

Case Name: *East Quayside 12 LLP v The Council of the City of Newcastle Upon Tyne* [2023] EWCA Civ 359 (31 March 2023)

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Commentary:

Summary

This was an appeal against the decision by Holgate J in the High Court to quash planning permission granted to the Appellant by the Inspector for the development proposed. The appeal centred around the interpretation of the Inspector's report in granting planning permission. The Court of Appeal concluded that there was substantial doubt as to whether the Inspector had erred in law in taking into account an irrelevant matter in assessing the heritage harm that could result from the proposed development, namely the existence or absence of an alternative scheme on the site that could produce less harm. For that reason, the Court dismissed the appeal.

Commentary

The Appellant was initially refused planning permission by the Respondent for a scheme providing apartments, residential amenity and commercial space ("the Development"). Upon appeal, the Inspector granted planning permission for the Development. One of the issues discussed in the Inspector's report was the level of heritage harm that would result from the Development. The Development is proposed to be situated at a site ("Plot 12") close to St Ann's Church, which is a grade I listed building. The Inspector concluded that the identified heritage harm of the Development falls at the "lower end" of the "less than substantial harm" classification for heritage harm.

In the High Court, Holgate J held that he had no doubt that, in coming to the conclusion that the harm fell at the lower end, the Inspector had taken into account an immaterial consideration, namely the existence or the absence of another scheme on Plot 12 that could produce less harm. Holgate J's conclusion was based on the use of the following words by the Inspector in paragraph 71 of her report:

"...given the key constraints of the plot and the nature of the harm identified, this is towards the lower end of any such scale within that classification."

Holgate J held that he had no doubt that the words "given the key constraints of the plot" were referring to the earlier paragraph in the report (paragraph 70) outlining that Plot 12 was situated such that any development on the site would affect the setting of St Ann's Church. The Appellant argued that this was an incorrect interpretation and that the words were in fact referring to earlier paragraphs in the report that dealt strictly with the harm from the Development itself on the heritage asset and its setting.

The Court of Appeal held that, if the existence or absence of another scheme on Plot 12 that could produce less harm was considered by the Inspector in assessing the level of heritage harm of the Development, this would amount to an error in law. Therefore, the

key issue for the Court of Appeal was whether the Inspector's use of the words "given the key constraints of the plot" suggests that the Inspector did refer to such an immaterial consideration.

The Court of Appeal, once again, emphasised the need to read paragraphs of the Inspector's report in its context, without excessive legalism and appropriate benevolence ([36]). It further held that it will only set aside the decision if the reasoning gives rise to a "substantial doubt as to whether [the inspector] erred in law" ([37]).

Upon conducting the above exercise, Sir Keith Lindblom concluded, albeit with some hesitation, that the use of the words "given the key constraints of the plot" does give rise to substantial doubt as to whether the Inspector was referring to the irrelevant matter of the existence or absence of alternative schemes that may give rise to less harm on Plot 12. Sir Lindblom noted that such a matter can be a relevant consideration in the final balance struck between harm and benefit, but it cannot be a relevant consideration in the assessment of what could be the heritage harm resulting from the Development itself, which should only consider the characteristics of that specific development proposed ([39]).

In coming to this conclusion, the Court read the Inspector's report as a whole and noted that paragraph 71 of the report, which contains the problematic phrase, begins with the word "Overall", suggesting that the Inspector was assessing all the factors discussed in the previous paragraphs relating to heritage harm, including the existence or absence of an alternative scheme discussed in paragraph 70 of the report. Further, it noted that there was nothing in the rest of the report "to dispel that impression" ([48]). For the above reasons, the appeal was dismissed.

Case summary prepared by Chatura Saravanan