APPENDIX 9

***Ornua Ingredients OLtd, R (on the Application Of) v Herefordshire Council [2018] EWHC 2239 (Admin) (*22 August 2018)**

Neutral Citation Number: [2018] EWHC 2239 (Admin)

Case No: CO/454/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
PLANNING COURT

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 22/08/2018

Before :

HHJ DAVID COOKE

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Between :

R (oao Ornua Ingredients Ltd)	**Claimant**
- and -	
Herefordshire Council	**Defendant**
Barratt Homes	**Interested Party**

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- -

Jenny Wigley (instructed by **Burgess Salmon LLP**) for the **Claimant**
Hugh Richards (instructed by **internal solicitors**) for the **Defendant**
Peter Goatley (instructed by **Shakespeare Martineau LLP**) for the **Interested Party**

Hearing date: 5 July 2018

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Approved Judgment

HHJ David Cooke :

1. The claimant challenges the decision of the defendant council on 21 December 2017, acting by officers under a delegated authority, to approve reserved matters including the layout of a housing development at Ledbury. That decision was taken in relation to outline planning permission for building 321 houses on the site that had been granted by an Inspector on appeal in April 2016. The claimant is the owner of a factory making cheese adjacent to the site. The Interested Party is now the owner of the development site, having bought it with the benefit of the outline planning permission.

2. The claim proceeds on one ground only, for which I gave permission on 27 March 2018, that the council failed to take into account a material consideration in that it did not take any account of representations made by the claimant on 15 December 2017 including a report by acoustic engineers on its behalf which, it says, casts doubt on a conclusion previously reached that it would in principle be possible to produce a scheme for mitigation of noise emitted by the claimant's factory such that it would be reduced to acceptable levels at houses built to the proposed layout.

3. It is not in dispute that the council received the representations and report concerned, and it is accepted that no consideration was given to them before the reserved matters decision was taken. The position of the council and the Interested Party is that this did not amount to an error of law because the outline permission was in any event subject to a condition (Condition 21) that before any development the council must first have approved "a scheme of noise mitigation for outdoor living areas, bedrooms and living rooms" for the houses to be built which would "include details of proposed ameliorative measures to mitigate against noise from operations within the nearby industrial estate… including the [claimant's] cheese factory…". The reserved matters decision did not amount to discharge of this condition, so that if it turned out in due course that acceptable noise mitigation could not be achieved with the approved layout no development could in any event begin and the developer would have to produce a revised layout, for which acceptable noise levels could be achieved. The representations on noise issues were thus, it is said, not material considerations at the point of approving the layout and no error was committed by ignoring them.

4. The claimant's commercial concern of course is that it should not be at risk in future of claims for noise nuisance by occupiers of the houses that might cause it to have to curtail its operations or pay for noise mitigation measures of its own. Insofar as such measures are necessary, it no doubt wants the developer to undertake them at the outset at its own expense, but it says that to the extent the developer has engaged in any discussion with it as to the measures it is prepared to undertake, they are not capable of producing acceptable levels given the proposed layout. It fears that if the layout is approved, in practice the council will come under pressure (and might even be obliged) to approve a scheme of noise mitigation which could be presented as the best practically achievable with that layout, but which would not be sufficient to protect it from future claims and the trouble and expense they would bring.

5. In return the council says there is no question of it being obliged to accept inadequate noise mitigation, and it would be fully entitled to withhold approval for discharge of condition 21 even if that meant revision of the layout previously approved.

6. It is obvious that there is a linkage between questions of layout of houses on the development and the noise mitigation measures that may be required to produce an acceptable noise level at and within those houses. The nearer a house is to the emitter of a given noise the louder that noise will be, as heard at the house itself, so that more effective measures of noise reduction or attenuation may be required to render it acceptable. Noise received in gardens will be less if the gardens are sited on the far side of the house from the source, and so shielded to some extent, than if they are on the near side. Noise heard in a given room, such as a bedroom, will also be affected by whether that room is on the near or far side from the source. In principle no doubt the two issues could be considered entirely separately, but in reality anyone seeking to design a layout would be bound to have some regard to this interaction and the likely effect of noise on the houses, not least because it might be very inefficient and expensive to have to revisit the layout if it emerged later that the noise condition could not be satisfied. I do not doubt either that in practice once a layout had been approved there would be a risk that the developer might seek to exert pressure on the planning authority to accept noise reduction measures it proposed, if the alternative was to revisit that layout with the possible delay disruption and expense that might cause. That does not mean of course that the authority would be necessarily bound to accede to any such pressure.

