***R (Zins) v East Suffolk Council* [2020] EWHC 2850**

Background and decision

The claimant, Zins ('Z') challenged the grant of conditional planning permission by East Suffolk Council ('E') to PGL *inter alia* for the creation of a lake for recreational activities, such as raft building and canoeing. Z's challenge consisted of two grounds. This casenote is confined to Ground 1, which related to the potential noise from the development.

Z claimed that E's planning officer's Report, and update sheet, which was provided to E's planning committee, which granted planning permission, materially and seriously misled members as to the advice and comments which had been made by E's environmental health officer (EHO) about the noise effects of the development. The new lake (the 'Lake') area was close to a number of residential properties, including the one which is owned by Z. The Lake was situated in the Bawdsey Manor Estate (the 'Estate') where PGL provided outdoor activity courses for school children. Z contended that whereas PGL formerly conducted its activities in a low key way and that there no complaints about its activities in that initial period, that had changed, since its activities had expanded. Z was particularly concerned about the noise which would be generated from the activities which were associated with the proposed Lake, in proximity to the residential properties.

In November 2017 PGL applied to E for planning permission for various outdoor activity structures to be provided within the Estate, along with the restoration of a water channel, which was called the River Jordan. The planning application was accompanied by a noise assessment ('NA'). The NA contended that, in the worst case scenario, the noise from the activities would be acceptable. The application attracted objections from two residents. They claimed, *inter alia*, that the shouting and screaming of the children from the proposed activities, had not been properly assessed in the assessment. They considered that the effects of such noise were masked in the assessment, by averaging the peak noise over an inappropriately prolonged period.

E's EHO had been consulted about the application. The EHO did not object to what had been proposed. However, he sought the imposition of a condition requiring the provision of a noise management plan (NMP) to assist in the

prevention of any noise nuisance to the residential neighbours. The planning application was determined by E's planning officers, acting under delegated powers. A NMP was subsequently submitted to E, and approved in March 2018. The NMP stated that it was designed to prevent exposure of people outside the site to levels of noises, which would result in complaints. PGL began using the approved outdoor activity structures in summer 2018. Z claimed that regular noise complaints were made first to PGL and, increasingly to E, about the activities which took place. Z claimed that it was the nature of the relevant noise, rather than the average level of noise, which was causing the complaints.

In 2018 PGL submitted a further planning application to E, seeking planning permission to construct a lake within the estate. This was intended to enable PGL to provide further raft-building and canoeing activities. The application was accompanied, *inter alia*, by a NA. The NA sought to assess 'LAeq' noise levels (ie averaged noise levels over a period of time). The NA concluded that the noise environment would be acceptable. A NMP, following the structure of that which had previously been approved, was also submitted. The EHO was consulted about this application. The EHO's consultation response stated that the proposal had the potential to cause noise nuisance to occupiers of neighbouring properties. The EHO was of the view that potential noise sources were *inter alia,* from children calling out, singing, screaming and laughing, while using the lake for the proposed use of kayaking and raft building. The EHO's response also stated that the sheer number of people using the Lake was excessive, as were the number of hours which the Lake could be used. The EHO further stated that LAeq did not consider the potential nuisance from this type of proposal. The use of BS8233:2014 was inappropriate, given the noise source of the human voice. Furthermore, WHO guidelines were generally aimed at steady continuous noise sources. The guidelines also recognised that lower noise levels (than those specified in the document) might be disturbing, depending on the nature of the noise. It was also likely that residents in the area would notice the noise, given the fact that that piece of land had not been historically used in conjunction with the school use/children playing.

PGL subsequently submitted a revised NMP (Version 3) in October 2018 for the site. This set out further detail of proposed noise management. The EHO

commented to the effect that it was important that he was made aware of Version 2, and that PGL should have submitted a clear list of changes, for both versions, to enable the EHO to comment on the document. The EHO further commented to the effect that very little information was contained in the NMP on how noise from the Lake would be controlled. In conclusion, the EHO was of the opinion that the NMP did not provide enough information to allow E to be confident that the noise from canoeing and raft building, would not cause a nuisance to occupiers of neighbouring properties.

This planning application was withdrawn by PGL before determination by E. A revised application was subsequently submitted by PGL. The second planning application was accompanied by the same NA and draft NMP. E's EHO was consulted and, in April 2019 responded to the effect that he had no adverse comments, other than in respect of the Lake, in relation to which the EHO stood by his earlier comments, to the effect that the addition of the Lake would be a source of significant disturbance, in its suggested form. PGL's noise consultants subsequently submitted a further version of the NMP (draft version 4) and an updated NA. However, the EHO remained of the opinion that the use of the Lake for canoeing and raft building would cause a noise nuisance. Following the EHO's response, E's planning officer contacted the EHO to inquire of the latter, *inter alia*, what level of noise the former would be happy with. However, the latter replied to the effect that, given the nature of the noise, his comments were based on a subjective assessment of the noise in question, simply because an objective assessment was inappropriate, as there was no guidance available for the objective assessment of that type of noise in that situation.

In July 2019 members of E's planning committee visited the Estate, in the light of the second application. E's planning officer produced a Report on that application. Z inferred that this version of the report had failed to reflect the updated information which had been received from PGL and also the EHO. The judge agreed with Z on this point. E's planning officers then produced an 'Update Sheet' which was intended to be read alongside with the corresponding paragraphs of the Report to the Committee. The Update Report contained a recommendation that officers be granted the authority to approve the application, subject to certain considerations, which did not relate to noise

issues. E's planning committee subsequently resolved to approve the application, subject to *inter alia* the resolution of certain matters which did not relate to noise issues. E then granted PGL planning permission for the Lake development, subject to a number of conditions which related to the reduction of noise from the proposed development.

