



Neutral Citation Number: [2018] EWHC 3526 (Admin)

Case No: CO/1639/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Date: 19/12/2018

Before :

HER HONOUR JUDGE BELCHER

Between :

CEMEX (UK) OPERATIONS LIMITED	<u>Claimant</u>
- and -	
RICHMONDSHIRE DISTRICT COUNCIL	<u>Defendant</u>
-and-	
DAVID METCALFE	<u>Interested Party</u>

Miss Jenny WIGLEY (instructed by **Clyde & Co**) for the **Claimant**
Mr Juan LOPEZ (instructed by **Darlington Borough Council Legal Services**) for the **Defendant**

Hearing dates: 9 and 26 November 2018

Approved Judgment

Her Honour Judge Belcher :

1. In this matter the Claimant challenges the decision of the Defendant local planning authority dated 15/03/2018 granting planning permission (the "Permission") to the IP (the "IP") for the conversion of a stone barn into a three-bedroom dwelling with

detached garage on land at Quarry Barn, Moor Road, Leyburn, North Yorkshire (the “Property”).

2. The Statement of Facts and Grounds contains five Grounds of challenge. By Order dated 20 June 2018, John Howell QC, sitting as a Deputy High Court Judge, granted permission on the papers in relation to Ground 4 and part only of Ground 5, but refused permission on Grounds 1, 2, and 3, and the remaining part of Ground 5. He ordered the matter to be listed for one day based on that permission order. The Claimant sought to renew the Application for Permission on Grounds 1 to 3 and asked that this be considered within the substantive hearing. Those Grounds are substantial, and the net effect was that the one day allowed for the substantive hearing was insufficient. Fortunately, we were able to find a second day within a reasonably short time frame, but I repeat my advice to Counsel that in such circumstances, the time estimate given should be revisited and, if appropriate, a revised time estimate provided to the listing officer. Having heard argument over 2 days, I am satisfied that permission should be granted on Grounds 1, 2, and 3. I grant permission accordingly.
3. At the outset of the hearing, both parties sought permission to rely upon further witness evidence, and each opposed the other’s Application on the basis that the evidence in question was inadmissible. I allowed both Applications on the basis that I considered the evidence to be admissible, and that the real issue was as to its relevance and or weight. There was also an Application by the Claimant for permission to add, whether as a new Ground or as part of Ground 5, the comments at Paragraph 8 of the Claimant’s Response. I gave a preliminary indication that I did not consider this to be a new Ground, but in any event, Counsel agreed that all matters should be dealt with by the court within this hearing. References in this judgment to the trial bundle will be by Tab number, followed by the page number, for example [15/102]. References to the bundle of authorities will be by the capital letters AB, followed by the Tab number, for example [AB/10].

The Facts

4. The Claimant is a global producer and marketer of cement, concrete and other building materials. Within the UK it is a leading producer of ready mix concrete, and the third largest cement and asphalt producer. The claimant operates a major limestone quarry (the “Quarry”) on an industrial site which includes an asphalt road stone coating plant (the “Asphalt Plant”) at Black Quarry, Leyburn North Yorkshire. The Asphalt Plant and the Property are located directly opposite each other on opposite sides of a road called Whipperdale Bank. The Property is located 64 m to the south of the Asphalt Plant. The distance between the Quarry and the Property is 569 metres.
5. The Quarry and Asphalt Plant operate subject to planning conditions imposed on 5 April 2000 in a Minerals Planning Permission granted by North Yorkshire County Council (the “Minerals Permission”) [23/161-170]. Conditions 14 to 16 of the Minerals Permission limit the hours of operation of the Quarry, but there is no limit on the hours of operation of the Asphalt Plant [23/166]. Condition 17 of the Minerals Permission, which appears under the heading “Noise Control”, requires that noise from the operations on the site including the use of fixed and mobile machinery shall not exceed a noise limit of 55 dB (A) LA eq (1 hour) free field at two residential properties, namely Moor Farm, and Stonecroft, Washfold Farm [23/167]. There is no dispute in this case

that the Claimant's operations, and the Asphalt Plant in particular, generate a considerable amount of noise.

6. I have the benefit of an aerial photograph based on ordnance survey land line data [12/86]. I was provided with an enlarged and much clearer version of this document which was kept loose during the trial. For ease of reference I shall refer to that enlarged aerial photograph as "AP1". AP1 has a number of arrows and distances marked on it. There are arrows purporting to show distances between Moor Farm and the Property, and between Washfold Farm and the Property. Miss Wigley advised me that those arrows should in fact be from the respective farms to the Asphalt Plant, rather than to the Property. There is no dispute in this case that the distances shown on AP1 are from the respective farms to the Asphalt Plant. Thus, Moor Farm is 1131 metres from the Asphalt Plant, and Washfold Farm is 652 metres from the Asphalt Plant.
7. On 21/01/14 the Defendant granted planning permission for conversion of the Property in a manner almost identical to the development which is the subject of the Permission which is challenged before me. The Claimant's case is that it did not receive any notice from the Defendant in relation to that planning application, and did not otherwise become aware of it. In those circumstances, the Claimant was obviously not able to object to that application. It is the Claimant's case that had it been aware of that application, it would have objected to it because of the proximity of the Property to the Quarry and the Asphalt Plant, and the adverse impact those operations would have in noise terms for the residents of the Property. (See Witness Statement of Mark Kelly, paragraph 26: 25/176). There is no dispute that the Defendant's own Environmental Health Department was not consulted with regard to noise emanating from the Claimant's operations in relation to the 2014 grant of planning permission.
8. The Property has been developed. However, there is no dispute that the works undertaken to convert the barn constituted unlawful development. This is because the pre-commencement conditions contained in the 2014 planning permission had not been discharged prior to the start of the works. Accordingly, in February 2017, the IP made a fresh planning application to regularise the position, with the proposed development being the same as that previously approved, save for the addition of a detached garage.
9. On 25/04/2017 the Claimant submitted objections in the form of an e-mail note from Dr Paul Cockcroft of WBM Acoustic Consultants, raising the issue of noise impacts at the Property. As a result, the Defendant's Planning Officer, Natalie Snowball, consulted Lindsey Wilson, a Scientific Officer in the Defendant's Environmental Health Department. Lindsey Wilson made an initial visit to the site to look at the relationship between the quarry and the dwelling. On 23/05/17 Lindsey Wilson sent an e-mail to Natalie Snowball about that visit. In her e-mail Lindsey Wilson describes clearly audible noise from the Asphalt Plant despite the wind direction blowing noise away from the Property. She comments that the noise had the potential to have a significant adverse impact on that the proposed dwelling, particularly at night as it would appear that the Asphalt Plant has permission to operate through the night where background noise levels will be low. In those circumstances, she recommended that the IP should be requested to carry out a noise impact assessment by reference to BS 4142:2014 "Methods for rating and assessing industrial and commercial sound", and should give consideration to BS 8233, "Guidance on sound insulation and noise reduction for buildings", with regard to whether recommended noise levels are achievable [16/117].

10. Her email continues as follows:

“I have also sought advice from North Yorkshire County Council mineral planning with regards to the planning permission for the quarry and whether any existing noise conditions would apply to [the Property] should permission be granted, or whether they could apply any review of the planning permission, which I understand is overdue. My initial concern is that should a noise limit from quarry operations be applied to this property, the quarry may be unable to comply particularly to any night time limit applied, and this would therefore impact on the operations of the existing quarry. I would therefore also recommend that consideration is given to this aspect” [16/117].

11. The IP instructed Apex Acoustics to undertake the noise assessment. Apex Acoustics produced a report dated 10/08/2017 (the Apex Report”) [17/119-138]. I shall have to consider the Apex Report in some detail later in my judgment, but for present purposes it suffices to say that the assessment carried out under BS4142 indicated a significant adverse effect from noise at the Property for both daytime and night time periods, and demonstrated high noise levels at the Property. The assessment results showed levels of noise far exceeding the threshold for the ‘significant observed adverse effect level’ as contained in the Noise Policy Statement for England (“NPSE”). This is the level of noise exposure above which significant adverse effects on health and quality of life occur and the policy aim is to avoid such levels [33/226 and 227]. The Apex Report sets out two “Feasible Ventilation Strategies” for achieving satisfactory noise levels within the Property, which options both include continuous mechanical ventilation [17/122]. Again, I shall return to this in more detail later in my judgment.
12. There is no dispute in this case that the IP did not wish to install mechanical ventilation at the Property. By way of follow-up to a meeting between Brian Hodges, Planning Consultant for the IP, and Natalie Snowball and Lindsey Wilson, Brian Hodges emailed Natalie Snowball on 08/12/17 to confirm “... the works proposed to satisfactorily attenuate the noise impact from the nearby quarry operations” [18/139]. That email was copied to Lindsey Wilson. He attached a further copy of the Apex Report and referred to the fact that with respect to internal noise levels, subject to appropriate glazing specification and ventilation arrangements, any Significant Observed Adverse Effect Level impacts can be avoided. He then gives details and specification of the existing glazing which had already been installed and which exceeds the example specification for glazing as referred to at Paragraph 2.9 of the Apex Report. He then goes on to deal with ventilation stating as follows:

“It is confirmed that the trickle vents used on the windows and doors are Greenwoods Slot Vents as referred to at 2.10 of the Noise Assessment Report and satisfy the performance requirements to achieve the acceptable internal noise levels. As detailed in Table 1 of the Noise Assessment Report Summary of minimum facade sound insulation treatment included in assessment calculations, in order to achieve the acceptable internal noise levels it is necessary to remove the slot vents from certain windows in the bedrooms.”

