

## ***Cemex (UK) Operations Ltd v Richmondshire DC [2018] EWHC 3526***

### **Background and decision**

The claimant was a global producer, and marketer of cement, concrete and other building materials. The claimant challenged the defendant local authority's decision to grant planning permission to IP for the conversion of a stone barn, into a three bedroom dwelling, with a detached garage (the 'Property'). The claimant operated a major limestone quarry (the 'Quarry') on an industrial site. The site also included an asphalt plant (the 'Asphalt Plant'). The latter was situated on the other side of a road, opposite the Property. The Property was situated 64 metres from the Asphalt Plant, and 569 metres from the Quarry. Both the Quarry and the Asphalt plant operated, subject to planning conditions under a Minerals Planning Permission (Minerals Planning Permission), which was granted by North Yorkshire County Council, and limited the hours of operation of the Quarry. However, there was no limit on the hours of operation of the Asphalt Plant. Conditions were also imposed in the Minerals Planning Permission relating to levels of noise from the site, which were not to be exceeded.

The claimant had submitted objections to grant of planning permission, on the basis that the noise from the claimant's operations would have an adverse impact on the Property. IP then instructed acousticians to undertake a noise assessment. That assessment indicated a significant adverse effect of noise at the Property. The acousticians report set out two ventilation strategies for achieving satisfactory noise levels within the Property. Both strategies included continuous mechanical ventilation. However, IP did not wish to install continuous ventilation. IP's alternative suggested means of mitigating the impact of noise on the Property, included the removal and blocking up trickle vents in certain windows, in order to achieve satisfactory noise levels inside the property.

Planning permission was granted for the Property, subject to a condition requiring either the removal, or blocking up, of trickle vents in certain bedroom windows of the Property. There were no conditions expressly requiring the retention of specified window glazing, or requiring the installation of a mechanical ventilation system.

The claimant's Minerals Permission was due for review in 2025. Any review would be required to consider operating conditions, alongside any change in circumstances, including the existence of any new dwellings in the vicinity of the Quarry. The claimant asserted that there was a very real risk that conditions could be imposed in the light of such a review, to protect the amenity of the occupants of the Property, and that such conditions could have a serious impact on the Quarry operations.

The claimant challenged the defendant's decision to grant IP planning permission on several grounds.

The principal ground of challenge was that the defendant had failed to have regard to the policy and guidance in the Planning Policy and Guidance (PPG) relating to reliance on keeping windows closed as a mitigation strategy. In short, the defendant had failed to take into account a material consideration when making its planning decision. At the time of the relevant NPPF was the 2012 version. The NPPF provides that planning policies and decisions should aim to avoid noise from giving rise to significant adverse impacts on health and quality of life, as a result of a new development. The NPPF recognised that noise which causes a material change in behaviour, such as keeping windows closed when the noise was present, caused the significant observed adverse effect level of noise to be crossed. Both parties accepted that the PPG was a material consideration, on the basis that the PPG represented government policy.

Her Honour Judge Belcher held that, given the fact that the reports which had been submitted to the defendant by the defendant's environmental health officer and planning officer, made no reference to the undesirability of keeping the windows of the Property closed, the defendant had failed to have regard to a material consideration. Therefore, it followed that the planning permission fell to be quashed.

Her Ladyship then went on to deal with two other grounds of challenge to the grant of planning permission to IP. However, only one ground merits very brief mention here.

The NPPF recognised that new development will often create some noise and that existing businesses wanting to develop should not have unreasonable restrictions placed on them as a result of changes in nearby land uses since they were established. The claimant argued that the defendant had failed to take into account the fact that the claimant's minerals permission fell to be reviewed in 2025 and, at that time, onerous conditions relating to noise levels from the site could be imposed on the claimant's operation as a result of the grant of planning permission to IP. Judge Belcher, in deciding in favour of the claimant, held that there was nothing in either the environmental health officer's report, or the planning officer's report, to suggest that any consideration had been given as to whether, as a result of such a review, firstly a new noise level could be imposed in relation to the claimant's industrial site, or, secondly, the effect such a condition would pose to the future operation of the claimant's business.

### **Comments**

While *Cemex* does not take the law further forward, it illustrates the importance of the role of planning in noise control. The principal ground of challenge calls for little comment. As far as the other ground mentioned in the note is concerned, Judge Belcher adopted a rather generous approach as to what constitutes 'unreasonable restrictions' being imposed on existing businesses by a new development, in terms of the NPPF. Her Ladyship was prepared to accept the claimant's argument to the effect that, in effect, even the spectral possibility of onerous conditions being imposed on the claimant, in the future review of its minerals permission, because of the existence of the new Property, constituted an unreasonable restriction.

It should be mentioned that the current version of the NPPF 3 in Scotland does not contain similar provisions to those which are contained in the English NPPF, in relation to the effect of planning permission for new developments on existing developments.

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