***James v Dover DC* [2022] EWHC 961**

Background and decision

The claimant James ('J') sought judicial review of a decision (the 'Decision') by Dover DC ('D') dated May 2020, to grant planning permission for development at Lydden Hill Race Circuit in Kent (the 'Race Circuit'). The Race Circuit was a sports venue, which was operated by the Interested Party ('IP'). The Race Circuit was located approximately one kilometre north-east of Wootton Village in the Kent Downs Area of Outstanding Natural Beauty ('AONB'). J lived in Wootton Village. J claimed that both she and other local residents, were adversely affected by noise from the Race Circuit. D was the planning authority for the area.

J claimed that D had erred in law in reaching its decision on the following grounds:

1 D had erred in law in regarding the existing level of noise, which was a statutory nuisance, and/or causing noise at a Significant Observed Effect Level ('SOEL') as a 'fallback position', against which to judge the IP's application for planning permission to develop the Race Circuit,
2 D had erred in law in its approach to the effect of the proposed development on the Kent Downs AONB,
3 D had failed to give adequate reasons for the decision,
4 D had failed to have regard to Art 8 of the ECHR and/or a breach of Art 8, contrary to the Human Rights Act 1998.

The Race Circuit had been in operation for over 50 years. There had been a lengthy history of planning permissions at the site and, also concerns about noise. The AONB Management Plan provided that the Race Circuit and the surrounding area, had a tranquillity index rating of 'medium' to 'medium low.' Planning permission had first been granted in 1986. Prior to the Decision, the Race Circuit operated under the limitations and conditions of planning permission, which had been granted in 2014. That permission had maintained conditions which had previously been imposed, but had varied the earlier permission, in order to allow several one-off events to take place in 2014.

The relevant conditions of planning included:

(i) The site was not to be used for any purpose, other than motor car, motor cycling and kart racing,
(ii) Certain one-off events were permitted to be carried out on the land in 2014,
(iii) Except for the events specifically set out in Condition '(ii),' permitted uses were not to be carried out on the land, in excess of a specified number of days in a calendar year, or in excess of a specified number of consecutive days, of more than two, subject to a specified interval between these days, and also before and after specific times of the day,
(iv) Noise emitted from the public address system was not to exceed a certain level
(v) All vehicles operating on the track require to be fitted with noise emission control equipment,

D had received a number of complaints concerning noise from the Race Circuit. In April 2015, D had served a noise abatement notice, on the basis that the noise had been causing a statutory nuisance, in terms of s79(1)(g) of the Environmental Protection Act 1990 (the 'EPA'), at residential properties. The Race Circuit had appealed against the abatement notice. At the same time, the Race Circuit had sought to regularise the position by making a planning application to develop the Race Circuit and increase the number of days upon which it could operate. In November and December 2015, D and the Race Circuit came to an agreement, as a result of which the Race Circuit agreed to withdraw the appeal. In turn, D had agreed to withdraw the abatement notice, and serve a revised abatement notice. D had also undertaken to withdraw the revised abatement notice, once the planning application had been determined, and any appeal had been concluded.

In December 2015 D withdrew the first abatement notice, and served the revised abatement notice on the Race Circuit. The revised abatement notice stated that D was satisfied that a statutory nuisance under s79(1)(g) 'exists and is likely to recur.' The notice stated that the cause of the nuisance was 'emissions from noise from motor vehicle activities, motor sports events and associated activities on site.' The revised abatement notice restricted the recurrence of the noise nuisance, by requiring that specified noise limits were not exceeded for the 52 events which were allowed each calendar year. This was expressed by allowing two event days per calendar year, with

unrestricted noise levels, and noise limits for the remaining events being restricted to 24 events, no greater than 55 dB LA eq 1 hour, as measured at specified locations. Compliance with the revised abatement notice was monitored in accordance with D's Guidance Note.