He then goes on to list the vents to be removed and confirms that the works would be carried out within two months from the grant of planning permission and would be the subject of a planning condition. There is no reference at all to mechanical ventilation in that email.

13. By further email dated 03/01/2018 Brian Hodges emailed Natalie Snowball (copied to Lindsey Wilson) indicating that in addressing the issue of the reduction of noise levels within the building involving the reduction in the ventilation arrangements, he was conscious of the implications and possible conflict with building regulations. He goes on to confirm that even with the removal of the required vents, the ventilation requirements to meet building regulations are still satisfied, and he encloses an email received from Yorkshire Dales Building Consultancy Ltd to confirm that [19/144]. The enclosed email from Yorkshire Dales Building Consultancy Ltd states as follows

“Further to our discussion regarding the provision of background ventilation... windows which will need to have the background ventilation openings (trickle vents) sealed in order to better meet the requirement for sound reduction into the building, will not reduce the background ventilation provisions required by building regulations as the provision can be met by the 2nd openings into each of the rooms....[19/147].”

In response to that, by email dated 08/01/2018, Lindsey Wilson replied

“Thank you for the additional information from Building Control who confirmed that the ventilation arrangements are satisfactory. I therefore confirm that Environmental Health are satisfied with the proposed glazing and ventilation arrangements.”

14. On 12/03/18 Lindsey Wilson provided her report to Natalie Snowball. I shall visit the detail of this report when considering the Grounds of challenge. For present purposes it suffices to say that Lindsey Wilson confirmed that the noise assessment recommended certain glazing and ventilation options all entailing the use of mechanical ventilation in order to achieve the recommended noise levels. She notes that the IP does not propose to use mechanical ventilation “..... and has forwarded documentation from Building Control who have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation”. She concluded that satisfactory internal noise levels can be achieved through the use of glazing and ventilation arrangements [21/150-151].
15. She also dealt with the question of the Mineral Permission and the need to protect the existing quarry operation. She sets out advice received from North Yorkshire County Council who advised that the conditions set out in the Minerals Permission for the Quarry are the only conditions that they would refer to and are in force until such time as that permission may be subject to a review under the ROMP (i.e. review of minerals permission) regulations or a variation. She confirms that the noise limits contained within the Minerals Permission would not apply to the Property and therefore there would be no breach of the Minerals Permission [21/151].
16. Natalie Snowball prepared a delegated application report dated 15/03/18. It was referred to throughout the proceedings as the Officer’s Report and I propose to refer to

it in the same way but using the commonly recognised abbreviation “OR”. In the OR, Natalie Snowball set out verbatim the final comments received from Environmental Health [14/94-96]. At paragraphs 6.8 to 6.13 of the OR, Natalie Snowball deals with “Noise and Amenity”. The need for noise attenuation measures to overcome the unacceptable noise level was recognised and paragraph 6.11 provides as follows:

“Environmental Health commented on the agent’s mitigation proposals confirming that the glazing specification of the building would appear to meet the requirements of the acoustic report, but raised concern regarding whether sealing up the trickle vents as proposed by the agent would result in unacceptable ventilation in the dwelling. The agent had this checked by a Building Control Inspector who confirmed that the ventilation in the dwelling was acceptable and met the requirements under the Building Regulations” [14/99]

17. The OR notes the Claimant’s continuing concern about the very high noise levels generated by the Asphalt Plant and the impact of this on the amenity of the Property, and that the Claimant is concerned that if the planning permission is approved it would have the effect of placing unreasonable restrictions on the Cemex Asphalt Plant operations particularly at night time. Paragraph 6.13 provides as follows:

“Environmental Health have looked carefully at the proposal, and the concerns of Cemex, and whilst recognising that the proposed dwelling will experience relatively high levels of noise from the [Asphalt Plant], they have concluded that, with the mitigation measures proposed by the agent including removing and blocking up trickle vents in certain windows,.....satisfactory noise levels..... inside..... the dwelling can be achieved..... They have also confirmed that the proposal will not conflict with the mineral planning permission which relates to the operations at [the Quarry] including the roadstone coating plant” [14/99]

18. On 15/03/18 the Permission was granted by the Defendant’s planning manager under the Defendant’s scheme of delegation. The Permission is subject to a condition requiring the removal or blocking up of trickle vents in certain bedroom windows in the Property. There are no conditions expressly requiring the retention of specified window glazing or requiring the installation of a mechanical ventilation system. The “Informative” on the planning permission states as follows:

“[The Property] is located in close proximity to [the Quarry], and in particular the [Asphalt Plant], which has permission to operate 24 hours per day if required. The occupants of [the Property] will therefore experience noise from the quarrying operations. By using a combination of glazing and ventilation to the property, guideline internal noise levels in accordance with BS 8233:2014 ‘Guidance on sound insulation and noise reduction from buildings’ can be achieved with windows closed...” [11/83].

19. The Claimant's Minerals Permission is due for review in April 2025 under ROMP. Any review will be required to consider operating conditions alongside any change in circumstances, including the existence of any new dwellings in the vicinity of the Quarry. On the second day of the hearing, the Defendant provided me with a second aerial photograph showing a number of other properties in the vicinity of the quarry, all of which have been developed pursuant to planning permissions granted since the grant of the Minerals Planning Permission in April 2000. I shall refer to this aerial photograph as "AP2". The Claimant asserts that there is a very real risk that conditions could be imposed under ROMP in order to protect the residential amenity of occupants of the Property, and that such conditions could have a serious impact on the quarry operations. They suggest that such conditions could include restrictions on the permitted hours of operation of the Asphalt Plant and/or noise limit restrictions on the level of noise from the Asphalt Plant measured at the Property.

Legal Principles.

20. With the exception of an issue as to the relevance and or weight of evidence provided by the planning officer in relation to the decision-making process, there is no dispute between the parties as to the relevant legal principles. I shall first summarise those areas where there is no dispute as to the legal principles to be applied. This is drawn from the skeleton arguments provided by both Counsel for which I am grateful.
21. Planning applications are required to be determined in accordance with the statutory development plan unless material considerations indicate otherwise (S38(6) Planning and Compulsory Purchase Act 2004 and S70 Town & Country Planning Act 1990) [AB/1 and 2]. Whether or not a consideration is a relevant material consideration is a question of law for the courts: **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1WLR 759 at 780 [AB/6]. A material consideration is anything which, if taken into account, creates the real possibility that a decision-maker would reach a different conclusion to that which he would reach if he did not take it into account: **R (Watson) v London Borough of Richmond upon Thames** [2013] EWCA Civ 513, per Richards LJ at paragraph 28 [AB/16].
22. Decision-makers are under a duty to have regard to all applicable policy as a material consideration: **Muller Property Group v SSCLG** [2016] EWHC 3323 (Admin) [AB/14]. National Planning Policy is set out in the National Planning Policy Framework ("NPPF") and the National Planning Practice Guidance ("NPPG"). National planning policy is "par excellence a material planning consideration": **R oao Balcombe Frack Free Balcombe Residents v West Sussex CC** [2014] EWHC 4108 (Admin) at paragraph 22 [AB/15]. The weight to be given to a relevant material consideration is a matter of planning judgement. Matters of planning judgement are within the exclusive province of the local planning authority: **Tesco Stores Ltd** (supra).
23. An OR is not susceptible to textual analysis appropriate to the construction of a statute. **Oxton Farms and Samuel Smith Old Brewery v Selby DC** [1997] WL 1106106 [AB/12]); **South Somerset District Council v Secretary of State for Environment** [1993] 1PLR 80. The OR should not be construed as if it was a statutory instrument: **R (Heath and Hampstead Society) v Camden LBC and Vlachos** [2007] 2 P&CR 19. The OR must be considered as a whole, in a straightforward and down-to-earth way, and judicial review based on criticisms of the OR will not normally begin to merit

consideration unless the overall effect of the report significantly misleads the committee about material matters which are left uncorrected before the relevant decision is taken.

