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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Department of the Environment's Application [2014] NIQB 4

IN THE MATTER OF AN APPLICATION BY THE DEPARTMENT OF THE ENVIRONMENT FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE PLANNING APPEALS COMMISSION DATED 15 JANUARY 2013

TREACY J

Introduction

[1] By this application, the Department of the Environment ("the Department") challenges a decision of the Planning Appeals Commission ("PAC") dated 15 January 2013 on an appeal by Mr A Hyde ("the appellant") against an enforcement notice issued to him by the Department on 24 May 2011 under Art 68 of the Planning (NI) Order 1991 ("the 1991 Order"), to allow the appeal under Ground(a) of Article 69(3) of the 1991 Order and grant planning permission for the element of his unauthorised use of land at 10 Crooked Stone Road, Aldergrove as a commercial car park which had not become time-barred from enforcement.

[2] Mr Charles Banner of counsel appeared for the applicant. Belfast International Airport Limited ("BIAL") support the applicant for judicial review and were represented by William Orbinson QC. Mr Tony McGleenan QC and Mark McEvoy BL appeared on behalf of Mr Alan Hyde as Notice Party to the application. Mr Hyde was the successful Appellant in the impugned decision of the PAC. Mr David Scoffield QC appeared for the respondent PAC. I am indebted to all counsel for their excellent written and oral submissions which were of great assistance to the court. I am also grateful to Mr Banner for the provision of his speaking note in reply which in cases of this kind is to be much encouraged.

Background

[3] The car park, used in connection with the appellant's business known as "Easipark", provides parking primarily for users of Belfast International Airport with a mini-bus shuttle service to and from the passenger terminal. The subject of this application is the section of the Decision at paras 29-43 under the heading *"Ground (a) that permission ought to be granted"*.

[4] The PAC held that the Development did not comply with Policy AMP10 of Planning Policy Statement 3 *Access, Movement and Parking* ("PPS3"), which was specifically addressed to apply to *"Provision of Public and Private Car Parks"*; that the Development did satisfy Policy CTY11 of Planning Policy Statement 21 *Sustainable Development in the Countryside* ("PPS21"), which related to farm diversification schemes; that on a proper interpretation of these policies, development which satisfied Policy CTY11 did not also need to satisfy Policy AMP10; and there was therefore no policy objection to the development.

Order 53 Statement

[5] The Department sought the following relief:

> (a) An order of *certiorari* to bring up into this Honourable Court and quash part of the decision of the Planning Appeals Commission dated 15 January 2013 to allow an appeal by Mr A Hyde under Article 69(3) of the Planning (Northern Ireland) Order 1991 against an enforcement notice issued by the applicant on 24 May 2011, the part in question being the decision to allow the Ground (a) element of Mr Hyde's appeal.
>
> (b) A declaration that the said decision is unlawful, *ultra vires*, and of no force or effect.
>
> ...

[6] The sole ground on which the relief was sought stated:

> (a) The Planning Appeals Commission erred in law in concluding that, on a proper construction of Policy CTY11 of Planning Policy Statement 21 *Sustainable Development in the Countryside* and Policy AMP10 of Planning Policy Statement 3 *Access, Movement and*

> *Parking,* the development subject to the enforcement notice needed to comply only with the former in order to be in accordance with planning policy".

Statutory Framework

[7] Art 25(1) of the 1991 Order provides that, in determining an application for planning permission, regard must be had:

> "to the development plan, so far as material to the application, and to any other material considerations".

[8] The Department's planning policies are normally issued through Planning Policy Statements (PPS). These set out the policies of the Department on particular aspects of land-use planning and apply to the whole of Northern Ireland. They are material to decisions on individual planning applications and appeals [see for example the Preamble to PPS21 and PPS1 General Principles]. The Department has issued a range of PPS setting out planning policy guidance covering an array of issues. It is common case that the PPS are material considerations which carry significant weight in planning decision-making.

[9] PPS3 *Access, Movement and Parking* sets out *"the Department's planning policies for vehicular and pedestrian access, transport assessment, the protection of transport routes and parking".* Policy AMP10 of PPS3 is entitled *"Provision of Public and Private Car Parks"* and states:

> "Planning permission will only be granted for the development or extension of public or private car parks, including park and ride and share, where it is demonstrated that:
>
> - they do not significantly contribute to an increase in congestion;
> - are not detrimental to local environmental quality;
> - they meet a need identified by the Department for Regional Development in Transport Plans or accepted by DRD following robust analysis provided by a developer;
> - within defined areas of parking restraint they are only used for short-stay parking and are

appropriately managed to deter long stay commuter parking; and

- they are compatible with adjoining land uses."