In 2017 IP's application for planning permission was refused by D, for non-noise-related reasons. In May 2019 IP again applied for planning permission to develop the Race Circuit and increase the days of operation. The Non-Technical Summary of IP's Environmental Statement, in support of the application, described the increased number of days, and concluded that the proposals would result in impacts of negligible significance.

Data from a company of acousticians, which had been commissioned by concerned residents, was provided to D, indicating numerous breaches of the revised abatement notice. That data was included as appendices to representations objecting to application for planning permission.

The Officer's Report ('OR') recommended that planning permission be granted subject, to certain conditions. The OR, which contained reasons why permission be granted, stated that whilst the use of the circuit would be considerably expanded, the officer considered that that would be balanced against the improved management of the circuit, and more stringent monitoring (which would be secured by condition). The OR stated that the development would not exacerbate the impacts of noise and, therefore, no additional planning harm would be caused. Furthermore, the development would not harm the living conditions of neighbours in any other respect, subject to conditions.

At a meeting of D's Planning Committee in January 2020, application for planning permission was approved, subject to conditions. In May 2020 planning permission was granted.

After outlining the principles which were to be applied by a court when considering a challenge to a planning officers report, the judge, Lang J, addressed the issues of noise and nuisance. Firstly, the judge recited the provisions of ss79-82 of EPA, which dealt with the control of statutory nuisances. The judge then addressed para. 183 of the National Planning Policy Framework (the 'Framework'). This stated, *inter alia*, that the focus of planning policies and decisions should be on whether proposed development was an acceptable use of land, rather than the control of

processes or emissions, where these were subject to separate pollution control regimes. Planning decisions should assume that these regimes would operate effectively. Equally, where a planning decision had been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.

The judge stated that case law had established that the existence of other pollution control regimes, such as that under the EPA, were material considerations, and planning decision makers were required to take these regimes into account in their decision-making, and also assume that they would operate effectively. However, the judge added that the decision maker could not simply rely on the earlier grant of an environmental permit and abdicate responsibility for its decision-making.

The judge then addressed the Planning Practice Guidance (the 'PPG') in relation to noise, which gave guidance as to how noise impacts could be determined. The PPG provided that in both plan-making, and decision making, a planning authority was required to consider whether a 'significant adverse effect' was occurring or likely to occur; whether or not an 'adverse effect' was occurring, or likely to occur, and whether or not a 'good standard of amenity' could be achieved. That would involve the planning authority identifying whether the overall effect of the noise exposure would be above, or below, the SOEL, and the lowest observed effect level for the given situation. The expression 'observed effect levels' was explained in the PPG.

J argued that D had erred in regarding the existing level of noise, which was a statutory nuisance and/or causing noise at a SOEL, as a fallback position, against which to judge the application for planning permission, in order to develop the Race Circuit. Furthermore, both the proceedings under the EPA 1990 and the abatement notice, were material considerations. Applying para. 183 of the Framework, J claimed that D should have assumed that the pollution control regime would operate properly to control the nuisance, and if the current revised abatement notice was not doing so, that a further abatement notice would be served. On that assumption, J claimed that D should have considered what was required to control the nuisance, whether by way of a further abatement notice, or otherwise, and take that into account as the correct fallback position. J further argued that the OR

should have advised members of D's planning committee accordingly. Instead, D had erroneously adopted the approach of regarding the fallback position as the existing planning permission, and also the existing revised abatement notice, notwithstanding that D was aware that they did not adequately control the noise or abate the nuisance.

J further argued that the OR had failed to inform D of important matters, in particular, the history of the abatement notices, the views of the acousticians which had been commissioned by D, and also, that the revised abatement notice would provide 'minimum relief' to the community.

In the alternative, J claimed that it was irrational for D to regard the maintenance of the nuisance to be the fallback position. Finally, J claimed that it was irrational for D to consent to an intensification of use, leading to noise on more days in the year, when D knew that the current use was giving rise to a SOAEL.