24. An OR is to be construed in the knowledge that it is addressed to a knowledgeable readership who may be expected to have a substantial local and background knowledge. There is no obligation for an OR report to set out policy or the statutory test, either in part or in full. **R v Mendip DC ex p Fabre** [2000] 80 P&CR 500 [AB/11]. Policy references should be construed in the context of general reasoning: **Timmins v Gelding BC** [2014] EWHC 654 (Admin) paragraph 83 [AB/17]. An OR is written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. A decision-maker does not need to rehearse every argument relating to each matter and every paragraph: **Seddon Properties v Secretary of State for the Environment** (1981) 42 P&CR 26 [AB/13]. These principles apply equally to a delegated application report.
25. The legal principles set out thus far are not in dispute. In this case Natalie Snowball, the Planning Officer, has provided two Witness Statements setting out, amongst other things, how she asserts she reached her decisions in relation to matters under challenge. It was suggested on behalf of the Claimant that this evidence was inadmissible as amounting to ex post facto rationalisation. As already indicated, I granted permission for both Witness Statements to be adduced in these proceedings, indicating that I would consider relevance and weight at a later point.
26. Having revisited the submissions made to me in relation to these matters, I conclude that there is in fact no real difference between counsel on the law to be applied in the circumstances. The law is helpfully set out by Green J in **Timmins v Gelding BC** [2014] EWHC 654 (Admin) at paragraphs 109 -113 (AB/17). In that case, Green J had regard to certain admissions made in the evidence of the principal planning officer (see paragraphs 47 and 55). Only at paragraphs 109 -113 did he deal with the more general issue of the relevance of witness statement evidence from the decision maker.
27. What is clear, for the reasons listed in paragraph 109 of Green J's judgment, is that there are a number of circumstances in which witness evidence can be properly received from a decision maker. In order to decide whether to accept or reject such evidence, is necessary for the court to identify the basis upon which the impugned statement is relied upon. It is equally clear that it should be rare for a court to accept ex post facto explanations and justifications which risk conflicting with the reasons set out in the decision. In support of that conclusion Green J referred to the decisions of the Court of Appeal in **Ermakov v Westminster City Council** [1995] EWCA Civ 42, and **Lanner Parish Council v the Cornwall Council** [2013] EWCA Civ 1290. Mr Lopez submitted that there is nothing in Miss Snowball's Witness Statement which conflicts with the reasons set out in her OR which formed the basis for the decision in this case. I accept that submission, and I do not understand it to be challenged by Miss Wigley.
28. However, the courts are also reluctant to permit elucidatory statements if produced for the purpose of plugging a gap in the reasoning. Green J refers to this principle at paragraph 113, citing the judgment of Ouseley J in **Ioannou v Secretary of State for Communities and Local Government** [2013] EWHC 3945. In my judgement this is where the issue lies between the parties in this case. Mr Lopez submits that the Witness Statements are not plugging any gap in the reasoning, whereas Miss Wigley submits that is exactly what the Witness Statements are designed to do. Thus, the issue is one

of construing the basis upon which the Witness Statements are relied upon, rather than an issue of law. In those circumstances I shall return to this issue when dealing with the relevant Grounds.

The Grounds

29. The Claimant's grounds of challenge are as follows:

- i) Errors as to the scope of the decision making process including as to the ability of the Environmental Health Officer to object to the proposed development and as to the ability of the Defendant to control the development (including to refuse the application). [3/24]
- ii) Taking into account an immaterial consideration, namely that the Property is occupied "by a long-standing local family aware of the presence of the adjacent quarry". [3/27]
- iii) Failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy. [3/28]
- iv) Failure to take into account the impact on the Claimant of the fact that the Minerals Permission is due to be reviewed in 2025 and that, at that time, onerous conditions could be imposed on the Claimant's operation as a result of the grant of the Permission. [3/28]
- v) Irrational failure to take into account all relevant considerations when deciding not to include all the conditions recommended by the IP's own noise consultant. [3/29]

Grounds 1 and 2

30. As both Counsel did in their submissions before me, I propose to deal with these two Grounds together. The full Grounds are set out in paragraph 29 above. However, in essence, each of these Grounds amounts to an allegation that the Environmental Health Officer ("EHO") constrained her consideration of the issues in this case by reason of the fact that the development of the Property had already taken place, and that the Property was already occupied. Ground 2 suggests a further and more specific constraint on the decision-making process, namely that the Property was not simply already occupied, but that it was occupied by a long-standing local family aware of the presence of the adjacent quarry. The Claimant asserts that this implies that the family in residence will be more willing to accept the noise from the quarry operations than might be the case for future occupiers, and that it is an improper and irrelevant consideration.

31. In relation to the more general point under Ground 1, Miss Wigley submitted that the EHO has erroneously assumed the principle of residential development in this location has already been accepted and that the options to control or mitigate noise are limited by the fact that the dwelling is complete and occupied. The way the EHO approached the matter is set out verbatim in the OR report at [14/94]. Miss Wigley relies upon the fact that the EHO indicated that if Environmental Health had been consulted initially, it is likely they would have objected to the development. The EHO then states that as

the barn conversion is complete and occupied, she considers it appropriate to assess whether the noise impact can be mitigated and reduced to provide an acceptable level of amenity for the residents and also that the existing quarry operations can be protected.

32. Miss Wigley submitted that there cannot be two different standards of what is acceptable, one to be applied to a planning application for a future development which has not yet been commenced, and one for a property which is already occupied. She submitted that the EHO's assessment has been influenced by the fact of occupation and amounts to an attempt to squeeze the application through on the basis of what the IP wants because the property is already occupied. Whilst the EHO asked for a noise assessment, Miss Wigley pointed to the fact that the scope of that assessment is itself limited by reference to the fact that "... The building has already been constructed, limiting the potential options for facade sound insulation design". (Apex Report, paragraph 3.2; [17/123]) Miss Wigley submitted that the assessment by the EHO as to what is acceptable is tainted by that approach, in effect adopting a starting point that "There's not much we can do in terms of design and layout". She submitted that the fact that the development has taken place should not preclude a finding that the mitigation needed to deal with noise does involve changes in design or layout.
33. Mr Lopez made the point that it is inevitable that the planning authority will approach this application on the basis of what has been built, precisely because it is an application to regularise the position. He submitted that the planning authority cannot consider the matter in a vacuum. For a future application, the planning authority of necessity considers plans and proposals; for an application to regularise the position, of necessity, they consider what has in fact been built. He submitted that does not mean they have restricted themselves, but simply that they have adopted a practical and sensible starting point. He also pointed out that whilst the EHO had said it was likely they would have objected to the development if consulted at an earlier stage, there is no certainty in that respect.
34. During her submissions in reply to Mr Lopez, I asked Miss Wigley to make the following assumptions in relation to a hypothetical property which was a sensitive receptor for noise. I asked her to assume, if an application for permission had been made prior to development, that it would have been granted with a noise mitigation package including alterations in design and layout. I further asked to assume that for the same property but already built, a perfectly proper package could be achieved to address the noise issues but without involving alterations in design and layout. I suggested to her that in those circumstances it was hard to see how it could be said that a grant of planning permission with the lesser noise package (by which I meant the package without alterations in design and layout) could be challenged on the basis that the local authority should have approached matter as if based on plans rather than actual build. Miss Wigley very properly conceded that would be a proper approach for the planning authority to take, provided it can truly be said that the package of noise measures for the property as built is a proper package, and even if the planning authority might have preferred something different had it been considering the matter at an earlier stage on the basis of plans only.
35. However, Miss Wigley submitted that concession did not invalidate Grounds 1 and 2 in this case. She submitted that the concern behind Grounds 1 and 2 is that the threshold of acceptability in terms of noise mitigation measures has been compromised by the

fact that this is a retrospective application for permission in respect of an occupied dwelling. In my judgment, it follows from that concession, that the true source of complaint here is not that the EHO has imposed improper constraints by considering the property as built, but rather that the package of noise mitigation measures produced is unsatisfactory for other reasons. There is nothing in the EHO's advice to the planning officer, or in the OR to suggest that either the EHO or the planning officer did not understand that this was an application that could be rejected, or that either failed to understand that mitigation measures going beyond those desired by the IP could be imposed if the planning authority thought that was the right thing to do.

