



Neutral Citation Number: [2022] EWHC 475 (Admin)

Case No: CO/3883/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2022

Before :

Upper Tribunal Judge Elizabeth Cooke, sitting as a Deputy High Court Judge

Between :

**The Queen (on the application of ROMEO DANCE
ACADEMY LIMITED)**

Claimant

- and -

MILTON KEYNES COUNCIL

Defendant

Mr Oliver Lawrence (instructed by **Howes Percival LLP**) for the **Claimant**
Mr Matthew Henderson (instructed by **the Defendant's legal department**) for the **Defendant**

Hearing date: 24 February 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Upper Tribunal Judge Elizabeth Cooke, sitting as a Deputy High Court Judge :

1. The Claimant seeks judicial review of the Defendant's decision to grant planning permission for a night shelter for the homeless in Milton Keynes. Permission to seek judicial review was granted by Timothy Corner QC on 16 December 2021, and the hearing was expedited because of the pressing need for the shelter.
2. I heard the parties at the Royal Courts of Justice on 24 February 2022. The Claimant was represented by Mr Oliver Lawrence and the Defendant by Mr Matthew Henderson, both of counsel, and I am grateful to them.

The factual background

3. The factual background can be briefly stated. The Claimant operates a dance academy and has a lease of part of the ground floor and of the south side of the first floor of The Old Bus Station, 401 Elder Gate, Milton Keynes. It conducts daytime and evening classes.
4. On 1 October 2021 the Defendant granted planning permission for a change of use of another part of The Old Bus Station, on the north side, from its use as a youth and community centre to a night shelter for the homeless with 19 beds. The applicant for planning permission was the Defendant itself, under Regulation 3 of the Town and Country Planning General Regulations 1992 which provides, so far as relevant:

“... an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned, unless the application is referred to the Secretary of State under section 77 of the 1990 Act for determination by him.”
5. 26 objections to the application were received from members of the public, three of them from the Claimant; all but one of the objections expressed concerns relating to the Claimant and the difficulties that would be caused both to the Claimant's customers, some of them children, by homeless people congregating outside and also to the homeless who would be sleeping very close to a business where music is played late at night.
6. The decision to grant planning permission was made by one of the Defendant's officers, Mr Chris Nash, under delegated powers, following consideration of a report prepared by one of the Defendant's planning officers, Ms Sophia Dudding, dated 28 September 2021.
7. The Claimant seeks judicial review on the basis that the Defendant did not comply with its own Scheme of Delegation. It is well-established that a local authority acts unlawfully if it has adopted and published a scheme of delegation and then does not act in accordance with that scheme (*R (Bridgerow Limited) v Cheshire West and Chester Borough Council*) [2014] EWHC 1187 (Admin)).

The Scheme of Delegation

8. The Defendant adopted a Scheme of Delegation in May 2019, which sets out the circumstances in which a delegated decision on an application for planning permission may be made and those in which the application must instead be referred to the Defendant's Development Control Committee ("DCC") or Development Control Panel ("DCP"). The relevant provisions of the scheme are as follows:

"2. No delegated decision shall be made where the development in the opinion of the delegated officer is likely to be of a controversial nature, taking into account such factors as the scale and nature of the proposed development, the history and sensitivity of the site and the likely level of public interest.

5. No delegated decision on a planning application shall be made if a written request or e-mail to the Head of Planning or nominated officer is received within the specified consultation period i.e. 28 days, giving notice of a representation from;

(a) A Ward Councillor in respect of an application within their Ward.

(b) A Ward Councillor where an application in an adjacent Ward will have an impact on their Ward.

(c) Any Ward Councillor, where with the agreement of the Chair, it can be demonstrated that the environmental planning effect on the Borough of Milton Keynes is significant.

(d) The Clerk or Secretary of a Parish or Town Council in respect of an application within their Parish.

(e) The Clerk or Secretary of a Town or Parish Council where an application in an adjacent Parish will have an impact on their Parish.

(f) In the case of a 'Minor' or 'Other' application or a Tree Preservation Order, 5 or more members of the public from different households.

(g) In the case of a Major application 20 or more members of the public from different households."