[10] PPS21 *Sustainable Development in the Countryside* sets out *"planning policies for development in the countryside"*, defined as *"land lying outside of settlement limits as identified in development plans"*. The policies in PPS21 are introduced by para 5.0 entitled "Planning Policies" which states:

> "In exercise of its responsibility for development management in Northern Ireland the Department assesses development proposals against all planning policies and other material considerations that are relevant to it.
>
> The planning policies of this statement must therefore be read together and in conjunction with the relevant contents of development plans and other planning policy publications, including the Regional Development Strategy. The Department will also have regard to the contents of published supplementary planning guidance documents.
>
> The following policies set out the main planning considerations in assessing proposals for development in the countryside. The provisions of these policies will prevail unless there are overriding policy or material considerations that outweigh them and justify a contrary decision."

[11] Policy CTY1 of PPS21 is entitled *"Development in the Countryside"* and provides in relevant part:

> "There are a range of types of development which in principle are considered to be acceptable in the countryside and that will contribute to the aims of sustainable development. Details of these are set out below.
>
> Other types of development will only be permitted where there are overriding reasons why that development is essential and could not be located in a settlement, or it is otherwise allocated for development in a development plan.

> All proposals for development in the countryside must be sited and designed to integrate sympathetically with their surroundings and to meet other planning and environmental considerations…
>
> **Non residential development**
>
> Planning permission will be granted for non-residential development in the countryside in the following cases:
>
> - farm diversification proposals in accordance with Policy CTY11;
>
>   ….
>
> There are a range of other types of non-residential development that may be acceptable in principle in the countryside, e.g. certain utilities or telecommunications development. Proposals for such development will continue to be considered in accordance with existing published planning policies."

[12] Policy CTY11 of PPS21 is entitled *"Farm Diversification"* and provides in relevant part:

> "Planning permission will be granted for a farm or forestry diversification proposal where it has been demonstrated that it is to be run in conjunction with the agricultural operations on the farm. The following criteria will apply:
>
> (a) the farm or forestry business is currently active and established;
>
> (b) in terms of character and scale it is appropriate to its location;
>
> (c) it will not have an adverse impact on the natural or built heritage; and
>
> (d) it will not result in detrimental impact on the amenity of nearby residential dwellings including potential problems arising from noise smell and pollution."

Submissions

[13] The applicant contended that a planning authority's failure to give planning policy its single objectively correct meaning, as determined by the Court, is an error of law and referred the Court to Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 (SC).

[14] The applicant contended that the PAC erred in concluding that, because the development complied with Policy CTY11 of PPS21, Policy AMP10 of PPS3 had no bearing on the Ground (a) appeal. The proper interpretation of PPS3 and PPS21 is that both policies applied to the development in the present case. The applicant set out its reasoning as follows:

(i) The Development was a car park. Policy AMP10 of PPS3 is specifically expressed to apply to *"Provision of Public and Private Car Parks"*. It was also in the countryside and therefore engaged PPS21 which is expressed to apply to *"development in the countryside"*. Accordingly, absent express indication to the contrary, both policies were applicable.

(ii) There is nothing in PPS3 disapplying Policy AMP10 from development to which PPS21 applies. Indeed, the justification and amplification to Policy AMP10 makes specific reference at para 5.77 to car parks *"in rural locations"*. This makes clear that Policy AMP10 was intended to apply to car parks in the countryside.

(iii) The policies in PPS21 are subject to para 5.0 quoted above, which states in terms that *"the planning policies of this statement must… be read together and in conjunction with… other planning policy publications"*. Policies CTY1 and CTY11 have to be read in that context.

(iv) Policy CTY11 of PPS21 also has to be read in the light of Policy CTY1, which cross-refers to farm diversification schemes pursuant to CTY11 as being one of the *"types of development which are considered to be in principle acceptable in the countryside"* (at para1), as opposed to other types of development for which *"overriding reasons"* were needed to justify a countryside location (at para 2). The effect of compliance with CTY11 in the present case was simply that there was no in principle policy objection to the Development based upon its location in the countryside and that there was therefore no requirement for *"overriding reasons"* to justify the countryside location. There was still, however, a requirement to *"meet other planning and environmental considerations"*. Policy AMP10 of PPS3 was one such consideration.

