‘Rottingdean’

Neutral Citation Number: [2019] EWHC 2632 (Admin)

Paragraph 88 confirms that, whilst development outside a Conservation Area is not covered by S.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, harm to the setting of a Conservation Area would nonetheless be a material consideration, in line with the NPPF, noting that this is one area where the NPPF goes further than the statutory requirements.

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Case No: CO/1166/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2019

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge
Between:

SAFE ROTTINGDEAN LTD	**Claimant**
- and -	
BRIGHTON AND HOVE CITY COUNCIL	**Defendant**
-and-	
FAIRFAX ACQUISITIONS LTD	**Interested**
GRANGE MANAGEMENT (SOUTHERN) LTD	**Parties**
COTHILL TRUST	

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Andrew Parkinson (instructed by **DMH Stallard LLP**) for the **Claimant**
Jacqueline Lean (instructed by **the Solicitor to the City Council**) for the **Defendant**
Christopher Katkowski QC and Richard Turney (instructed by Trowers and Hamlins LLP) for the **First Interested Party**

Hearing dates: 23 July 2019
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Approved Judgment

so. The first part of what Lewison LJ was saying shows that this is related to the duty to give reasons on an appeal decision, the nature of which had been at issue in relation to these statutory duties in a decision discussed in *Mordue*. It demonstrates that reasons may not satisfy the legal duty to give reasons for a decision, where they leave a substantial doubt as to what the conclusion was on a principal point of controversy, or whether it was itself legally flawed. But he does not say, and I would have been surprised if he had, that the same applied to the demonstration of the sort of legal error alleged here: that the relevant statutory duties were not performed, and that the Framework was misinterpreted or ignored.

85. However, be all that as it may, it is clear that the statutory duties do not need to be referred to for them to be performed. S66 first. The OR plainly gave special regard to the desirability of preserving the listed building, its setting and its features of interest. The achievement of the desirable object of its preservation- building, features and setting- was one of the chief issues at the heart of the decision to grant permission for this development as a whole. Considerable importance and weight was given to that, in favour of granting permission. It is impossible to read the OR in a different sense. I add that it was the strong presumption in favour of the development for that purpose, and for the overall enhancement to the Conservation Area, which led to the acceptance of the need for development on the playing field in order to produce a viable, policy compliant development.

86. Mr Parkinson's argument focuses on but one part of one aspect of s66: the less than substantial harm to the setting of the listed building from the development on the playing field. The section is different in scope from HE3 and brings in HE1, as well. Lewison LJ in *Palmer* at [29] made the point that the section requires an overall view of the effect on the listed building itself, its features and its setting. I do not think that giving considerable weight to the desirability of achieving the statutory duty requires separate views to be reached on each part, and then the beneficial parts to be put to one side where there is some harm, however relatively unimportant. It would be an irrational thought process, not sanctioned by statutory wording, to require significant weight to be given to the benefit, and significant weight to the harm, without the two being brought into a single balance under the statute, and then requiring only significant weight to be given to the harm. It is difficult, however, to avoid concluding that that is what Mr Parkinson's argument amounts to. There was in reality no overall harm to which the strong presumption could apply or to which considerable weight could be given as a matter of statutory duty.

87. That is not to say that the harm becomes irrelevant; it is simply that the statutory duty can be complied with, in line with the jurisprudence, even if there is some harm to a setting, if it is not as significant as the benefit to the building and its setting, as was obviously the case here. Quite the reverse; considerable weight has to be given to the overall benefits.

88. The same points apply to s72. I note in passing however that nothing in the *Bath* case, (*The Bath Society v SSE* [1991] 1WLR 1303 CoA), or *Barnwell Manor* alters the scope of s72 which is concerned with development in a conservation area. The former concerned development within the conservation area, the latter listed buildings. The setting of a listed building is part of the statutory scope of s66. Development outside a conservation area but affecting its setting is not covered by s72, although the harm to the setting of a conservation area would nonetheless be a material consideration. This

is because s72 applies "with respect to any buildings or other land in a conservation area". This, however, is one aspect where the Framework goes further than the legislation: it makes the setting of a conservation area part of what may make it significant. This makes it significant to planning decisions. It appears to make harm to the setting of a conservation area of equivalent importance, in terms of the justification required, to the setting of a listed building; see [194-5]. But it does so as a matter of policy rather than of statutory duty, which does have different legal consequences.

89. Taking s72 on its own terms, it is plain that special attention was paid to the desirability of preserving or enhancing the character and appearance of the Conservation Area. The language confines it to the effect of development within the Conservation Area. Considerable weight was given to it, telling in favour of the development. There was no harm. S72 on its terms was irrelevant.

90. If s72 does look beyond the boundaries of the Conservation Area, the same points about the striking of a balance within s72, between the benefits to the Conservation Area and the harm to its setting, apply as they do to s66. It is perfectly clear from the OR that it was concluded that there was an overall and significant benefit to the Conservation Area, allowing for the harm to its setting from the playing field development.

91. These conclusions in relation to both s66 and s72 are consistent with the conclusions I reached in relation to the application of HE3 and 6, and the other LP and CP heritage policies. These conclusions are clear, notwithstanding the absence of reference to those provisions. It is plain from the OR as a whole that the significance of the listed building, its setting and the Conservation Area, and the effect of the development upon them, was given the necessary considerable weight in the decision. In any event, the OR plainly gave weight to the harm to the setting of the listed building and Conservation Area from the playing field development. It was considered at length, and treated as an important issue, throughout the OR.

92. I did not find persuasive Mr Parkinson's comment that the word "regrettable" showed that the harm from development on the playing field was downplayed. The harm was less than substantial to the setting of the Conservation Area, and lower still to the setting of the listed building. As OR 8.54 showed, it had to be weighed against the enhancement to the Conservation Area, and by necessary implication to the setting of the listed building, and the need for a viable and deliverable scheme, all else apart, to provide the benefits to the listed building and to the Conservation Area. Without that regrettable but less than substantial harm, the greater overall heritage benefits, to which greater significant weight should be given applying the statutory provisions, would not be achieved.

93. I do not accept either, for the same reason, Mr Parkinson's submission that the OR carried out a conventional balancing exercise. The heritage benefits were considered separately, and found to outweigh the effect of the playing field development; this is further explained in OR 8.174 and 176. The harm would not justify refusal in those circumstances.

94. At 8.180, the OR concluded that the totality of the benefits meant that permission should not be refused: there were listed building benefits which on their own sufficed,