9. It will be seen that paragraph 2 is independent of paragraph 5, and therefore a planning application may be referred to a committee or panel under one paragraph where such referral would be unnecessary under the other.
10. The Claimant was granted permission to seek judicial review on one ground, namely that the Defendant failed to comply with paragraph 2 of the Scheme of Delegation because the decision by the officer to deal with the application under delegated powers was irrational.
11. The Claimant has been given permission to amend its Statement of Facts and Grounds, and the single ground has been amplified by being split into three propositions. It is

now said that the Defendant failed to comply with Paragraph 2 of the Scheme of Delegation in the following ways:

1. The Defendant failed to turn its mind or have regard to Paragraph 2 of the Scheme of Delegation, which is neither mentioned in the Officer's Report nor the Permission;
 2. If the Defendant did have regard to Paragraph 2 of the Scheme of Delegation, then it misinterpreted the ambit of Paragraph 2; and/or
 3. If the Defendant did have regard to Paragraph 2 of the Scheme of Delegation, then its decision that the development was not likely to be of a controversial nature was taken on the basis of irrelevant considerations and was one which no reasonable decision-maker could have made.
12. In response to the amended Statement of Facts and Grounds the Defendant has adduced, with permission, a witness statement by Mr Nash, to which he has exhibited an email exchange with Ms Dudding on 23 September 2022, before the grant of permission, in which she asked whether the delegated procedure was appropriate and he responded that it was.
13. I look at these three points in turn.

1. Did the Defendant fail to turn its mind to paragraph 2 of the Scheme of Delegation?

14. The first point can be dealt with very briefly. It was not particularly strong in the first place, because the fact that the Scheme of Delegation is not mentioned in the officer's report or the decision notice is not surprising; both documents are concerned with the substance of the application and not with procedure. However, Mr Nash's witness statement makes it clear that this ground of challenge fails. In her email of 23 September 2021 Ms Dudding asked Mr Nash: "I would like to know due to the number of objections received, should the planning application be determined in DCP according to SoD Part 2". So the scheme of delegation, and in particular paragraph 2, was explicitly brought to Mr Nash's attention and he answered the question in the negative: "... there is no requirement for it to be presented to the DCP or the DCC."
15. There is no basis on which it can be said that the Defendant did not turn its mind to the Scheme of Delegation and the Claimant's first argument fails.
16. The two other points made by the Claimant are that even if the Defendant did consider the Scheme it got it wrong, by misinterpreting it or by making an irrational decision. The Claimant's arguments are largely, although not entirely, gleaned from Mr Nash's witness statement.

2. Did the Defendant misinterpret the ambit of paragraph 2?

17. In support of this point the Claimant relies upon Mr Nash's witness statement. I pause to note that the statement itself is, quite properly, brief. Mr Lawrence says that its brevity is telling and that I should regard as significant the fact that the witness statement does not say that Mr Nash took a decision on the basis of a judgment that the development was not likely to be controversial. I reject that argument; as Mr Henderson pointed out, Mr Nash has carefully refrained from after-the-event justification; the purpose of his statement is to exhibit the correspondence which shows what was said

to him at the time and how he responded. Accordingly I focus on the correspondence rather than on the witness statement.

18. Ms Dudding’ email included more than the brief paragraph I have quoted above. She also said:

“In general, the proposal is considered to comply with relevant policies in Plan:MK(2019) as stated in the below brief assessment.

The proposal would result in loss of part of the existing youth and community facility ...; it would use the area which has been approved for office administration at the first floor to accommodate 19 homeless bed spaces. As the proposal would retain majority of the youth and community facility, it is not considered contrary to policy CC3. The principle of the proposed temporary accommodation is also supported by policy HN6. ... Although the noise disturbance will need further assessment in accordance with policy NE6, however, I think a condition to require a noise management plan can sufficiently address this.

In conservation aspect, Historic England advised they don’t need to be notified I am still waiting for Highway Officer’s comments, but so far, I don’t foresee any significant highway issues would be caused by the proposal. Although no additional parking will be provided for the proposal, most homeless people who will be living there probably won’t have a car, and there are abundant public car parking spaces around the building can accommodate temporary parking and picking up and dropping off.”

19. The full text of Mr Nash’s email in reply is as follows:

“Of the 25 objections, I believe the majority are from customers to the Dance Studio indicating that there has been an active attempt to garner objection (i.e. how would those persons otherwise know about the proposals), and they circulate around the fear that the two uses may not be compatible due to disturbance from the dance school. With this nature of objection taken into consideration, I don’t consider it is in the public interest, taking account of it needing to be of a wider scale of public interest, and thus there is no requirement for it to be presented to DCP or DCC.”

20. The Claimant points out that Mr Nash never mentions the key word in paragraph 2, “controversial”. Instead, his email demonstrates that his concern was whether it would be “in the public interest” to refer the application to a committee. Paragraph 2 does not refer to the public interest in that sense. It requires that the application be referred to a committee if in the officer’s opinion it is “likely to be of a controversial nature, taking into account such factors as the scale and nature of the proposed development, the history and sensitivity of the site and the likely level of public interest.” Moreover, the Claimant says that Mr Nash referred to there “needing to be a wider scale of public interest”, which was a misinterpretation for two reasons. First, paragraph 2 refers to the likely level of public interest and not to the width of the scale of public interest. Thus he was wrong to regard as relevant the fact that the objections came from the Claimant’s customers; the fact that the objectors have something in common is irrelevant to the likely level of public interest. Second, paragraph 2 does not say that there needs to be a

level or scale of public interest before an application is referred to committee; it says that the likely level of public interest is something that the officer must bear in mind when considering whether the development is likely to be controversial.