7. Noise was an issue before the Inspector. Her decision letter includes the following:

> "Dominant noise sources likely to affect future occupiers are the adjacent industrial units and traffic on Leadon Way and Dymock Road. The appellant's noise report sets out various mitigation measures that could be secured by condition. The measures that provide the baseline for the conclusions in the report do not, it transpires, take account of the proposed roundabout on Leadon Way which would, potentially, introduce noise from vehicles braking on approach, and accelerating away from it. I have no reason to suppose, however, that associated noise would preclude development on the appeal site and am satisfied that an appropriately worded condition would deal with the matter and would ensure that acceptable living conditions were provided for future occupiers.
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> … As referred to earlier, a scheme of noise attenuation is necessary to ensure acceptable living conditions for future occupiers "

8. The application for approval of reserved matters was submitted in December 2016. It included, amongst other matters, the proposed layout for the site. It was referred by officers for consultation to the council's Environmental Health Department, and it is plain from the consultation responses that the officers in that department were significantly concerned by the potential impact of noise on the proposed houses, and wanted to be satisfied that appropriate mitigation measures could in principle be devised for the layout proposed. The developer's acoustic experts, Wardell Armstrong were asked to submit noise modelling reports to supplement reports they had prepared at the time of the original planning application in 2014 and 2015. These were sent in January and April 2017, and in the consultation response dated 8 May 2017, the

Environmental Health Department set out what appear to be fairly serious concerns about the information provided.

9. They said they did not agree with Wardell Armstrong that the appropriate limit for noise garden areas was 55 dB, that the acceptable limit ought to be 50 dB but the modelling provided showed levels between 55 and 60 dB. This was described as "not acceptable", and although this particular point seems to be directed at traffic noise, may indicate that the EHO considered that Wardell Armstrong were tending to seek to apply inadequate standards. In relation to noise from the cheese factory, it was noted that the mitigation levels proposed in the April report produced a worse result than had been suggested in the January report with noise levels "likely to be around 5 dB above background sound levels… This is not desirable."

10. It was noted that in the 2015 report Wardell Armstrong had anticipated that the houses closest to the cheese factory would have their gardens facing away from the factory so that they would be screened by the houses, but the layout now proposed included two houses where this was not the case. Further, the original report had suggested noise mitigation measures being taken on the factory premises but these were now omitted (though it was noted that this might have to be reconsidered). Further information was requested on this and also in relation to night-time noise where it was noted that "our concern is that closest residents may be adversely impacted in their bedrooms at night time when much lower background noise levels exist. Please can the applicants supply further noise contours of the closest dwellings… to evaluate the impact of this noise."

11. Further noise contour drawings were provided by Wardell Armstrong on 23 May, and the EHO made a site visit before submitting a further consultation response on 7 June. In that response it was noted "At visits to the proposed site both during the day and late evening officers from our department noted the constant humming noise emanating from [the cheese factory]… which was identified as the dominant noise source in the locality and was accompanied by a hissing (pressure relief type) noise every few seconds. Without mitigation, this would seriously impact on the amenity of residential properties in close proximity to the site. Mitigation of the 24/7 sound source on the roof at [the cheese factory] has been mentioned as an option in a number of Wardell Armstrong reports… Despite this at our meeting 26 May 2017 it would appear that… there has been no discussion with [the claimant] on this issue." It was also noted that the information provided indicated that during the daytime noise levels from the cheese factory would be between 5 and 10 dB above background level "thus indicating a likely adverse impact, depending on context." Further, the difference at night time was suggested to be between 23 and 26 dB, significantly more than the level of 10 dB which the relevant British standard suggested would be "likely to be indication of a significant adverse impact depending on context."

12. Further concern was expressed about low-frequency noise measurements, where the council's own measurements showed a significant difference from those provided by Wardell Armstrong. This was evidently a serious concern; this document concluded "we would strongly recommend the Wardell Armstrong proposed option to mitigate the [cheese factory] sound at source and this needs to be further explored with [the claimant]. Alternatively we recommend the site layout and design should be further reviewed to assess the suitability of siting dwellings close to [the cheese factory]… There must either be attenuation of this noise at source or a buffer zone on the site

where there is no residential development or a combination of the two so that we could be satisfied that noise from [the cheese factory] (including low-frequency noise) does not impact on the amenity of residents when their windows are open as well as closed."