(v) The preamble to PPS21 sets out some circumstances in which the provisions of PPS21 will take precedence over the provisions of other policies, including certain provisions of PPS3. Had it been intended that Policy CTY11 of PPS21 was to take precedence over PPS3 generally or Policy AMP10 specifically, this section would have said so. It did not.

(vi) Policy CTY11 of PPS21 is not itself expressed to disapply Policy AMP10 of PPS3 for purported farm diversification schemes that take the form of a commercial car park.

(vii) The PAC's assertion that *"whilst the amplification text for the farm diversification policy in draft PPS21 made reference to proposals also having to comply with planning policy, the text for Policy CTY11 of the extant PPS21 does not"* is misconceived. Para 5.44 of the justification and amplification to Policy CTY11 in the draft PPS21 states: *"Additional policy guidance on specific forms of farm diversification is set out in a number of other planning policy statements"*. That was a mere statement of fact. It is in any event no different in substance from the over-arching text of para 5.0 set out above which introduces the planning policies in the Extant PPS21 by saying: *"the planning policies of this statement must… be read together and in conjunction with… other planning policy publications"*.

[15] Therefore, the applicant submits, the PAC erred in law in concluding that the Development only needed to satisfy Policy CTY11 of PPS21 in order to be in accordance with planning policy.

[16] The applicant submitted that where a legal error in a planning decision is identified, the Court will not withhold relief unless the outcome would inevitably have been the same and referred the Court to Simplex GE (Holdings) Ltd. v. Secretary of State for the Environment (1989) 57 P&CR 306. The high threshold of inevitability exists, it submitted, so that the Court does not stray into the forbidden territory of evaluating the planning merits of the development in question in attempting to second guess what might have happened absent the identified legal error.

[17] Mr Scoffield for the respondent PAC contended that the precise issue in the case related not merely to the interpretation of one policy but, rather the interaction, if any, of two policies namely (i) Policy CTY11 of PPS21 on sustainable development in the countryside and (ii) Policy AMP3 on Access, Movement and parking. Both in his written and oral submissions he conducted a detailed policy analysis in an attempt to make good his thesis that CTY11 was self-contained. Thus it was submitted that the generally permissive language of Policy CTY1 pointed to the conclusion that a proposal which meets Policy CTY11 does not also have to meet Policy AMP10 in order to be acceptable in the countryside. To that extent it was said the later document PPS21 (published in 2010) "takes precedence" over PPS3

(published in 2005). In summary it was submitted that once the PAC were satisfied that permission should be granted in principle for the farm diversification proposal which meets CTY11 and there were no site specific objections the PAC was required to grant permission. Indeed, he submitted that it would be impermissible for the PAC to take into account AMP10 in such circumstances.

[18] In contrast Mr McGleenan on behalf of the appellant took a different approach from the respondent. His first contention is that the development in question (a car park located in the country) engaged *both* CTY11 and AMP10. He agreed with the applicant (and BIA) that AMP10 was an existing policy against which the application should be considered. He maintained that the PAC identified that AMP10 was a policy against which the application should be considered and did so. He did not dispute that PPS3 is engaged but said it is an ancillary consideration to those raised by the application of PPS21 (see para 17 of Mr McGleenan's skeleton argument).

[19] Mr Scoffield, on behalf of the PAC took a different view contending that once the PAC was satisfied that permission should be granted in principle under CTY1 and there were no site specific objections, that they were required to grant the application for planning permission. Indeed, Mr Scoffield accepted that the logic of his argument was that the PAC would have been in error in importing AMP10 considerations which, on his analysis, would be entirely irrelevant to this development.

Discussion

[20] In Tesco [2012] UKSC 13 Lord Reed stated at paras 17-19:

> 17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan … The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord

Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:

> "In the practical application of sec 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a

measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

[21] And at para 35 of the same case Lord Hope stated:

"35. ….We are concerned here with a particular provision in the planning documents to which the respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128, para 23, is the interpretation of the policy which it sets out primarily a matter for the decision maker. As Mr Thomson for

> the interveners pointed out, the challenge to the respondents' decision to follow the Director's recommendation and approve the proposed development is not that it was *Wednesbury* unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.

[22] Although Tesco was on its facts concerned with the proper interpretation of a development plan nothing turns on this. The same considerations apply to the carefully drafted and considered statements of policy embodied in Planning Policy Statements. This is not disputed by any of the parties.