The judge held that the purpose of para. 183 of the Framework was to avoid needless duplication between the two schemes of statutory control, where the pollution control regimes operated parallel to the planning regime. Irrespective of whether there had been any proceedings under the pollution control regime, the decision-maker should assume that the regime would operate effectively in the future. However, where there had been such proceedings, they would be a material consideration which the planning decision-maker must consider and take into account.

The judge held that D had correctly taken the view that proceedings under the EPA, and the abatement notices, was a material consideration which D was required to consider. Furthermore, the OR had given a detailed and balanced account of the issues D's elected members had to consider and had given appropriate advice. The planning officer was correct to identify the fallback position as that which currently existed, under the existing planning permission, and the existing revised abatement notice. The judge stated that 'fallback position' had acquired a specific meaning in planning law. The judge referred to para.1.002.29 of the Encyclopaedia of Planning Law and Practice, which states that 'sometimes an applicant for planning permission can demonstrate that the grant of planning permission will be less harmful than a use or development which has previously been permitted; this is known unsurprisingly, as 'fallback'.[61] The judge stated that in *R(Mansell) v Tonbridge and Malling BC* 2017 EWCA Civ 1314 at [27]

Lindblom LJ considered the status of a fallback development, as a material consideration, confirming that there required to be a 'real prospect' that it would be reverted to.

The judge rejected J's submission that D should have considered what was required in order to control the nuisance, (whether by way of a further abatement notice, or otherwise) and take that into account as the correct fallback position. The judge stated that that would not be a fallback position, as defined above. Nor would it be consistent with the Framework policy in para.183. It followed that the OR was not required to consider or advise elected members as to what further abatement notices might be served in the future. The elected members were not responsible for making any decision of such matters. Speculation would not have been appropriate. The judge stated that there was neither support for J's contention in para. 183 of the Framework, nor in the authorities cited therein.

The judge stated that at the heart of J's objection to the fallback position adopted in the OR, was that the existing level of noise amounted to a statutory nuisance and/or a SOEL and, therefore, could not properly be relied on. However, there was no legal basis for that submission. The judge added that J had relied on *Lawrence v Fen Tigers* [2014] 2 WLR 433. However, the issues in that case had been quite different and that the judgement in that case did not provide any support for J's submission.]63] J had simply misunderstood D's approach. In the view of the OR and the EPT, the revised abatement notice restricted, but did not eliminate the nuisance. Once satisfied that a statutory nuisance existed, D had complied with its duty under s80(2A) of the EPA and had served an abatement notice, which required the nuisance to be restricted in accordance with the schedule to the notice. It was a matter for D's discretion whether to choose all, or any of the requirements available in s80(1) of the EPA. The judge stated that there was no duty on D to serve a notice, which required the statutory nuisance to be abated. The revised abatement notice had been lawful and could be relied upon by D and the IP as part of the fallback position. For these reasons it was not irrational for D to have treated the revised abatement notice as the fallback position.

The judge held that D's elected members had been correctly advised in the OR to consider whether the proposed planning permission would be more effective in controlling noise levels, because it would include more stringent

and more effective conditions, than the existing planning permission and revised abatement notice.[65] It was a matter for the planning officer's discretion to determine how much of the history of abatement notices, and, in particular, the magistrates courts proceedings, the evidence contained in the reports of acousticians, and the undertaking to withdraw the revised abatement notice, the OR contained. The judge held that that was background information which was not directly relevant to the issues which elected member had to decide. Applying the test in *Mansell,* it could not be said that D's elected members had been seriously misled. It had been reasonable for D to have decided to address the noise issues at the Race Circuit, by way of detailed planning conditions, rather than by way of a further abatement notice. That was an exercise of discretionary judgement on the part of D.

