Case Name: *Steven Thomas v Cheltenham Borough Council & Ors [2025] EWCA Civ 259 (13 March 2025)*

Full case: Read here

Commentary: Mr. Thomas had originally challenged a decision by the Defendant local planning authority, Cheltenham Borough Council ("the Council") that prior approval was not required for a proposed development of a 15-metre-high mobile phone mast and ancillary apparatus on a site located in Cheltenham's Central Conservation Area. Mr. Thomas complained that the Council's Planning Officer, whose report and recommendation were adopted by the Council, had failed to address specific concerns raised by Mr. Thomas and another person about the effect of exposure to radiofrequency magnetic fields ("EMFs") on medical implants such as pacemakers and hearing aids installed in those living nearby.

His Honour Judge Jarman KC, sitting as a judge of the High Court, decided that the Planning Officer had erred in his approach, but refused to grant relief on the basis that the outcome would not have been substantially different had he gone about things in the right manner, applying section 31(2A) of the Senior Courts Act 1981. The Council sought and was granted permission to appeal against that decision, as it was concerned that the judgment of the High Court might be interpreted as laying down a general principle that the potential impacts of EMFs on medical implants is *always* a material consideration, while Mr. Thomas unsuccessfully sought permission to cross-appeal. The Court of Appeal held that the Council's concerns were legitimate, if based on an unduly wide interpretation of the Judge's decision, which properly understood turned on a much narrower, fact-specific point and did not seek to lay down any principle of wider application. However, the risk of misinterpretation of the judgment meant that it was appropriate for the Court of Appeal to clarify the position.

The decision of HHJ Jarman KC

The passage which gave rise to the Council's concerns began at [39] of the High Court judgment, where the Judge stated that whilst it was entirely proper to approach the application from the basis that compliance with the ICNIRP Guidelines was sufficient to satisfy any general concerns about the impact on health, including anxiety about the proposed location of the mast, the guidelines expressly stated that EMFs can cause harm by interfering with medical implants, and that such issues were beyond the scope of the guidelines. That was, in his view, an important issue and one that should have been "grappled with." This phrase was juxtaposed with a reference to the well-known passage in Lord Keith's speech in *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 780, where the distinction was drawn between the question of whether something is a material consideration, which is a matter of law for the Court, and the weight which it should be given, which is a matter of planning judgement.

The Council's concerns were that this judgment could be read as laying down a wider principle that the potential impact of EMFs on medical implants is so obviously material that a failure to treat it as material would be irrational in the Wednesbury sense. However, the Court held that this was not the Judge intended to convey. Rather, he was stating that the two objections based on the potential impact of EMFs on medical implants that were received by the Council before the decision was made were different from other objections based on general health considerations, and should have been treated as such. In other words, the Judge was pointing out that the Planning Officer, rather than believing that he was obliged to disregard the material before him because of a misinterpretation of paragraph 118 of the NPPF, should have appreciated that he could choose to take the matter into account.

Nor did the Judge substitute his own planning judgment for that of the inspector when considering whether to refuse relief pursuant to section 31(21). Properly understood, the Judge was saying that if the Planning Officer had not mistakenly believed himself to be constrained from considering the potential impact of EMFs on pacemakers, and had instead addressed whether that was something to which he should have regard, it was highly likely that he would have decided to leave it out of account, because in this case there was no evidence of any substance to support the concerns expressed.

Conclusion

The Court found that the judge was right to identify that the Planning Officer fell into error, but the error in question consisted of fettering his own discretion to evaluate whether or not he should treat certain information as relevant to his own decision. The judge then decided, as he was entitled to on the evidence before him, that it was highly likely that if the Planning Officer had not considered himself to be so constrained, he would have left that information out of account regardless. The judge did not find that the potential impact of EMFs on pacemakers or other implants was material even in the circumstances of this case, and certainly not as a general principle.

Case summary prepared by Gregor Donaldson