36. Turning specifically to Ground 2, Miss Wigley submitted that the EHO's reference to the Property "...being occupied by a long standing local family aware of the presence of the adjacent quarry" ([21/149] and adopted verbatim in the OR [14/94]) shows that the assessment of appropriate noise mitigation measures has been compromised by an assumption that the environment need not be so good for a local family already occupying an unlawful development. Miss Wigley submitted that this was a curious statement to include if it has no relevance to the matter. She submitted it must have been included as factoring into the assessment on the impact on amenity, as in "This family is perhaps more tolerant of noise than others".
37. I agree that it is not immediately obvious why the fact that the Property is occupied by a long standing local family aware of the presence of the adjacent Quarry needs to be mentioned by the EHO or by the planning officer. However, it is a significant leap from the fact of that mention, to the assertion that the effect was that the EHO and the planning officer were effectively treating this as a personal planning application for a family more likely to put up with the noise because they were already occupying and aware of the Quarry. There is absolutely nothing in the documentation to suggest that an error of that sort was made. The statement about the occupation of the family could equally well be proffered to explain why the current occupiers may not have complained about noise, with the implication that future occupiers might. I cannot accept that single sentence evidences a constraint of the type argued for by Miss Wigley. In my judgment, if relevant at all, the issues raised under Grounds 1 and 2 are more relevant to and supportive of the complaint in Ground 3. It follows that I reject Grounds 1 and 2.

Ground 3

38. Ground 3 is the alleged failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy. At the time of the Permission decision, the relevant NPPF was the 2012 version. In this judgment all references to the NPPF are to the 2012 version. Paragraph 123 NPPF provides (so far as relevant) that planning policies and decisions should aim to:
- i) avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of a new development
 - ii) recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established.

The above are the first and third bullet points in Paragraph 123 NPPF.

39. The PPG on noise defines the “Significant observed adverse effect level” as “...the level of noise exposure above which significant adverse effects on health and quality-of-life occur” [33/226]. For ease of reference I shall refer to this level as “SOAE” or “SOAE level”, as appropriate. In a section entitled “How to recognise when noise could be a concern”, there appears the following paragraph:

“Increasing noise exposure will at some point cause the [SOAE level] boundary to be crossed. Above this level the noise causes a material change in behaviour such as keeping windows closed for most of the time or avoiding certain activities during periods when the noise is present. If the exposure is above this level the planning process should be used to avoid this effect occurring, by use of appropriate mitigation such as by altering the design and layout. Such decisions must be made taking account of the economic and social benefit of the activity causing the noise, but it is undesirable such exposure to be caused.” [33/226]

40. The same section contains a table summarising the noise exposure hierarchy, based on the likely average response. Noise that is noticeable and disruptive crosses the SOAE level and should be avoided. This is described as follows

“... noise which causes a material change in behaviour and/or attitude, eg avoiding certain activities during periods of intrusion; where there is no alternative ventilation, having to keep windows closed most of the time because of noise. Potential for sleep disturbance resulting in difficulty in getting to sleep, premature awakening and difficulty in getting back to sleep. Quality of life diminished due to changing acoustic character of the area.” [33/227]

It should be noted that the most serious noise in the table, described as noticeable and very disruptive, and of unacceptable adverse effect, should be prevented, rather than simply avoided [33/227].

41. The PPG goes on to consider what factors influence whether noise could be a concern, pointing out that the nature of noise is subjective such that there is not a simple relationship between noise levels and the impact on those affected. A number of general factors to consider are listed, followed by more specific factors to consider when relevant, including the following:

“consideration should also be given to whether adverse internal effects can be completely removed by closing windows and, in the case of new residential development, if the proposed mitigation relies on windows being kept closed most of the time. In both cases a suitable alternative means of ventilation is likely to be necessary. Further information on ventilation can be found in the Building Regulations” [33/228]

42. I now turn to the Apex Report, which is the noise assessment prepared for the IP at the request of the EHO. Apex Acoustics measured weekday noise levels at the facade of the Property exposed to noise from the Quarry and the Asphalt Plant. As requested by the EHO the tests were carried out under British Standard, BS 4142: 2014. Under BS 4142:2014 the methodology is to obtain an initial estimate of the impact of the specific sound by subtracting the measured background sound level from the rating level. Typically, the greater this difference, the greater the magnitude of the impact. A difference of around +10dB or more is likely to be an indication of a significant adverse impact, depending on the context [38/380].
43. The results in the Apex Report indicated a SOAE for both daytime and night time periods. The differences between the background sound level and the rating level were reported by Apex Acoustics as +35dB for daytime, and +43dB for night-time [17/126; table 5]. I have a Witness Statement from Dr Paul Cockcroft, a specialist Acoustic Consultant engaged by the Claimant. He explains that the generally accepted rule is that a change of 10 dB(A) corresponds roughly to halving or doubling the loudness of a sound. The noise level for the night-time assessment, which is recorded as +43dB above the background sound level, would be eight times as loud as the level representing a significant adverse impact. [26/182].
44. The Apex Report proposes two alternative ways to address the noise issue and to meet internal noise criteria. Section 8 of the report deals with “Facade acoustic design to meet internal criteria”. The internal criteria referred to are the noise criteria. The report sets out a proposed provision to meet the issues, whilst emphasising that it is not intended to constitute a ventilation strategy design, which is the responsibility of the mechanical engineers [17/127, paragraph 8.7]. In order to achieve the desired internal noise levels, the Apex Report recommends the glazing and ventilator performance specifications shown in the summary table, which is table 1 in the report. The author adds that the current construction design will need to be reviewed to comply with these requirements [17/128, paragraphs 8.24 – 8.25]. Table 1 contains the author’s summary of **minimum** facade sound insulation treatment included in the assessment calculations (my emphasis added). Both options set out in Table 1 contain minimum glazing performance requirements, and continuous mechanical ventilation, Option A being for mechanical extraction with the use of a single trickle vent to each of the bedrooms for make-up air, and Option B being frame of continuous mechanical supply and extract with heat recovery, which does not require any trickle ventilators [17/122: Table 1].
45. Paragraph 2.8 of the Apex Report refers to the proposals in Table 1 as “...a set of minimum glazing and ventilation strategy options, interpreted from Approved Document F (AD-F)” [17/121]. The summary goes on to refer to the glazing options and concludes at paragraph 2.13 as follows: “On this basis it is considered that any [SOAE Level] impacts on internal noise levels are avoided...” [17/121].
46. As already mentioned, the proposal includes glazing options, and paragraph 8.13 of the Apex Report refers to the acoustic performance of the proposed glazing. There is no dispute in this case that the glazing currently installed at the Property meets the acoustic performance recommended. The Apex Report continues at paragraph 8.14 (still under the heading of “Glazing”) “Opening windows may be acceptable to provide purge ventilation; all opening lights should be well fitted with compressible seals.”

47. Miss Wigley submitted that there is a nexus between mechanical ventilation and purge ventilation, a nexus which she submitted is recognised both in the BS 4142:2014 and in Building Regulations. In BS 4142:2014 in Section 11 on “Assessment of the impacts” [of sound], amongst the pertinent factors to be taken into consideration is the following:

“The sensitivity of the receptor and whether dwellings or other premises used for residential purposes will already incorporate design matters that secure good internal and/or outdoor acoustic conditions, such as:

i) facade insulation treatment;

ii) ventilation and/or cooling that will reduce the need to have windows open so as to provide rapid or purge ventilation; and

iii) acoustic screening” [38/381]

48. (AD)-F of the 2010 Building Regulations deals with Ventilation. The “Key terms” are set out in Section 3 and include the following of relevance to this case;

“**Background ventilator** is a small **ventilation opening** designed to provide controllable **whole building ventilation**.

Purge ventilation is manually controlled ventilation of rooms or spaces at a relatively high rate to rapidly dilute pollutants and/or water vapour. Purge ventilation may be provided by natural means (e.g. an openable window) or by mechanical means (e.g. a fan).

Whole building ventilation (general ventilation) is nominally continuous ventilation of rooms or spaces at a relatively low rate to dilute and remove pollutants and water vapour not removed by operation of **extract ventilation, purge ventilation** or **infiltration**, as well as supplying outdoor air into the building. For an individual dwelling this is referred to as ‘**whole dwelling ventilation**’.” [36/244-245]

49. Paragraph 5.7 of (A-D) F provides as follows:

“**Purge ventilation** provision is required in each **habitable room.....** Normally, openable windows or doors can provide this function ..., otherwise a mechanical extract system should be provided....” [36/257]

Miss Wigley also referred me to Table 5.2a where there is reference again to the need for purge ventilation for each habitable room, where it is also noted “There may be practical difficulties in achieving this (e.g. if unable to open a window due to excessive noise from outside), and “As an alternative... a mechanical fan... could be used” [36/261]. I note that the same wording is repeated in each of Tables 5.2b [36/263], 5.2c

[36/265] and 5.2d [36/266], with the addition, in the latter two cases, of an indication that expert advice should be sought in such situations.