21. This is a forensic dissection of Mr Nash's email, which is obviously inappropriate as well as being the sort of analysis that the Planning Court has, as Mr Henderson points out, consistently rejected (*R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314). Mr Nash's email was not a published reasoned decision about the Scheme of Delegation, nor was it a report to a committee. It was a quick exchange with a colleague to answer her question. There was no need to set out the text of the Scheme; these are colleagues in a team that processes, according to Mr Nash's witness statement, around 3,300 applications a year; they know about the Scheme because they use it constantly. The absence of any mention of the word "controversial" does not mean that Mr Nash misunderstood the Scheme or had not read it. Instead Mr Nash's answer, like Ms Dudding's question, focussed on the only aspect of the application that could possibly indicate a problem about the use of the Scheme of Delegation, namely the public objections. As Mr Henderson points out, there was nothing else the slightest bit problematic about this application. Ms Dudding had set out the absence of objection from ward councillors, from the Council's conservation and archaeology officer, and from Central Milton Keynes Town Council. She had confirmed that the application complied with the relevant policies. The only issue was the public objections. The idea that a focus on those meant that Mr Nash was unaware of the requirements of the Scheme is implausible.
22. Mr Lawrence argues that Mr Nash used the wrong test when he said that he did not consider that it was "in the public interest" to refer the application to a committee or panel. Mr Nash has, he says, confused the relevant test under other statutory regimes, for example freedom of information, with the Scheme of Delegation where paragraph 2 requires referral not when that is in the public interest but when, in the officer's opinion, the development is likely to be controversial. Mr Henderson's response to this was that Mr Nash had in mind that the purpose of paragraph 2, and of the various requirements in the Scheme for referral to a committee or panel, is to protect the public interest. Far from misunderstanding the Scheme he was homing in on its purpose. I take the view that that is likely to have been what Mr Nash had in mind. The words he used are not a precise enunciation of the test in paragraph 2 because none was needed. The important point, reading that sentence as a whole, is that he focused on the only possible indication of controversiality, namely the scale of public interest in the application.
23. That, says Mr Lawrence, was also wrong. Mr Nash should have focused on the likely level of public interest and not the width of the scale of public interest. I agree with Mr Henderson that there is no difference between those two metaphors for the quantification of public interest. Mr Nash's email is not to be construed as if it were a statute. He had asked himself how much public interest there was likely to be, and was correct to do so.
24. As for the reference to there "needing to be a wider scale of public interest", this is not a misreading of the Scheme. Mr Nash was looking at what in his view was needed before he could regard the application as likely to be controversial. And it was obviously relevant that the majority of objections came from the Claimant's customers.

This is indicative of the likely level of public interest, which is low. There is no groundswell of opposition from surrounding properties or the wider public.

25. In the light of the surrounding circumstances and the information presented to him in Ms Dudding's email it was inevitable that Mr Nash focused on the public objections and the level of public interest that they indicated, and I see no reason to infer from that that he had misunderstood the Scheme of Delegation.

3. Was the decision that the development was not likely to be of a controversial nature was one which no reasonable decision-maker could have made?

26. This is an irrationality or *Wednesbury* challenge, and is a high threshold for the Claimant to meet.
27. The Claimant argues that the decision was irrational because the officer took into account irrelevant considerations, namely the fact that most of them were made by customers of the claimant, and the fact that in Mr Nash's view there had been an attempt to garner objections.
28. These he says are irrelevant consideration; it is unsurprising that most of the objections come from people who use the land and indeed that makes their objections all the more sincere and is relevant to the controversiality of the proposed development. As to the attempt to encourage objections, this is not denied: I quote from Mr Lawrence's skeleton argument – "it is irrelevant that most of the objectors have been alerted to the application and encouraged to object to the Council." But again this is said to be an irrelevant consideration.
29. By contrast what the Defendant did not do was to consider the actual substance of the objections, and in particular the concerns raised about the safety of children.
30. I accept Mr Henderson's argument that the identity of the objectors, and the fact that objections may have been sought or encouraged by the Claimant were relevant factors. In my judgment the assessment of controversiality had to be made, and was made, in the light not only of the objections that were made but of those that were not. The fact that all or most of the objections related to the dance studio was not irrelevant to the issue of controversy; Mr Nash was entitled to conclude that rather than being controversial the application was of interest only to a narrow group. He was entitled to bear in mind that there were no objections from any ward councillors, nor from the Council's conservation and archaeology officer, nor from Central Milton Keynes Town Council. No concerns were raised on the basis of the building's listed status and Historic England did not wish to be notified.
31. Moreover, if objections were encouraged by the Claimant that was certainly relevant. It does not indicate that objections were insincere, but it may well indicate that the people concerned might not have felt sufficiently strongly about the matter to object had they not been asked to.
32. So I do not agree that Mr Nash took into account irrelevant considerations. On the contrary, the nature and source of those objections was central to what he had to consider, which was whether the application was likely to be controversial bearing in mind the level of public interest, and they indicated that it was likely to be low.

