.

62. On a correct reading of policy H3 it is clear that the criteria in paragraphs (a) to (e) have to be satisfied for all rural dwelling proposals and that proposals for temporary dwellings – as this one was – must also satisfy both the criteria in paragraphs (f) and (g).

63. The focus of this claim has been criterion (f). I agree with Mr Fry that the test of financial viability as described in the policy must be an objective one, otherwise it would be open to applicants for planning permission to distort the analysis with specific contentions that could prove difficult to verify. An objective test also imposes the requisite degree of consistency to decision-making in this policy area. The objective nature of the assessment was not seriously disputed by the Claimant. He preferred instead to advance the argument that even on an objective basis the Inspector's conclusion was without foundation.

64. In my judgment the Inspector has carefully recorded and analysed the evidence from both sides which led to his conclusion about the lack of financial viability in the business plan. He noted the evidence about the number of workers likely to be needed to service a herd of the size the Claimant projected it would become within the three year period. He correctly summarised the conclusions from the financial tables in the Acorus Statement. He acknowledged the evidence about the average farm wage, about how in practice the Claimant would expect to bring in any additional labour he may need, and about the allowance made by the Claimant in the financial projections for paying occasional labour whom he could not call upon to work for free. The Inspector has not gainsaid the evidence of the Claimant as to whom in practice he pays and whom he does not have to pay for agricultural labour, nor even whether this might be customary in farm businesses of his size. Instead the Inspector has concluded that on an objective basis a business plan which assumes little or no costs attributable to additional agricultural labour is not a viable one.

65. The Inspector reached a conclusion on the evidence that the Claimant had not demonstrated his business plan to be financially viable. This was a conclusion that he was entitled to arrive at on the evidence. I see nothing in there which was irrational. The Claimant maintains his vehement disagreement with the Inspector's conclusions on the evidence but that does not make them unlawful. His argument amounts to a challenge to the planning merits assessed by the Inspector, and in doing so it is an invitation to the Court to trespass upon the "exclusive jurisdiction" of the Inspector as decision-maker (cautioned against by Lindblom LJ in [6(3)] of his judgment in St Modwen).

66. In deference to the patient arguments made by the Claimant I respond to two of his central concerns about the Inspector's reliance upon the £16,500 agricultural wages figure and what that means for the wider agricultural industry.

67. Firstly the Claimant submitted that in granting permission for his Ground 2 to proceed Mr Strachan QC had accepted that the figure of £16,500 had no foundation. That is not correct. The hurdle the Claimant had to clear at the oral renewal hearing was lower than the hurdle in a substantive hearing. All he had to show there was that there was an arguable case to proceed to hearing. The recitals to the Order make clear that Mr Strachan QC's conclusion about arguability was influenced heavily by the absence of information available to the Court about what evidence the Inspector had before him. The evidential gap has now been filled by the Inspector's witness statement which has allowed me to reach a reasoned conclusion on the one ground of challenge that has permission to proceed.

68. Secondly the Claimant expressed a concern that the Inspector's conclusions amounted to an endorsement of £16,500 as the minimum agricultural wage when that should be a matter to be determined by Parliament. Whether the prescription of a minimum agricultural wage is within the purview of Parliament in any event is not for me to decide but it is plain that this is not the effect of the Inspector's decision, still less of the decision of this Court. The Inspector accepted evidence from the Council on the facts of the case that £16,500 was an "average" agricultural wage and that it should be used as a reasonable proxy to input into the Claimant's viability assessment. He already had evidence from the Claimant as to what figures the Claimant said should be used. The Inspector preferred the evidence from the Council and it informed his findings and conclusions. This is a permissible exercise of the Inspector's judgement on the facts of the case before him. It has no wider implication than that.

69. A subsidiary argument made by the Claimant is that an adverse conclusion on the financial viability of his business plan represents a low risk for the Council because he has only applied for a three-year temporary permission and hence if the business has not proven to be viable after three years he can then be required to vacate the Land. But that argument ignores several factors. The wording of the policy has been constructed so as to require a forward-looking estimation of future viability, and the demonstration of likely future viability is a precondition to allowing the erection of dwellings in the countryside that would otherwise be unacceptable in policy terms. The presence of a rural dwelling associated with an unsustainable business in an otherwise unacceptable location, even for the balance of three years, is contrary to the interests of good planning. It is therefore legitimate for the Council to draft and apply policies aimed at avoiding such an outcome.

70. These conclusions alone are sufficient to dispose of the claim on the narrow basis on which it has been allowed to proceed. I note in passing, though, that the criteria to be satisfied in policy H3 are cumulative and that the Inspector had already concluded that policy criterion (d) was not met either. The Inspector also found the proposals to be contrary to Local Plan policies NE4 and BE2 and NPPF policy in paragraph 174. Those facts alone, which are unchallenged before me, would have been sufficient justification for the Inspector to dismiss the Claimant's appeal. Mr Fry's alternative submission to me - that even success in this claim would have made no difference to the overall result - is therefore a powerful one but it is unnecessary for me to reach a conclusion on it in view of my conclusions on the ground of challenge I have heard.

Conclusion

71. It follows that for the reasons I have given above this claim is dismissed.

72. I will now invite the parties to agree an appropriate form of Order or, failing agreement, to make submissions in writing on the form of Order and on any supplementary matters.

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