50. Miss Wigley submitted that it is clear from the above matters that purge ventilation is not a binary matter. Where there is another form of ventilation, the need for purge ventilation will be reduced. She pointed out that the acknowledgement in the Apex Report that opening windows may be acceptable to provide purge ventilation is against a background of the recommendations in that report that a mechanical ventilation system is also needed. She further submitted that the alternative ventilation strategy to opening windows is a mechanical system (per Paragraph 5.7 (A-D) F set out in paragraph 48 above), and that there is no question of trickle vents alone providing this function. She also referred me to paragraphs 4.15 and 4.16 (A-D) F. It is clear from paragraph 4.15 that purge ventilation is ventilation of a separate type to whole building ventilation. Furthermore, purge ventilation is intermittent and required only to aid the removal of high concentrations of pollutants and water vapour released from occasional activities such as painting and decorating or accidental releases such as smoke from burnt food or spillage of water. It is noted that purge ventilation provisions may also be used to improve thermal comfort although this is not controlled under the Building Regulations [36/251, paragraph 4.15].
51. In paragraph 4.16 there is reference to trickle ventilators being used for whole dwelling ventilation and windows for purge ventilation [36/251]. Miss Wigley submitted that trickle vents are plainly for useful background ventilation of the whole building and are not a substitute for purge ventilation by the opening of windows and/or the use of a mechanical system.
52. As set out in paragraphs 12 -13 above, the IP did not wish to install mechanical ventilation and there were discussions between the EHO, the planning officer and the IP's agent concerning ventilation. The agent provided the email [18/147] from the building surveyor set out in paragraph 13 above. Miss Wigley submitted that discussion relates entirely to background ventilation, or whole dwelling ventilation and that no consideration was given to purge ventilation and whether purge ventilation would be adequate, given that mechanical ventilation was not being provided as recommended in the Apex Report.
53. Miss Wigley very properly accepted that the fact that there is no express reference by the EHO or the OR to the PPG is not, without more, a ground for challenging the reports of either officer. She submitted, however, that it must be clear that the issues concerned have been fully covered. There is no dispute between the parties that the PPG is a significant material consideration because it is government policy. The application of the policy is of course a matter of planning judgement and depends upon the facts of the case. The significance of the relevant policy will also depend on the facts of the case. Miss Wigley submitted that in this case the PPG is central, particularly as the noise mitigation relied upon in this case is closed windows, when the PPG clear policy is to try and avoid this. She pointed to the fact that there is no reference to any of these factors in the advice of the EHO or in the OR. She submitted that the OR shows that the planning officer placed total reliance on the EHO response on these matters as the OR sets out verbatim the EHO's final recommendations. Miss Wigley submitted there is no evidence at all that the EHO has considered the applicability of the PPG and, in particular, the desirability of avoiding relying on windows being closed to address the noise issues. She submits that the EHO has in effect cherry picked from the Apex

Report, and simply relied upon the email from the building surveyor (wrongly described as Building Control by the EHO but nothing turns on this) which “..... confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation”, and that they met the Requirements under the Building Regulations.

54. All the e-mail from the Building Surveyor does is to confirm that the sealing of certain trickle vents to assist with reducing sound in the building will not reduce the background ventilation provisions required by Building Regulations. Plainly, that email does not address in any way at all, the impact of noise and the proposed control of noise into the building by the use of closed windows. It simply deals with the adequacy of background ventilation. Obviously, it cannot address, and does not purport to address, how the residents of the Property might be affected by noise if, for example, they wish to keep windows open for lengthy periods of time during hot weather. Indeed, the Building Regulations themselves make it clear that they do not control the use of purge ventilation for thermal comfort (see paragraph 49 above). Miss Wigley relies upon the fact that nowhere is there any indication that the EHO or the planning officer considered that PPG advises that the SOAE level identified in the noise assessment, (a document expressly asked for by the EHO), should be avoided and is undesirable. She acknowledged that this is obviously not an absolute requirement, but it is nevertheless relevant policy and the council is required to have regard to it and take it into account. She submitted that the council should either have ensured that the mitigation measures overcame or avoided the SOAE level, or it should have been balanced against other considerations and an explanation given as to why it was not to be avoided in this case. She submitted that all the guidance in the PPG (quoted at paragraphs 39 – 41 above) contains a link between mechanical ventilation and the need to open windows, but no one at the council considered this.
55. She submitted that the EHO and the OR both state that internal noise levels can be met with glazing and the windows being closed, without any consideration as to the need for mechanical ventilation. Whilst the Apex Report allows for windows to be used for purge ventilation, it does so in the context of and contingent upon the provision of alternative mechanical ventilation, something Miss Wigley submitted, which has been completely missed by the council officers both in construing the Apex Report and in failing to consider the guidance in the PPG.
56. On behalf of the Council, Mr Lopez submitted that the treatment of the noise issues has been perfectly properly carried out and is consistent with the PPG guidance. He pointed out that both the NPPF and PPG indicate that planning decisions should aim to avoid noise from giving rise to significant adverse impacts, but neither is prescriptive. He further submitted that there is no rule that purging must be avoided and, therefore, that it is a matter of planning judgement for the decision taker to consider the acceptability of purging. There is nothing in the PPG identifying an acceptable degree of purging, subject to the issue of noise. Mr Lopez submitted that it is possible to depart from the guidance without their necessarily being an error. That is plainly right, and Miss Wigley accepted that in her submissions.
57. Mr Lopez submitted that it is plain on the face of her report dated 12 March 2018 that the EHO has carried out her own independent assessment and concluded that some purging would be acceptable. He submitted this is a matter of planning judgement and not open to challenge. The passage in question appears in the EHO report at [21/150]

and is repeated verbatim in the OR at [14/94]. I shall refer to the passage from the OR as this was the passage addressed by Mr Lopez in his submissions. Under the heading “Impact on amenity” there appears the following:

“BS 4142 recognises that not all adverse impacts will lead to complaints and it’s not intended for the assessment of nuisance. [The Property] is occupied by a long standing local family aware of the presence of the adjacent quarry. BS 4142 also allow scope look at absolute noise levels rather than just relative levels and for other standards such as BS 8233 to be considered. It was therefore recommended that the applicant considered BS 8233:2014 ‘Guidance on sound insulation and noise reduction for buildings’ as part of their assessment in order to see whether the recommended guideline indoor and outdoor noise levels can be achieved. The report shows that guideline indoor levels can be achieved with a combination of glazing and ventilation and that some areas of the garden can offer an acceptable amenity space in accordance with BS 8233.

With regards to internal noise levels, the noise assessment recommended certain glazing and ventilation options all entailing the use of mechanical ventilation in order to achieve the recommended noise levels. However, the applicant does not propose to use mechanical ventilation and has forwarded documentation from Building Control who have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation. I note the view of Cemex that windows should be sealed shut to protect residents, however, I consider that the option for windows to be openable for the purposes of purge ventilation to be acceptable.” [14/94]

58. Mr Lopez emphasised the use of the word “However”. He submitted that marks a clear transition. He submitted that prior to the transition the report shows that the EHO was aware of the contents of the Apex Report. The transition shows that the EHO has moved on to make an assessment based on her knowledge that the IP did not want to use mechanical ventilation. He submitted the transition represented by the word “However” supports the fact that there has been a separate assessment by the EHO. He submitted the EHO has stood back, with the knowledge and understanding that mechanical ventilation would not be used but has concluded in her own assessment that purging was an acceptable way of addressing matters. He submitted that relates not just to the issue of ventilation, but also to the issue of noise.
59. Mr Lopez reminded me that the Claimant’s challenge on this Ground is not a reasons challenge, or an irrationality challenge. He submitted that the Claimant’s challenge is that the EHO has either forgotten the fact that the IP did not want mechanical ventilation or has forgotten that the Apex report was all prefaced on mechanical ventilation. In my judgment that is not an accurate statement of the Claimant’s challenge. The challenge is a failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy.