J alternative submission that it was irrational for D to consent to an intensification of the use, leading to more noise on more days of the year, when it knew that the current use was giving rise to a SOEL, turned on the evidence.[70] However, that evidence indicated that, although the Race Circuit would be used on more days of the year, the quieter nature of the activities on those days, combined with the noise limits imposed and improved controls and monitoring, meant that there would not be any increase in impact on local residents. The OR had set out the basis for this advice in considerable detail. The judge also accepted that in assessing acceptable noise levels in the community, that D had formed an assessment based solely on BS 4142 or the WHO Community Noise Guidelines, would not be suitable.

The judge concluded that there had been sufficient evidence upon which the planning officer and D's members could rationally conclude that the increased number of days which activities were permitted, would not increase the impact on local residents.

Ground 1 therefore, did not succeed.

Ground 2

As far as Ground 2 was concerned, J had claimed that D had erred in two respects in its approach to the effect of the proposed development on the Kent Downs AONB.

The first ground was that it was irrational for the OR to conclude that the additional use of the site would not 'significantly diminish its tranquillity beyond the application site, given that there would be a change from 313 days per year without noise to 316 days per year, with noise.[77]

The second ground was that the OR's starting point was unlawful when it undertook the assessment required by para. 172 of the Framework, on the basis that it had condoned a level of noise which it had accepted was a statutory nuisance and/or SOEL. The current lack of tranquillity was capable of improvement under the statutory nuisance regime and its application should have been assessed in that context. However, the judge held that the approach which had been set out on para.172 did not require permission to be granted only for development that reduced noise impacts to levels which were not a statutory nuisance or below SOELs, still less to zero. The OR had given elected members detailed and appropriate advice on the AONB. Issues of tranquillity had been duly considered in the OR[82]

As far as the first ground was concerned, the judge held that D was rationally entitled to conclude that the noise impacts arising from additional days of activities would not significantly diminish the level of tranquillity in the AONB for two main reasons. The first was that events would be restricted to quieter uses, at or below the levels of noise in the areas where there was no activity at the Race Circuit (the residual level). The second was of the consequences of the enhanced controls on noise from all activities. The legal and policy framework on AONB was correctly set out in the OR and had properly been applied by the planning officer, and D's members to the facts of the application.

The judge held that D, as decision-maker was required to assess the tranquillity of that of the AONB that was affected, and then consider the likely impacts of the proposal. However, the tranquillity levels in and around the Race Circuit had been shown to be medium to medium to low. Subject to control by conditions, there was sufficient evidence upon which D could properly conclude that additional use would not sufficiently diminish tranquillity beyond the site.

Ground 2 therefore, did not succeed.

Ground 3

Under Ground 3 J submitted that in its statement under s30 of the Town and Country Planning (Environmental Impact Assessment) Regulations (the 'EIA' Regulations) and the OR and Minutes, D had failed to give adequate reasons for the Decision and had failed to grapple with the issues raised in the light of representations made by residents and other consultees in opposition to the proposed development. J further submitted that it had been required to give reasons for its decision under common law.

The judge held, however, that D had issued the requisite statement. The Planning Committee had adopted the reasoning in the OR and had accurately and adequately summarised its reasons for doing so. The main reasons for the decision had been set out in the requisite statement, including the effects on the AONB and noise generally. The decision to grant permission took account of the consultee's views and representations.

Ground 3 therefore, did not succeed.

Ground 4

J claimed that the level of noise, assessed as SOEL, had engaged Art 8 of the ECHR. J claimed that D was under a positive duty to take effective measures to secure respect for other local residents to peaceful enjoyment of their homes. The failure to do so amounted to a violation under Art 8. J further claimed that D had failed to consider its human rights obligations adequately or at all in reaching its Decision.

Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in such a way which is incompatible with a Convention right. Art 8 provides *inter alia* that everyone has the right to respect for his private and family life, his home, and his correspondence. The judge stated that the right to respect for the home encompassed the right to enjoyment of a residence, free from excessive environmental pollution, including noise nuisance. That could give rise to an obligation, on the part of the state, to take effective measures against noise.