33. Furthermore I do not accept that Mr Nash's email indicates that he failed to consider the substance of the objections or that if he did he was dismissive in tone. Again, this is to fall into the error of forensic analysis of a brief email exchange between colleagues. Mr Nash's reference to the "fear that the two uses may be incompatible" indicates that he was well aware of the nature of the objections. He did not need to prove to Ms Dudding that he was conscious of the detail, nor did he need to set out his entire thought process to her. It is worth noting that we do see in the eventual planning officer's report, on the basis of which planning permission was granted, a consideration of those objections and a full appreciation of what the objectors were saying, and the suggestion (which was adopted) of a planning condition to meet those objections. That of course came later. Importantly it is clear from Mr Nash's summary in his email that he was aware not only of the source of the objections but also of their nature.
34. Finally the Claimant argues that the following facts support its case that the officer's decision that the development was not likely to be controversial fell outside the range of reasonable decisions open to him: the number and nature of the objections; the fact that paragraph 5 of the Scheme of Delegation would have required the application to go to a committee if 5 or more members of the public from different households had requested a referral; the nature of the development; the fact that the application for planning permission was made by the council itself.
35. Those four factors do not in my judgment cast any doubt on the reasonableness of the Defendant's decision. First, the objections came from in effect a single source with a set of concerns that, as it turned out, were given due attention and were able to be addressed by a planning condition. I do not regard these objections and this number of objections as indicating that the development was inevitably likely to be controversial.
36. Second, paragraph 5 of the Delegation Scheme is irrelevant. None of the objectors asked for the planning application to be referred to committee so paragraph 5(f) is not engaged. The number 5 has no magic about it in the context of the likely level of public interest in the application. Mr Lawrence argues that where the number of public objections equals or (as in this case) exceeds the number of requests that would trigger a referral, that is relevant to any assessment of the reasonableness of Mr Nash's decision; but as I say there is no magic in the number. Paragraph 5(f) is entirely independent of paragraph 2.
37. The third point the Claimant mentions is "the nature of the development". I see nothing inherently controversial in the provision of accommodation for the homeless. Mr Henderson went through the other factors set out in paragraph 2 and observed that the development is limited in scale, being confined to 550 square metres of the building, it accords with all the policies of the development plan and indeed is a form of development that the plan supports; the planning history of the building is unremarkable, and no concerns arise from its listed status. I agree that there is nothing in the nature of the development that makes it inevitably controversial.
38. Finally the Claimant says that the application for planning permission was made by the Council itself. I do not see any reason why that would make it controversial. If that in itself were a reason to refer the matter to a committee then the Scheme of Delegation would say so.

Section 31(3C) and (3D) of the Senior Courts Act 1981

39. Mr Henderson has drawn to my attention section 31(3C) and (3D) of the Senior Courts Act:

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

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

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

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

40. Mr Henderson argues that had the application gone to a panel or committee the outcome it is highly likely that permission would have been granted and therefore that even if I find that Mr Nash fell into error in his use of the Scheme of Delegation I should refuse to quash the decision. He points out that the application is wholly unobjectionable to all except a narrow group concerned with the dance studio, and that councillors would have been swayed by planning policies and by the need for the shelter. Mr Lawrence argues that the decision might well have been different as a result of political pressure brought to bear on the committee or panel by the objectors.
41. The point does not arise because I find no flaw in Mr Nash’s reasoning. Had I found any flaw I would have taken the view that a committee or panel would have granted permission, for the reasons Mr Henderson gives.

Conclusion

42. Paragraph 2 of the Scheme of Delegation states that the scheme is not to be used where “in the opinion of the delegated officer” the matter is likely to be of a controversial nature. Mr Nash took that decision in accordance with the Scheme. I see nothing that even comes close to being *Wednesbury* unreasonable in his decision, nor do I see that any irrelevant considerations were taken into account. The Claimant’s application to quash the decision is refused.