60. Miss Wigley accepted that Ground 3 is neither a reasons nor an irrationality challenge. Her challenge is that the policy and guidance has simply not been considered, and because of that there are no reasons given for departing from policy, and thus there are no reasons to challenge. Further there is no irrationality challenge which could only follow from an assessment which had been undertaken. The whole thrust of the Claimant's submissions in support of Ground 3 is that there is no evidence of an independent assessment or any independent calculations carried out by the EHO.
61. Mr Lopez submitted that the EHO was clearly aware of the Apex Report, a report which gave options, but which was not saying these are the only options. He submitted it was therefore open to the EHO to depart from the options proposed in the Apex Report, and to say why she had done so. He submitted she did not need to go into figures and that she had everything in front of her to entitle her to make the judgement she made. He submitted it was completely unreal to suggest that the EHO had not exercised her own judgement and made a wholly separate assessment, separate from the Apex Report. He submitted there is nothing in the EHO's report which signposts back to the Apex Report, and he refuted the suggestion put forward on behalf of the Claimant that the EHO has effectively cherry picked from the Apex Report, taking background ventilation alone and not considering the ventilation strategy as a whole.
62. Whilst I accept that the EHO has clearly recognised that the IP did not wish to use mechanical ventilation, I am wholly unpersuaded by the suggestion that the EHO has necessarily carried out a wholly separate and independent assessment. The word "however", is at the beginning of a sentence which goes on to place reliance on the documentation described as being from Building Control and relies in that sentence on the fact that Building Control have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation. That is of course a reference to the email set out in paragraph 13 above. As I have already said, that email was dealing simply with whether the background ventilation provision after the sealing of certain trickle vents satisfied the ventilation requirements in the Building Regulations. In my judgement the straightforward reading of the sentence commencing with the word "however" is that the provision of the information from Building Control is such that it can properly be concluded that mechanical ventilation is not needed. The e-mail from "Building Control" [19/147; quoted at paragraph 13 above] refers to the provision of background ventilation. As already set out, the Building Regulations address ventilation, not noise in this respect.
63. Mr Lopez made much of the fact that the EHO is a scientific officer. He asserted that she is just as much an expert as Dr Cockcroft, the Claimant's acoustic expert, although there is no evidence as to the EHO's qualifications. In any event, whatever her qualifications, they do not protect her from the possibility of making a mistake, any more than the professional qualifications of Dr Cockcroft, or indeed the qualifications of any of the lawyers in this case, protect each or any of them from the possibility of making mistakes. Human beings all make mistakes. Mr Lopez repeatedly submitted that it was unreal to suggest that the EHO had not made her own independent assessment taking into account not just ventilation, but also noise impact. Miss Wigley suggested that the reason he kept relying on something being unreal, was precisely because he had no other point to put forward.
64. The court is plainly not constrained to assume it is unreal that officers may not have carried out their functions properly. If that were the position, the jurisprudence as to the

need for reasons for decisions to be provided would be wholly otiose. Indeed, there would be no need for this court to have a reviewing function, as it would be obliged to assume that all officers had done what they were required to do, and had done it properly, whether or not they had signposted that fact in the relevant documents.

65. I accept Miss Wigley's submissions that nowhere in the EHO's report or the OR is there any indication that, having set aside the provision of mechanical ventilation as recommended as a minimum in the Apex Report, the EHO then made a separate assessment of her own as to the noise impacts in the light of the policy guidance as to the undesirability of managing noise by keeping windows closed. Of course, it is not an absolute requirement, but it is relevant policy which the Defendant is required to have regard to and to take into account. In those circumstances, the Defendant should have ensured either that appropriate mitigation measures were in place designed to avoid the SOAE level for internal noise at the Property or have taken the policy into account and balanced it against other considerations to justify any position which did not seek to avoid the SOAE level internally. I recognise this is not a reasons challenge, but the absence of any reasons or explanation designed to show why it is appropriate in this case (if indeed it is) to allow a scheme of glazing and background ventilation which does not avoid the SOAE level, particularly in the face of the Apex Report setting out minimum requirements to achieve that and which are being expressly rejected for the purposes of the Permission application, suggests to me that no such independent assessment was carried out. Alternatively, if it was carried out, in my judgment, it is not clear that it was taking the documents at face value, and recognising they are addressed to a knowledgeable readership, and must not be read in an over legalistic way. In my judgment, the Claimants challenge on Ground 3 is made out.
66. I have before me two Witness Statements from Natalie Snowball [28/198-204] and [29/205-209]. Both are addressed to issues arising under Grounds 4 and 5. Unsurprisingly, Natalie Snowball does not address the reasoning in relation to Ground 3 as she adopts the advice of the EHO. There is no Witness Statement from the EHO, Lindsey Wilson. I regard that as unsurprising. Any evidence which she might purport to give on this subject would, of necessity, involve plugging gaps given the findings which I have made.
67. By Section 31(2A) Senior Courts Act 1981 the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. I do not consider Section 31(2A) assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the PPG guidance been considered in the context of the need to avoid closing windows as a way of controlling noise, it might be the case that mechanical ventilation would have been required as recommended in the Apex Report. Equally, some other form of mitigation might have been proposed. These are matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment.
68. It follows that Ground 3 succeeds and the planning permission in this case must be quashed. Whilst that is sufficient to dispose of the proceedings, I should plainly also consider Grounds 4 and 5 in this judgment.

Ground 4

69. Ground 4 is the alleged failure to take into account the impact on the claimant of the fact that the minerals permission is due to be reviewed in 2025 and that, at that time, onerous conditions could be imposed on the claimant's operation as a result of the [grant of planning] permission. [3/28]

70. In relation to noise effects and existing businesses, the PPG states as follows

“The potential effect of a new residential development being located close to an existing business that gives rise to noise should be carefully considered. This is because existing noise levels from the business even if intermittent (for example, a live music venue) may be regarded as unacceptable by the new residents and subject to enforcement action. To help avoid such instances, appropriate mitigation should be considered, including optimising the sound insulation provided by the new developments building envelope. In the case of an established business, the policy set out in the third bullet of paragraph 123 of the Framework should be followed.” [33/227]

The third bullet of paragraph 123 of the NPPF is set out in paragraph 38 above.

71. There is no dispute in this case that the EHO properly recognised at the outset that she had to consider the potential impact on the quarry operations of a grant of planning permission for the Property. This is clear from her initial response of 23 May 2017 as set out in paragraph 10 above. The Claimant relies on the fact that the existing Minerals Permission requires that noise from the Claimant's mineral operations shall not exceed a noise limit of 55dB (A) for the two properties named in condition 17 [23/167]. As is clear from AP1, the two named properties are 1131m and 652m from the Asphalt Plant. The Property is only 64m from the Asphalt Plant. Miss Wigley submitted that the fact that such conditions were considered necessary to protect the residential amenity in relation to those two dwellings, indicates a strong likelihood that a similar condition would be considered necessary in relation to the Property, at which the effects on residents are likely to be more acute given how much closer it is to the Asphalt Plant. The Claimants rely upon the fact that the Apex Report demonstrates that if such a condition were imposed in relation to the Property, it would be immediately breached.

72. In his Witness Statements ([25/172] and [27/194]) Mark Kelly, the Claimant's Planning Manager, gives detailed evidence as to the likely impact on the Claimant's business of the imposition of such a planning condition. Mr Lopez correctly makes the point that none of that evidence was before the planning authority at the time the decision was made. The objections before the planning authority made clear in general terms that there was the potential for adverse effect on the Claimant's business if the quarry operations were restrained in the future, but without the level of detail given in Mr Kelly's Witness Statements. Those statements give details as to potential impacts on the viability of the operation, and as a result the possible loss of employment for local people, and possible loss of business rates income for the Defendant. Mr Lopez invites me to disregard that detailed evidence on the basis that none of it was before the Council at the time it made the decision. In my judgement that submission must be correct. I should approach this on the basis of the information that was before the Council at the

time it made its decision. What was before the Council, was the Claimant's concerns that its business might be restricted by planning conditions on the Minerals Permission in the future.

73. The Claimant's case is that the Council has failed to consider the risk that the Claimant's business could be the subject of unreasonable restrictions by reason of conditions imposed at ROMP as a result of changes in nearby land uses, namely the grant of a residential planning permission for the Property.
74. There is no dispute that North Yorkshire County Council (which is the minerals planning authority) confirmed that the grant of planning permission for residential use at the Property would not amount to a breach of the existing minerals permission. The following appears in the OR, (having been taken verbatim from the EHO's report at [21/151]):

“Throughout this application I have been aware of the need to protect the existing quarry. I am also aware of the concerns of Cemex in this regard. I have therefore made enquiries with North Yorkshire County Council Mineral Planning with regards to the existing permissions for [the Quarry] and whether any noise limits would be applied to [the Property]. The reply from North Yorkshire County Council mineral planning advises that the conditions set out under the permission are the only conditions that they would refer to and enforce until such time that the permission may be subject to a review under the ROMP regulations or a variation, which at the present time is not applicable. They advised that the authority cannot impose new conditions which would consider any new development which may be nearer to [the Quarry] outside of these remits. The current planning permission names 2 properties where existing noise conditions apply. [The Property] is not one of those named” [14/95]
75. The Claimant's case is that neither the EHO nor the planning officer have considered the potential for the noise conditions to be expanded to include the Property on a review of the ROMP conditions, and that the risk of that happening and its consequences were not evaluated, assessed or taken into account by the Defendant.
76. The first point which Mr Lopez took in reply to this Ground was a highly technical point and one which I consider lacks merit. He referred me to the Order granting permission on this Ground, where John Howell QC sitting as a Deputy High Court Judge acknowledged that the planning officers considered the effect of the grant of planning permission on the Claimant's business pending the review of the Claimant's planning permission. Mr Lopez submitted that it follows from that that the Council has acted properly in relation to this issue in respect of the period between now and the ROMP review in 2025. He submitted that it would be open to the Defendant Council to issue a Noise Abatement Notice at any time between now and 2025, and that such a notice would address the same species of noise as would be addressed at a ROMP review. In the light of the permission order, Mr Lopez pointed out that the claimant could not argue that it would be wrong for the Council to issue an Abatement Notice at any stage during that period. He submitted that there was no qualitative difference

between an assessment of an actionable noise subject to an Abatement Notice, and the tasks to be undertaken in relation to noise on a ROMP review. Since the result of an Abatement Notice might be to require the quarrying activity to be restricted in some way in order to bring about a satisfactory noise scenario, and given that this could be done legitimately prior to the ROMP review, Mr Lopez submitted there is no qualitative distinction between that which the Claimant cannot challenge (i.e. a Noise Abatement Notice), and that which the Claimant seeks to challenge (the impact of the ROMP review).