The judge stated that the relevant legal principles which fell to be applied in a judicial review case such as the present, were not in dispute. He cited the leading case of *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, where Lindblom LJ stated that a planning decision was not akin to an adjudication made by a court. That is to say that, planning decision-making had been assigned by Parliament not to judges but, rather, to elected councillors, with the benefit of advice which had been given to them by planning officers. Furthermore, planning officers' reports were not to be read with undue rigour, but with reasonable benevolence, bearing in mind that they were written for councillors with local knowledge. Unless there was evidence to suggest otherwise, it should reasonably be assumed that members followed the officer's recommendations, and did so on, the basis of the evidence which he or she gave. The question for the court was whether the officer had materially misled members on a matter bearing on their decision, and that error had gone uncorrected before a decision had been made. It was only if the advice in the officer's report was such as to misdirect members in a material way so that, but for the flawed advice, the committee's decision would, or might have been different, that the court would conclude that the decision was unlawful. Where the line was drawn between an officer's advice which was misleading in a material way, and advice which was misleading, but not in a material way, would depend on the context and circumstances in which the advice was given, and on the possible consequences of it. Unless there was some distinct, and material defect in the officer's advice, the court would not interfere.

Z claimed that the planning officers Report and update sheet seriously misled the planning committee in relation to the issue of noise. The judge recognised that there was some force in Z's contention that the planning officer's Report, and update sheet did not report all the detail of the EHO's advice on the subject of noise. Nor did it report the full extent of the reasons for the EHO's concern, as expressed in more detail in the consultation responses. However,

for the judge the key question was whether, on a fair reading of the reports, as a whole, members were materially misled on noise and the EHO's advice, and if so, that had gone uncorrected before the planning decision was made. As stated above, in *Mansell*, the distinction between significantly or seriously misleading, misleading in a material way, and advice that was misleading, but not significantly so, depended on the context and circumstances in which the advice was given, and its potential consequences. However, in the judge's opinion, the members of the planning committee were not materially misled, in the way which Z suggested. This was so for the following reasons.

The Report and update sheet provided members with advice as to how the officers thought a balance could be struck between the advantages and disadvantages of the development, but at the same time, leaving members to make their own decision. The fact that the Report did not set out the EHO's *verbatim* consultation response did not mean that the members would have been materially misled. The judge added that it was important to distinguish between the EHO's advice and the planning advice. Whereas the EHO was providing advice, as a consultee, on the question of noise, the Report and Update sheet were ultimately providing advice on matters of relevant planning judgement. The judge added that Z, in his criticisms of the Update sheet, had failed to distinguish planning advice from the officer, from the advice of the EHO, with which the officer could disagree. It was legitimate for the planning officer to have a different view as to the overall acceptability of the noise environment (with the noise management measures proposed) and to communicate that view to members in the Report. In turn, it was up to E's elected members to make up their own minds on such matters, exercising their own judgement. As to the crucial question as to whether members were materially misled, the judge held that what was communicated was legally adequate. Whereas the Report was not a model in the excise of precis, it was sufficiently clear to members from both documents, read as a whole. As far as noise was concerned, the elected members had been sufficiently informed about the key noise issues which they had to consider, and on which they had been required to make a judgement. Furthermore, in considering whether the members had been misled, it was relevant that the relevant members had carried out a site visit, as part of their deliberations on the planning

application. This would have enabled them to reach a decision on the noise effects.

The judge concluded by deciding that the Report and Update Sheet did not materially mislead members as to the noise issue. The elected members had been informed adequately as to the noise issue, and about the EHO's advice. The substance of the points which the latter had made were identified and allowed members to make their own assessment. In turn, the planning officer was entitled to express her view that, notwithstanding the EHO's concerns, she considered that the noise mitigation measures would enable the proposal to be compliant with policy. It was then a matter for committee members to decide whether they agreed.

Comment

While *Zin* does not take the law further forward, it raises a few interesting points. The first point is that the case provides a homely illustration of the point, which was made in *Mansell,* to the effect that a planning court should be wary of excessive legalism, and that a planning decision is not akin to a judgement, which was made by a court. In *Zin* the claimant had, essentially, claimed that the planning officer's report to E's planning committee was inadequate (by reason of failing to provide sufficient detail, which had been provided by the EHO, of the potential noise from the proposed development) to allow the latter to arrive at an informed and lawful, decision on PGL's planning application. In rejecting Zin's application for judicial review the court, in effect, held that a planning officer's report should not be construed as a statute but, rather, as simply a document which was intended to adequately inform elected members of the material issues which they should lawfully address, in reaching a decision a planning decision.

The second point, which has also had to be addressed by the courts in dealing with noise, in both common law and statutory nuisance cases, is that it is often difficult to ascertain whether the noise in question is unreasonably loud, given the fact that people react differently to noise and also to different forms of noise. This is particularly the case when the noise in question is not continuous and constant in nature, as was the case in *Zin,* where the potential noise from the Lake would take a variety of forms from the recreational activities which

took place on the Lake. Given the fact that there are no scientific means whereby one can accurately ascertain if noise of this nature, is unreasonably loud the formulation of an appropriate noise management plan is a crude exercise, in any case, in such circumstances.

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