13. A further response was sent by Wardell Armstrong on 16 June, in relation to which the EHO commented on 5 July 2017 "the proposal for mitigation of the noise [from the cheese factory] at source has been dropped after repeated references to this in earlier submissions. The noise consultants advise that the low-frequency noise can be addressed by residents keeping their windows closed night time. Our submission is that this is not a reasonable expectation on residents… and is contrary to World Health Organisation guidelines… Our low-frequency noise assessment and the officers' site observations would support the BS:4142 assessment findings in that the [cheese factory] noise source is likely to have a significant adverse impact on the dwellings closest to the noise source. This is especially so at night time…" The "strong recommendation" that mitigation measures and or a change of layout be considered was repeated.

14. This led to a yet further proposal by Wardell Armstrong, which was sent on 10 October. That document provided, as had been requested, a specification for proposed mitigation measures on the cheese factory site, in the form of a 3 m high acoustic fence in combination with sound insulation measures at the principal sources of noise from the factory. This led the EHO to send an email to the planning officer dealing with the matter on 17 October in which she said "The proposed mitigation works… will be satisfactory for the site with windows open… as long as the mitigation at the [cheese factory] site namely a) acoustic fencing and b) extract plant mitigation… are undertaken."

15. An officers' report was then prepared for the meeting of the planning committee. It is accepted that it contained an adequate summary of the consultation that had been undertaken with the EHO and the result that had been reached. Members were informed that the layout had been referred to the EHO who had initially been concerned that it might not be possible to achieve acceptable noise mitigation but that "the work that has been completed by [Wardell Armstrong] has demonstrated that there are measures that can be taken. The provisions of condition 21 remain in force and it is incumbent upon the developer to provide further information for the condition to be discharged, but officers are sufficiently content that noise from [the cheese factory and the road] can be mitigated on the basis of the layout shown above."

16. The minutes of the committee meeting make clear that members of the committee were concerned about noise. They record that they were told by the officer "it was not a requirement of the reserved matters application to address all the conditions imposed by the inspector. With reference to condition 21 relating to noise, for example, the Environmental Health Officer had to be satisfied that a scheme could be implemented to mitigate that issue. It was then incumbent upon the developer to submit a suitable scheme to enable the application to proceed. The absence of the detailed scheme at this stage was not a ground upon which to refuse a reserved matters application." The committee resolved that (subject to conditions not relevant for present purposes) delegated authority be given to officers to issue the reserved matters approval.

17. It was only after this that the claimant became aware of the matters that had been under discussion. There had been no consultation by planning officers or the EHO with the claimant (it is not suggested there was any obligation to undertake such consultation) and the measures that Wardell Armstrong proposed by way of noise mitigation, which would require to be executed on the claimant's land, had not been agreed with the claimant. On 15 December 2017 the email that forms the basis of this challenge was sent, enclosing a report prepared by Hayes McKenzie, the claimant's acoustic consultants, and:

    i) drawing attention to the fact that in its calculations of noise impact the latest Wardell Armstrong report had dropped a 6 dB "tonal penalty" that had been applied in its 2014 and 2015 reports, and stated that in their opinion further measurements showed that the sound from the cheese factory was not tonal in quality. However Hayes McKenzie had performed their own measurements which, in their view, showed a distinct tonal quality as a result of which the relevant British standard required a tonal penalty to be applied.

    ii) Referring to further background noise data collected by Hayes McKenzie, including measurements for evening and night periods that had not previously been assessed.

    iii) Stating that Hayes McKenzie's opinion was that in light of these factors the proposed mitigation measures would not prevent a significant adverse impact on residents likely to give rise to complaints, and that with the layout proposed, it would not be possible to achieve suitable mitigation.

18. The email requested that determination of the reserved matters application should be delayed "until this issue has been properly addressed and a suitable scheme agreed by [the claimant and the developer]". It is not clear exactly what happened on receipt of that email; the planning officer did not however refer the matter back to the EHO for any comment, nor did he ask the developer or Wardell Armstrong to respond to it, nor did he refer the matter back to members of the planning committee. There is no note or other record, or other evidence, showing what if any consideration was given to the email and the Hayes McKenzie report. Thus, although the position of the council now is that any information casting doubt on the advice the EHO had given was irrelevant because it could all be addressed as and when an application was made to discharge condition 21, there is no evidence at all that the relevant planning officer considered the matter and came to that conclusion at the time.

