Case Name: *Marks and Spencer PLCYou v Secretary of State for Levelling Up, Housing and Communities & Ors* [2024] EWHC 452 (Admin) (01 March 2024)

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Commentary: This case concerns the successful s.288 challenge to the decision of the Secretary of State for Levelling Up, Housing and Communities (the "SoS" or the "First Defendant") to refuse planning permission for the redevelopment of Marks and Spencer's flagship store near Marble Arch (the "Site").

Facts

Marks and Spencer Stores Plc (the "Claimant") applied to Westminster City Council (the "Council") in 2021 for planning permission to demolish the existing buildings on the Site and to construct a ground plus nine storey mixed use office and retail store.
The Council's officers recommended approval, and its Planning Committee resolved to grant permission on 23 November 2021. The SoS then called the application in, and a public inquiry was held between October and November 2022. The Inspector recommended the grant of permission, however the SoS refused the application by his decision letter dated 20 July 2023 (the "DL").

Grounds

The challenge was brought on six grounds:

1. Ground One – that the SoS erred in respect of paragraph 152 of the National Planning Policy Framework (the "NPPF") when he said that there is "strong presumption in favour of repurposing and reusing buildings";
2. Ground Two – that the SoS erred in respect of the consideration of alternatives;
3. Ground Three – that the SoS erred in the balance of public benefits as against the heritage impacts;
4. Ground Four – that the SoS's conclusion on the harm to the vitality and viability of Oxford Street had no evidential basis;
5. Ground Five – that the SoS made an error of fact and misapplied policy in respect of embodied carbon; and
6. Ground Six – that the SoS erred in his approach to analysing the impact of the proposals on the setting of Selfridges and the Stratford Place Conservation Area.

Ground One

The Claimant submitted that the SoS incorrectly identified a "strong presumption in favour of repurposing buildings" at paragraph 24 of the DL and went on to wrongly apply this presumption in later paragraphs of the DL, which "impacts upon the balance and structure of the DL as a whole". The Claimant further submitted that

there are paragraphs within the NPPF which expressly apply a presumption, but that paragraph 152 is not one of those, and it was therefore a highly material error to misidentify and apply a presumption which does not exist in policy or law.The First Defendant submitted that it is up to the SoS to apply a policy presumption in order to achieve the "radical reductions in greenhouse gas emissions" intended by paragraph 152 of the NPPF and that it is not necessary for the policy itself to use the word presumption.

Mrs Justice Lieven, in hearing the challenge, found that the SoS misinterpreted the NPPF, relied on a meaning of the framework which was "simply not open to him", and had "not applied the policy" but had "rewritten it". The challenge therefore succeeded on Ground One.

Ground Two

The Claimant submitted that the SoS had failed to provide adequate reasons for his rejection of the Inspector's conclusions on alternatives. Despite the Inspector's conclusion that there was "no viable and deliverable alternative" to which he gave substantial weight, the SoS, with reference to the Inspector's identification of gaps and limitations in the evidence, considered that there had been insufficient exploration of alternatives.

The Claimant submitted that the SoS failed to explain why he disagreed with the Inspector sufficiently clearly. The Judge agreed with the Claimant's submissions on this ground that the SoS misunderstood the Inspector's reasons for rejecting an alternative scheme, being that an alternative which achieved the public benefits sought by the policies had to be both viable and deliverable, which the refurbishment scheme was not. The SoS failed to appreciate that the gaps and limitations in the Claimant's evidence were not, in the end, material to the Inspector's conclusion. Ground Two was therefore allowed.

Ground Three

This ground also focuses on the existence of a viable and deliverable alternative scheme. The SoS accepted the public benefits of the scheme, but found them to be outweighed by the heritage harm. The Claimant submitted that the SoS failed to deal with the "harm" to both the Development Plan and the West End and failed to adequately explain his approach to the loss of the benefits associated with the scheme if the scheme were to be refused. The Judge found an obvious inconsistency in the SoS's DL, by giving "limited weight" to the harm to the vitality and viability of the area from the refusal of permission, but also giving "significant weight" to the benefits of the scheme to employment and regeneration, which would be lost if the

scheme was refused.
On that basis, Ground Three also succeeded.

Ground Four
Ground Four was closely tied to Ground Three in that it related to the alleged harm to the vitality and viability of Oxford Street if the scheme, or an alternative, is not delivered. The Inspector agreed with the Claimant's evidence given during the inquiry, that if permission was not granted, M&S would not continue to occupy and trade from the Site for much longer, that it would not be replaced by another department store, and that this would cause serious damage to the vitality and viability of the whole of Oxford Street and the West End. He therefore concluded that the benefits outweighed the harm to the historic environment.

The SoS however found potential for some harm to Oxford Street, but not to the wider West End, considering that this "overstates the scale of the impact". He also disagreed with the weight to be afforded to the harm, giving it "limited" weight, compared with the "substantial" weight given by the Inspector.
Ground Four also succeeded due to the SoS's failure to give adequate reasons for his departure from the Inspector's conclusions.

Ground Five
The Claimant submitted under this ground that in his approach to "embodied carbon" used in the proposal, the SoS:

(a) made a clear error of fact; and
(b) made an even clearer error in the interpretation of the policy on carbon.

It was accepted by all the principal parties that a "do-nothing" option for the Site would not deliver the benefits because of the shortcomings of the existing buildings, and therefore that only a comprehensive or deep refurbishment would meet the accepted need.

The Claimant submitted, however, that the SoS at DL21, and the Inspector in his report, made a clear error of fact by saying that "there was no dispute that [...] redevelopment would involve much greater embodied carbon than refurbishment". It was the Claimant's submission that there was significant disagreement during the inquiry as to the "light-touch refurbishment" alternative put forward by Save Britain's Heritage (the "Third Defendant or "SAVE") and whether it would in fact result in less embodied carbon than redevelopment.

Whilst the First and Third Defendant submitted that the relevant part of DL21 made the point that "in general" redevelopment would cause greater embodied carbon than refurbishment, Mrs Justice Lieven considered this to be "an obvious misreading of the DL" which involved "mangling" the DL's language.

Further, the Claimant submitted that the SoS had erred in his interpretation of London Plan Policy SI 2 "Minimising greenhouse gas emissions", which refers to "be lean, be clean, be green and be seen", and provides for carbon offsetting. The judge found that it was "beyond any rational doubt" and accepted by all the parties that the offsetting requirements in Policy SI 2 are in respect of operational carbon, not embodied carbon, and found in favour of the Claimant on this ground as counsel for neither of the defendants represented at the hearing were able to point to another instance where the policy had been interpreted to apply the offsetting requirement to embodied carbon. The Judge also concluded that it would not be safe to find that the decision would have been the same if not for the misinterpretation of the policy, given that carbon impacts were one of the most important issues in the case and the SoS relied on embodied carbon in the conclusions of the DL, however she found that this did not matter as the challenge would succeed on the first four grounds in any event.

Ground 6

This ground focussed on whether there would be any harm to the significance of listed buildings or conservation areas by reason of impact on setting of heritage assets. The Claimant submitted that in reaching the conclusion that "the harm to the settings of, and significance of[,] the designated heritage assets carries very great weight", the SoS failed to explain "the extent to which each relevant asset's significance depended on or derived from its setting", with particular reference to Selfridges, a Grade II* listed building. The First Defendant, however, submitted that this was in fact dealt with at DL16, a view which the Judge agreed with. She therefore dismissed Ground Six.

Conclusion

The challenge succeeded on Grounds One to Five and the SoS's decision was quashed and will be redetermined.

Case summary prepared by Sophie Bell