77. Whilst I accept that the scope of an Abatement Notice would target the same noise complaint that might be of concern at ROMP, I do not accept that the two procedures necessarily produce the same result. By way of example, if the Defendant received a noise complaint, it would be entitled to consider, amongst other things, whether the issues could be properly addressed by requiring occupants of the Property to keep certain windows closed. A ROMP review is directed solely to the Claimant's operations, and not the actions of the occupants of any noise sensitive receptor. In any event, the issue here is whether the Council failed to have regard to the possible effects on the Claimant's business of a ROMP review occurring after the grant of the Permission in this case.
78. Mr Lopez' next point is that this is a wholly speculative complaint. He referred me to AP2 which shows the locations of a further four dwellings which have received planning consent since the Mineral Permission granted to the Claimant in this case. Notwithstanding those four dwellings, he pointed to the fact that the Minerals Planning Authority (the "MPA") has not caused a review to take place notwithstanding the erection of those further dwellings. He relied on the letter of North Yorkshire County Council dated 24 February 2016 which postpones the ROMP review until 3 April 2025 [25/171]. He submitted, therefore, that the indications are that the Quarry is not an issue in noise terms. On the contrary, he suggests this is good news, reflecting the way the Quarry is operating with regards to all those dwellings. Whilst Mr Lopez accepted that he cannot say that the MPA would not impose a condition, he submitted that the Claimant cannot say that the MPA would impose condition in the light of the above, and that the Claimant's Ground is purely speculative. He pointed out it is not for the EHO or the planning officer to crystal ball gaze or constrain the ROMP review. He submitted, therefore, that there was nothing more that the EHO or planning officer could do other than have regard to the fact that the powers are available to the MPA at the ROMP review.
79. In response to these points, Miss Wigley pointed out that the postponement of the ROMP review to 2025 is no indication that the MPA is content with the impact of noise in relation to the further dwellings which have been built since the Minerals Permission was granted in April 2000. AP2 was produced by the Defendant on the second day of the hearing, and whilst Miss Wigley has not objected to it, she pointed to the fact that the Claimant has had no opportunity to check the circumstances of the planning applications in respect of the four dwellings in question. She also pointed to the fact that they are all much further away from the Asphalt Plant than the Property is.
80. More significantly, she drew my attention to the statutory provisions which have resulted in the postponement of the ROMP review until April 2025. It is clear from the letter from North Yorkshire County Council, that the Claimant had requested a postponement of the periodic review of their mineral permission until 03/04/2025. It is

equally clear that the planning authority had not responded to that within three months from the date of the receipt of the request. The letter therefore confirms that in accordance with Schedules 13 and 14 of the Environment Act 1995 the request for postponement is approved. I have the relevant provisions at AB3. By paragraph 7(1) of Schedule 13 Environment Act 1995, a company such as the Claimant may apply to the Mineral Planning Authority for the postponement of the date specified for a first review. By paragraph 7(10), where the Mineral Planning Authority has not given notice of a decision on such an application within a period of three months, the Authority shall be treated as having (i) agreed to the specified date being postponed and (ii) having determined that date should be substituted as the date for the next review. Miss Wigley made the point that the postponement of the ROMP review was therefore automatic as a result of the failure of North Yorkshire County Council to respond to the Claimant's request for it to be postponed, and does not represent any substantive consideration of the merits of the position, and the noise environment in particular. She submitted that the fact that there are other properties which have been built in the vicinity has no relevance as North Yorkshire County Council has clearly not undertaken any substantive consideration in relation to the Minerals Permission since the relevant dwellings were erected or converted.

81. Miss Wigley submitted that it is not mere speculation to look at the existing Condition 17 in the Minerals Permission, and to recognise that the concerns which led to the imposition of that condition are likely to feed into a similar condition in relation to the Property. She submitted it is not outlandish speculation to consider that a similar condition would be imposed in relation to the Property which is very much closer to the Asphalt Plant than the two properties named in Condition 17. She submitted it is a clear indication of the MPA's stance and what the MPA considers necessary to protect the residential amenity near the Asphalt Plant. I accept that submission. In my judgment that is a possibility that could, and should, have been considered when considering this planning application, and the impact for Cemex under the third bullet point of Paragraph 123 of the NPPF.
82. Mr Lopez' next point related to a further document which was provided to me on the second day of the hearing. This is an elevation plan showing the elevations of the Property, with various windows shaded in yellow. This was referred to at the hearing as the yellow window plan. I shall refer to this as the "YWP", as shorthand for the yellow window plan. This was simply handed to me and there is no evidence as to its provenance. Miss Wigley accepted that the yellow highlighting on the YWP accurately indicates the windows which were required to have the trickle vents permanently closed as part of the planning permission. That is all she accepts in relation to the YWP. Mr Lopez told me that this was a document that Miss Snowball had in front of her when considering the issues in this case, but there is no evidence to support that.
83. Mr Lopez relied upon the YWP as showing that the blocked up trickle vents are all within the elevations fronting the Quarry. The property is set at an angle and both the north-west and south-west elevations front the Quarry. Within each of the habitable bedrooms, there are windows on other elevations away from the Quarry where the trickle vents are not blocked up. Mr Lopez submitted that there is no evidence that opening of windows in those elevations would cause an actionable noise event. He submitted, therefore, that the EHO was entitled to exercise her own planning judgement

and to conclude that there would be no noise issues on the elevations away from the Quarry, and that there is no merit in Ground 4.

84. Miss Wigley submitted that Mr Lopez had made an enormous leap from the Apex Report to the submission that because one window in each bedroom was not required to have the trickle vent removed, it meant that window could be opened without any unacceptable noise effects. In support of this she pointed to calculations in the Apex Report. In particular, she drew my attention to the fact that at Paragraph 8.21 in the section dealing with “calculated internal noise levels”, the cumulative impact is considered through all windows to the room under assessment. In the table at Paragraph 8.24, the upper limit of internal noise levels in the first column is right up against the limit and is calculated quite clearly after mitigation levels including both the glazing and mechanical ventilation. The fact that those items are included is made clear in Paragraph 8.25. In those circumstances, Miss Wigley submitted that Mr Lopez cannot assert that it is fine to open the non-highlighted windows on the YWP without there being any unacceptable noise. I accept that submission.
85. Further, and in any event, Miss Wigley submitted that there is no evidence at all that any of this was considered at the time by the EHO. Miss Wigley made the points again about trickle vents being background ventilation and not as a substitute for purge ventilation, a submission I have already dealt with and accepted.
86. I accept the points made by Mr Lopez that there is no power or option for the EHO to second guess what the MPA would do. Mr Lopez suggested that when the MPA, North Yorkshire County Council, replied to the EHO indicating that there would be no breach of the current planning restrictions, there is nothing to suggest that the MPA was not also forward-looking about conditions it might impose. He pointed to the fact that North Yorkshire County Council did not object to the grant of planning permission in this case. It does not seem to me to be necessarily within the remit of Yorkshire County Council to object to the planning application. However, what clearly was within the remit of the EHO and the Defendant was to consider the third bullet point in NPPF paragraph 123, and to recognise that the Claimant should not have unreasonable restrictions put on them because of changes in nearby land uses since the business was established.
87. I recognise that there will be matters of planning judgement in considering what restrictions might be imposed in the future, and whether such restrictions might amount to unreasonable restrictions on the Claimant in the future. If it was clear from the documents that these matters had been considered, that would be one thing. However, in my judgment, whilst the documents do show that the EHO, and through her the planning officer, recognised that the quarry business needed protection, I am not satisfied that any consideration was given to the likely impact that the grant of planning permission for the Property might have on a ROMP review. Whilst in her Witness Statement Natalie Snowball asserts that all of these matters were considered, I am of the view that amounts to evidence seeking to plug the gaps in the decision-making process. I regard it as of no assistance to me.
88. Furthermore, Natalie Snowball’s evidence is to the effect that the future position on a ROMP review was considered in the context of all the information before her including “... the adequacy of the proposed development in noise impacts and attenuation terms...” [28/199, paragraph 5]. Given the conclusions I have reached in relation to

Ground 3, and, in particular, the failure to have regard to the PPG relating to the reliance on keeping windows closed as a mitigation strategy, it follows, in my judgment, that failure would inevitably also feed through into the assessment which Natalie Snowball alleges she has undertaken. I recognise, as Mr Lopez repeatedly reminded me, that this is not a reasons challenge or an irrationality challenge. I equally appreciate that the comment I have made in this paragraph goes to the issue of reasons, but those being reasons which are provided ex post facto in the form of a Witness Statement. Had those reasons been provided in the OR, no doubt they would have been the subject of a challenge. As with Ground 3, there is no reasons challenge here precisely because the challenge is that nowhere in the OR is there any indication that the issues have been considered.