19. In fact, as Mr Richards points out, the email may have somewhat overstated Hayes McKenzie's opinion in relation to proposed mitigation. It is apparent from the content of the report that, whilst it strongly disputes Wardell Armstrong's conclusion that the tonal penalty should not be applied, stating that its measurements show "a tone at around 600 Hz which has a tonal audibility greater than 10 dB confirming the requirement for a 6 dB rating correction under BS 4142" the conclusion reached was that "it is therefore possible that the only way of achieving an acceptable external noise environment is through greater separation distance between the factory and nearby housing." This, Mr Richards says is not a conclusion that adequate noise mitigation *is not* possible, but only that it *may not* be possible.

20. It cannot however be said that this is the reason why no action was taken in relation to the email; there is simply no evidence that any planning officer considered it all came to any view of it at all.

21. Ms Wigley's submission is that the law in relation to what is a material consideration and the obligations on officers acting under a delegated power when a material matter arises after a delegated power is given to them but before they exercise that power to make a decision is set out on the judgment of Jonathan Parker LJ in *R (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370, in which he said:

> "*"material considerations"*
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> 121 In my judgment a consideration is "material", in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.
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> ***"have regard to"***
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> 122 In my judgment, an authority's duty to "have regard to" material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind – albeit that the application was not specifically placed before it for reconsideration.
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> 123 The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.
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> 124 At one extreme, it cannot be a sensible interpretation of section 70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated*, prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty

> material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.
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> 125 On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.
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> 126 In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision."

22. Issues relating to noise were, she submitted, inevitably material considerations in addressing the reserved matters application because of the link between layout and perceived noise at the houses, notwithstanding the existence of the separate condition specifically requiring acceptable noise mitigation. The council was obliged, she submitted, to be satisfied at least that acceptable mitigation was possible in principle before approving a given layout, even if the detail was then left to a later application to discharge the condition. Alternatively, if the council was not obliged to take noise issues into account at that stage it was entitled to do so if it wished, and since the council had in this case plainly chosen to take noise into account at the reserved matters stage it had become a material consideration even if it need not have been treated as such.

23. As to the first point, that noise was an obligatory consideration, Ms Wigley submitted that it must be so, since otherwise when an application was made to discharge condition 21 it would be argued that the council could not lawfully refuse that application on the basis that acceptable mitigation was not possible unless the layout was changed. She pointed to *Thirkell v Secretary of State* [1978] JPL 844, holding that reserved matters approval could not be withheld on a ground that had already been decided in principle at the grant of outline planning permission as that would be to reopen an issue already decided and frustrate the permission granted. She accepted this could not be read across directly to the position where a condition is considered after reserved matters approval, but submitted the same would apply by analogy; the council having approved a layout at one stage could not make it impossible to

implement that layout by adopting standards for what constituted acceptable noise levels that could not practically be achieved with that layout.

24. Mr Richards submitted that there was no question of frustration. The permission granted was dependent on both an acceptable layout and acceptable noise mitigation; the fact that one layout had been approved did not preclude the developer submitting another and the council would be perfectly entitled to refuse discharge of condition 21 if not satisfied with the mitigation measures proposed, leaving the developer with the option of submitting revised mitigation measures or a revised layout, or a combination of the two.

25. Counsel are agreed there is no prior authority either way directly in point. For my part, I can see force in Ms Wigley's submission, and I do not find particularly persuasive the argument that because the layout was approved as a reserved matter the planning authority could in effect compel submission of a revised layout by a conclusion that the one approved could not result in satisfaction of an outstanding condition as to noise. Such a condition might equally be imposed on a grant of full planning permission, or on a grant of outline permission where layout was not one of the reserved matters. If it might be argued (as presumably it could) that refusal to discharge a condition amounted to frustration of a permission in those forms, why should it make a difference that the permission in place is a composite of an outline permission and a reserved matter approval, as here?