The judge went on to state that the precautionary principle was a core principle in EU environmental law. She referred to *R (RLT Built Environment Ltd) v Cornwall CC* [2016] EWHC 2817 where it was held *inter alia* that where Art 8 rights were in play in a planning context, they were a material

consideration. However, any interference with such rights caused by the planning control decision had to be balanced with, and against, all other material considerations. That balancing exercise was one of planning judgement. The court would only interfere if the decision was out-with the legitimate range. The court would defer to the decision-maker (ie the planning authority). Furthermore, the decision-maker would be accorded a substantial margin of discretion. The deference and margin of discretion would be greater if he had particular expertise and experience, in the relevant area and/or if he was acting in a quasi-judicial capacity (such as an inspector). If the decision-maker had clearly engaged with the Art 8 rights in play, and had considered them with care, it was unlikely that the court would interfere with his conclusion.

In the instant case, the judge held that members of the planning committee had received specific training on human rights, in the context of the planning decision-making process. The judge stated that both the planning officer and elected members had Art 8 well in mind. The issue of noise from the Race Circuit, and its impact on local residents in their homes, had been extensively considered in the OR. Furthermore, the precautionary principle had not been relevant, in that the relevant Decision did not consist of an analysis of risk in relation to which preliminary scientific evidence and evaluation did not allow the risk to be determined with sufficient certainty. D had not accepted the evidence and submissions which had been made by J and other residents, as to non-compliance with the revised abatement notice. D had preferred to rely on its own evidence of compliance. The judge held that D had been entitled to reach this view.

The judge concluded that even if Art 8 had not been adequately considered, it was highly unlikely that D's decision would not have been substantially different, if D had specifically addressed Art 8 in the OR. That was to say, that planning permission would still have been granted, for the reasons which had been set out in the OR. The judge added that even if her primary conclusion on Art 8 was incorrect, and that D had failed to give sufficient consideration to Art 8 she would have refused relief, applying s31(2A) of the Senior Courts Act 1981.

The claim for judicial review, therefore, fell to be dismissed.

Comment

Only Grounds 1 and 4 of the decision require comment.

As far as Ground 1 is concerned, it is now well-established by case law that noise, as well as other forms of pollution from a proposed development, rank as a material consideration, and that a planning authority is required to take pollution into account when making its decision on such a development. Again, the effect of other regulatory controls, in relation to the development, which is the subject of a planning application, may also be taken into account: see eg *Gateshead BC v Secretary of State for the Environment* [1995] Env LR 37; *R v Bolton MBC ex p* Kirkman[1998] JPL 787; *Hopkins Development Ltd v First Secretary of State and North Wiltshire DC* [2007] Env LR 14. In such a case, a planning authority is also entitled assume that the relevant regulatory regime will operate effectively, in controlling pollution from the development. Therefore, in *James,* D had been entitled to regard the controls which had been put in place, by way of the abatement procedure under the EPA (the 'fallback position'), as an effective device for controlling noise from the proposed development.

As far as Ground 4 is concerned it is well established by case law that noise pollution can engage Art 8 of the ECHR; see eg *Hatton v UK* (2003) 37 EHRR 28; *Lopez Ostra v Spain* (1995) 20 EHRR 277; *Dees v Hungary* (2013) 57 EHRR 12. Where the rights conferred by Art 8 are relevant, such rights rank as a material consideration, which the planning authority is required to take into account when it is determining a planning application. However, as was stressed in *RLT Built Environment Ltd* (above) Art 8 rights require to be balanced against other material considerations. In effect, the weighting which falls to be accorded to such rights, is within the discretion of the planning authority, and can only be impugned on public law grounds. In the last analysis, in *James*, D had addressed Art 8 in reaching its decision. Therefore, J could not successfully challenge its decision.

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