[23] I am satisfied that CTY1 must be read subject to para 5.0. Thus development proposals must be assessed against all planning policies and other material considerations that "are relevant to it". Para 5.0 is not the policy but importantly it indicates *how* the relevant planning policy is to be construed. Thus, CTY1 is, as Counsel for the applicant and notice party submitted, subject to para 5.0. That this approach is correct is confirmed by the paragraph "Non-Residential Development" in CTY1 which provides:

> "...
>
> Non-Residential Development
>
> Planning permission *will* be granted for non-residential development in the countryside in the following cases:
>
> - farm diversification proposals in accordance with Policy CTY 11;…
>   There are a range of *other* types of non-residential development that *may* be acceptable in principle in the countryside, e.g. ... Proposals for such development will *continue* to be considered in accordance with existing published planning policies."

[24] Mr Scoffield drew a distinction between (i) the specifically enumerated bullet point developments (of which there are 9) and (ii) the "*other*" types of non-residential development that "*may*" be acceptable in principle. Whereas AMP10 considerations were, he submitted, legally irrelevant factors in the former category they would/could be relevant in the second category. He contended that the word "continue" indicated that "whereas proposals falling within the nine categories set out in the preceding part of the policy are now to be considered against policies specifically identified in Policy CTY1, proposals for other types of development

falling outside those categories will, as previously, be considered, against other planning policies that were introduced before PPS21 was introduced. The reference to continuity applies only to developments which are outside the nine categories" [see respondents skeleton at para 29]. If Mr Scoffield's contention were right then there were would be two categories of "in principle" development which, on his analysis, would have to be approached differently depending on whether they fell within the bullet point categories or the "other" permissible development category. In the former category, according to Mr Scoffield, such proposals would not require to be considered in accordance with published planning policies but in the second category they would. I cannot accept that this is a sensible or objectively correct construction of the policy. On the contrary, the underlined portion referred to above provides additional support for the contention that the proper approach is that mandated by para 5.0 namely that development proposals must be assessed against all planning policies and other material considerations *that are relevant to it*. The planning policies of PPS21 must therefore be read together and in conjunction with the relevant contents of other planning policy publications. The policies that follow para 5.0 (which para is standard in PPS) set out the *main* (not the sole) planning considerations in assessing proposals for development in the countryside. The provisions of these policies will prevail *unless* there are other overriding policy or material considerations that outweigh them and justify a contrary decision. That was not the approach of the PAC who consequently fell into reviewable error. Thus at para 32 of its decision the PAC said that if the development was found to meet "either" CTY11 of PPS21 "or" AMP10 of PPS3 it "would" satisfy Policy CTY1 of PPS21. The PAC continued "there are essentially *two routes* through which development could be found acceptable in the countryside in accordance with Policy CTY1." This point was picked up again at para 41 of the decision where the decision states: "as the development is acceptable in principle, there is no requirement that it also meet Policy AMP10 of PPS3".

[25] The policies contained in PPS21 set out the main planning considerations in assessing proposals for development in the countryside. The provisions of these policies will prevail unless there are other overriding policy or material considerations that outweigh them and justify a contrary decision. In the present case there were other material considerations namely PPS3 Policy AMP10. They required to be conscientiously taken into account and put into the scales when assessing the planning merits of the development proposal. Mr McGleenan argues that such an exercise was in fact carried out. Mr Scoffield argues that even though such an exercise was unnecessary and indeed impermissible that the PAC effectively did just that (see paras 38 et seq of the decision).

[26] As to the question of weighing I am not satisfied that any such exercise was carried out. At the very least it is unclear that they did conduct any such exercise. The starting point must surely be that the PAC erroneously concluded that CTY1 is a self-contained policy which, since it was satisfied, must lead to the grant of planning permission. In the first instance it seems to me that ordinarily one must expect the decision maker to have correctly identified the relevant policy(s) and the

relationship between them, correctly interpreted and applied them. That, for the reasons given, did not occur in the present case.

[27] It is not enough to say that the Commissioner considered AMP10. It is clear he did consider it and that the development did not meet the policy tests because the applicant had not demonstrated a need for this development in a rural location in close proximity to BIA [see para 40 of decision]. He appears to have regarded this finding as immaterial to the decision to be reached and in consequence did not weigh it against the other considerations, as he was required to do. I cannot be satisfied that the decision *might* not have been different if the PAC had not made the error it did and accordingly I quash the decision [see Simplex (1989) 57 P&CR 306 at pp 323, 327 and 329].