26. No doubt it would be fairly rare for a condition imposed to be absolutely impossible to fulfil. For instance, a condition as to noise could in principle always be discharged by procuring the cessation of the source of noise. In practice, the argument would no doubt be that refusal to discharge the condition made it impossible in the real world to implement the permission because the measures required were impractical or uneconomic (eg perhaps if noise mitigation to the standard required involved the closure of a road or factory). It is fairly easy to imagine circumstances in which such an argument could arise, so it cannot be said that it is so fanciful that the duty argued for cannot exist.

27. In the end however I have concluded that I do not need to decide that point in the present case, because Ms Wigley succeeds on her secondary argument. The interaction of layout with satisfaction of the noise condition was in my view plainly such that the council was entitled to have regard to it in considering the reserved matters application. It is evident from the consultation, the officers' report and the minutes of the meeting that it did so, and approached the matter on the basis it required to be satisfied that satisfaction of the noise condition would not be rendered impossible. The advice given to members was expressly on the basis that having regard to the measures the developer had proposed officers and the EHO were satisfied the condition was capable of discharge without changing the layout, and the delegated authority given to the officers was plainly premised on that advice.

28. In this context it is clear, it seems to me, that further information coming to light that cast significant doubt on the validity of that advice amounted to a material consideration. It would, adopting the test set out in *Kides*, have been bound to tip the balance of consideration to some extent- if for instance members at the meeting had been told that the acceptability of the revised proposals depended on the developers experts having apparently watered down the standards applied by excluding a tonal

penalty on a basis that now appeared open to challenge it is not realistic to say this would not have been considered relevant. This is particularly so given the history of concern on the part of the EHO, including apparent concern that Wardell Armstrong had sought to apply standards the EHO considered inadequate and provided measurements that did not appear to be supported by her own observations.

29. Such information would not I think be an entirely new material consideration, arising for the first time after the grant of delegated authority, such as Jonathan Parker LJ appeared to be envisaging in the passage quoted in *Kides*, but best considered as material bearing on a matter already taken into account. I am bound to say I have some difficulty in reconciling what he said at para 122, which seems to envisage that a new matter must have been considered by the authority before a delegated power is exercised, but not necessarily by the officer referring it back to the authority, and para 125 which seems to indicate that if the new material is received immediately before a decision is taken it must be referred back to the planning authority, ie members. But in the present context I think the resolution is that the delegated authority itself confers on officers a degree of power to consider for themselves new relevant information bearing on the exercise of the power they have been given such that, depending on the terms of the authority conferred, they may properly take a view as to whether in light of such information they should proceed to make a decision or refer the matter back to the members. If they do so, the new information has been considered by the planning authority, at the level of the officers acting under delegated powers, before the decision is taken and its duty is satisfied.

30. There may of course be issues that arise in a particular case whether the scope of the delegated authority is sufficient to allow officers to take their own decision on information they in fact receive, or, if it is, whether the decision they reach on that information is rational. But no such considerations arise in this case, because on the evidence before me the officers did not give any consideration at all to the 15 December email or the report it attached.

31. Mr Richards submitted that even if such consideration had been given, the result would inevitably have been the same because officers would have concluded that the matters raised could (indeed must) have been left to be addressed later on discharge of the condition. But this it seems to me flies in the face of the way the matter had been dealt with previously both by officers and members. Although Mr Richards points to textual matters in the email and the attached report that he says might have led to a conclusion they did not raise a strong enough doubt about the previous advice to prevent the decision proceeding, these are not such that the email and report must inevitably have been dismissed out of hand. It cannot be said, it seems to me, that responsible officers who had advised members they and the EHO were satisfied the noise condition was capable of discharge would inevitably have proceeded to a decision on considering new information, apparently supported by expert advice, casting doubt on what members had been told, without referring that information to the EHO or members or both.

32. It follows in my judgment that an error of law was committed. The error may be considered either as a failure by the planning authority to consider, either at the level of members or officers, a material factor in the form of the information provided with the 15 December email, or as a failure by officers properly to exercise the delegated

power they had been given by evaluating and coming to a conclusion on that information.

33. In either case, the result is the same and the decision taken must be quashed and remitted to the authority for redetermination.

34. I will list a hearing at which this judgment will be handed down. I do not require attendance on that occasion, though if there are matters arising that can be conveniently dealt with in 30 minutes I will take them at that hearing. If a longer or later hearing is required, counsel should submit and agreed time estimate and joint availability so that it can be listed.