89. In my judgement Ground 4 is also made out. I am satisfied that the EHO set out to consider not only the current position as regards the Minerals Permission, but also to consider the future impact on the Quarry. However, based on the EHO reports and the OR, there is nothing to suggest that any consideration was in fact given as to whether a condition similar to Condition 17 of the Minerals Permission was likely to be imposed at ROMP, or that any consideration was given as to the risks such a condition would pose to the future operation of the Claimant's business, all matters which should have been considered as part of the consideration under paragraph 123 NPPF. I further note, in passing, that the EHO mentioned the 55dB being a limit in a fairly old permission and the absence of a tighter night time condition such as 42dB [38/440]. This formed no part of the Claimant's case before me and forms no part of my decision in this matter, but it appears nowhere in the consideration of these issues.
90. In relation to Ground 4, again I do not consider Section 31(2A) Senior Courts Act 1981 assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the likely future impact of a similar planning restriction to Condition 17 of the Minerals Permission been considered, it might be the case that this would have informed the adequacy of proposed noise mitigation measures. It could be the case that mechanical ventilation might have been required as recommended in the Apex Report, or even that mitigation going to the physical building and/or its layout might have been considered. It is even possible that the conclusion might have been reached that the grant of planning permission would not be appropriate. These are all matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment of my own.

Ground 5

91. Ground 5 is the alleged irrational failure to take into account all relevant considerations when deciding not to include all the conditions recommended by the IP's own noise consultant.
92. The Claimant's case is that the conditions imposed in the Permission should have included conditions to ensure that the standard of glazing for the future was maintained and that those windows where the trickle vents were to be blocked up, could not have trickle vents reintroduced. The Claimant's case is that having required these factors to be included as noise mitigating measures, it is irrational not to include conditions in the Permission to ensure the mitigation measures are retained in place for the future.

Ground 5 is drafted to include an irrationality challenge for the failure to include mechanical ventilation as a condition, but it seems to me that more properly forms part of Ground 3. This Ground is really based on the premise that even if the Permission was unobjectionable on the application of PPG, nevertheless there is still a challenge based on the failure to incorporate appropriate conditions. The oral submissions were based on the failure to include conditions relating to glazing and the retention of the blocked trickle vents.

93. Miss Wigley submitted that there was no consideration by the Council as to the retention of the specified glazing properties for the windows, nothing to keep the removal of the trickle vents in the yellow highlighted windows in place, and nothing to prevent the introduction of new trickle vents. She submitted that the EHO's report and the OR are silent on these matters, showing that there has been no consideration as to how to secure that these requirements stay in place. She submitted that looking at the documents there is a clear lacuna in failing to ensure that the mitigation measures endure.
94. The Defendant seeks to rely on Condition 3 of the Permission which abrogates the usual permitted development rights, and requires what would otherwise be permitted development to be the subject of a formal application for planning permission. The reason given for that Condition is that it is in the interests of the appearance of the proposed development and to reserve the rights of the local planning authority with regard to those matters [11/80]]. Natalie Snowball deals with this in her Second Witness Statement where she asserts that any work involving the replacement of the existing windows or glazing, the introduction of new opening trickle vents, the removal of blocked up trickle vents, or the insertion of new windows not incorporating necessary noise mitigation measures required under condition 4 would require there to be a full planning application by reason of Condition 3 of the Permission. She expresses her opinion that any such works would materially affect the external appearance of the building, and so would amount to development. She asserts that the question of whether proposed works would materially affect the external appearance of the building is a question of planning judgement [29/206; paragraphs 6-12]. In reliance on that, Mr Lopez submitted that Ground 5 is wholly misconceived and must fail.
95. In response to this Miss Wigley submitted that a change of the windows would not amount to development. She submitted that I should disregard the evidence of Natalie Snowball on these issues for the following reasons. Firstly, she submitted that this is ex post facto rationalisation which should not be permitted. Secondly, she relied upon the fact that the reasons now suggested are different from the stated reason on the planning decision notice which relates to the appearance of the building and has nothing to do with noise mitigation measures. She further pointed to the fact that whilst in her first Witness Statement Natalie Snowball does rely on Condition 3 of the Permission, nowhere in that statement does she explain how she considers replacement windows would be development in any event. Miss Wigley submitted that Miss Snowball's thought processes were eked out over the course of the Witness Statements and are inherently unreliable. None of these reasons is given in the reports and she invited me to disregard them.
96. In response to this Mr Lopez submitted that these are quintessentially matters of planning judgement. He also pointed to Miss Snowball's evidence that the trickle vents had been permanently blocked and cannot be reopened. He denied that Condition 3 was

limited solely to the appearance of the building, pointing to the second part of Condition 3 which refers to the reservation of the relevant rights to the local planning authority with regard to the permitted development matters. I accept that submission in relation to the reasons given for the condition. He submitted that if I accept that submission, there is no reason to attach less weight to the evidence of Miss Snowball on this matter.

97. It is right that I should record that I mentioned that I was aware, from sitting on other cases, that not all planning officers necessarily regard a change of windows as amounting to development. I therefore suggested that a future planning officer might not take the same view as Miss Snowball as to whether windows amounted to development and whether Condition 3 applied. In response to that Mr Lopez pointed out that any planning decision taker imposing a condition cannot unduly or improperly bind the authority or other planning officers moving forwards. The planning decision taker must simply exercise his or her own planning judgement. Mr Lopez submitted that any concern I might have that a future person might reach a different view is irrelevant. It is a matter for the planning judgement of the relevant officer at the relevant time. It seems to me that must be correct. He further submitted that for this challenge to succeed, the Claimant would have to say that the planning officer's judgement in this case that a change to the windows would amount to development is irrational. He pointed to the fact that there is no evidence put forward on behalf of the Claimant to suggest that such a conclusion is irrational.
98. Whilst accepting that she has no evidence on that point, Miss Wigley did not accept that it was necessary. She submitted that it was plainly irrational for Miss Snowball to assert that any works to replace windows, for example simply with different glazing, or simply with a different slot vents, would always materially affect the external appearance of the building. She submitted that is irrational, and that Miss Snowball's evidence on this is simply not credible. She submitted that this simply was not considered at the time of the grant of the Permission and there no decision at all was taken which was designed to retain the mitigation measures for the future. She submitted it is not acceptable to rely on the convoluted evidence of Miss Snowball in seeking to plug the gaps, particularly where such a serious issue of noise exists.
99. In response to questions from me as to whether, rather than this being an issue of planning judgement, it was a matter of law as to the construction of Section 55 Town & Country Planning Act 1990 which defines development, Miss Wigley reminded me that if a future occupier wanted to assert that a change of windows would be lawful development, the procedure would be for the occupier to make an application for a Certificate of Proposed Lawfulness on the local planning authority. It would then be for the local planning authority to decide whether that amounted to lawful development, and any appeal against their decision would lie to a Planning Inspector.
100. Having considered the submissions, I do not consider I could properly conclude that Condition 3 is not capable of covering any future work in relation to the windows given that there is plainly a matter of planning judgement to be made as to whether or not any works proposed amount to lawful development. I recognise that Miss Snowball's evidence is once again ex post facto rationalisation. However, even if the need to keep the mitigation measures for the future was not addressed by the decision-makers, if there is a route by which they can properly address those issues in the future, then the fact they failed to consider them would make no difference.

101. I have come to the conclusion that Ground 5 is made out in that there is nothing on the face of the documents to suggest that any consideration was given to the retention of those noise mitigation measures which the EHO and the planning officer thought were necessary and sufficient in this case. I do consider that the evidence of Natalie Snowball is evidence attempting to plug the gaps in this case. However, in relation to this Ground, I would not grant relief on the basis that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. I consider that the fact that there are matters of planning judgement involved in the application of Condition 3 of the Permission means that Condition 3 can be used as a method to secure the retention of mitigation measures in the future. Indeed, it allows for a degree of flexibility in the future and for the imposition in future applications of measures which might not be available now, but which become available with advancements in technology, development materials and the like.
102. In summary, I reject Grounds 1 and 2. I accept Grounds 3, 4 and 5 are proved. I decline to give any relief on Ground 5 on the basis that Section 31 (2A) Senior Courts Act 1981 applies in relation to that Ground. However, I also find that Section 31 (2A) has no application when considering Grounds 3 and 4. It follows that the planning permission in this case must be quashed.