Case No: CO/639/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 2782 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

Tewkesbury Borough Council	**Claimant**
- and -	
Secretary of State for Housing Communities and Local Government	**Defendant**
- and –	
J J Gallagher Limited and Richard Cook	**Interested Parties**

- -
- -

Josef Cannon (instructed by **One Legal**) for the **Claimant**
Tim Buley QC (instructed by **Government Legal Department**) for the **Defendant**
Killian Garvey (instructed by **Shoosmiths LLP**) for the Interested Party
Hearing dates: 21st and 22nd July 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE DOVE

Mr Justice Dove :

1. On 25th October 2019 the interested party applied to the claimant for outline planning permission for the erection of up to 50 dwellings with associated site works, open space, car parking and site remediation in respect of a site described as Land off Ashmead Drive, Gotherington. The application was refused by the claimant on the 16th June 2020 and the interested parties appealed collectively. The appeal was conducted by way of the public inquiry procedure, and the Inspector appointed by the defendant to determine the appeal issued her decision letter on the 12th January 2021, in which she allowed the appeal and granted planning permission.

2. The claimant's application is made under section 288 of the Town & Country Planning Act 1990 and seeks to quash the Inspector's decision. The claimant is represented by Mr Josef Cannon, the defendant by Mr Tim Buley QC and the interested party by Mr Killian Garvey. The attribution of submissions set out below should be read accordingly. I am very grateful to all counsel and also to their legal teams for their extremely helpful written and oral submissions and, in particular, for the thoughtful preparation that went into a focused hearing bundle which provided simply the essential documentation necessary for the purpose of the hearing. A tribute to the care which had gone into the preparation of the hearing bundle was that (with the exception of some material which emerged subsequent to its preparation) there was no need to delve into any other documentation.

The facts

3. The requirement to demonstrate a five-year housing land supply is a central feature of national planning policy in relation to residential development. The details of that policy are set out below, but suffice to say it was an issue which the claimant and the interested parties considered should be addressed as part of the merits of the appeal proposal. It was an agreed position that at the time of the public inquiry the claimant could not demonstrate that there was a five-year supply of housing in their area.

4. The issue between the claimant and the interested parties for the purposes of the appeal was the extent of the shortfall in the five-year housing land supply. There were individual elements to that dispute, but for the purposes of the present case the key question was whether or not past oversupply of housing measured against an annual requirement could be taken into account when calculating the current housing land supply.

5. The nature of the dispute as to whether it could be taken into account or not was helpfully crystalised for the purposes of the debate at the public inquiry in the Statement of Common Ground ("the SOCG"). The relevant passages from the SOCG setting out the differences between the parties provided as follows:

> "**Use of 'Oversupply' as part of Housing Land Supply Calculation**
>
> 1.4 It is the Appellants' position that 'oversupply' from the previous monitoring years should not be included within the Council's five-year housing land supply calculation. This is consistent with the Secretary of State appeal decision at

Oakridge, Highnam (Tewkesbury Borough Council Reference: 16/00486/OUT; Appeal Reference: APP/G1630/W/17/3184272) dated 20th December 2018.

1.5 The Council do not agree with that approach and considers that past over delivery can be credited towards the five-year supply. That approach was also accepted, without comment, in earlier appeal decisions prior to the Highnam decision. There is no express policy on this issue in the Framework, although the Planning Practice Guidance contains guidance that supports the Council's approach. There is no case law that directly addresses this issue. Moreover, no conclusions as to the interpretation of planning policy in an appeal decision is binding.

…

1.8 In terms of how past shortfalls and past over supply can be addressed, paragraph 031 (Reference ID: 68-031-20190722) explains that the level of deficit or shortfall will need to be calculated from the base date of the adopted plan and should be added to the plan requirements. Paragraph 032 (Reference ID: 68-032-20190722) follows and states that where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years.

1.9 Contrary to the Appellant's position, the Council is of the view that its approach is consistent with the Framework. This is for the following reasons.

1.10 First, when calculating five-year supply, the principle of adjusting the annual requirement for future years, by reference to past years' delivery rates, is clearly established by national policy: see the approach expressly advised in respect of past years' under-delivery (paragraph 31 above). A symmetrical approach to past years' over-delivery is consistent with policy.

1.11 Secondly, the paragraph from the Planning Practice Guidance cited above at paragraph 34 supports the Council's approach. Notwithstanding the Council's current housing land supply position, the Council's area is one of those areas that previously 'delivered more completions than required' and 'this additional supply' (i.e. the surplus) 'can be used to offset any shortfalls…' The words 'against requirements from previous years' used in the Guidance, when read in the context of the heading for this paragraph, must be taken to mean 'the requirements delivered in previous years'. The heading makes it clear that the paragraph is intended to address the relationship between past over-supply and planned (i.e. future) requirements.

> 1.12 Thirdly, reliance upon policy to boost significantly the supply of homes, and on policy stating that the five-year requirement is a minimum, are nothing to the point. The policy objective to boost supply in paragraph 59 of the Framework is linked to the need for a sufficient amount and variety of land, and not the calculation of a five-year supply in a development control context."

6. It was the claimant's contention in the SOCG that they were able to demonstrate a five-year housing land supply of 4.37 years if the over-supply from previous years within the plan period was taken into account. It was the interested parties' position that removal of the oversupply would reduce the five-year housing land supply to 2.4 years; there were disputed sites included in the housing supply and once those were removed the housing supply was further reduced, in the opinion of the interested parties, to 1.84 years.

7. Shortly prior to the completion of the SOCG, and undoubtedly forming part of the background to it, the claimant published its Five-year Housing Land Supply Statement in October 2020. This document related the housing supply to the housing requirement derived from the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy ("the JCS"). As set out in greater detail below, the JCS provided a total housing requirement for the claimant of 9,899 dwellings for the plan period 2011 to 2031, equating to a need to provide 495 dwellings per annum. The Five-year Housing Land Supply Statement demonstrated that over the first nine years of the plan period housing completions in the claimant's administrative area had exceeded the housing need when measured at 495 dwellings per annum by 1,115 dwellings. In other words, the requirement over nine years measured at 495 dwellings per annum amounted to 4,455 dwellings, and during that period 5,570 dwellings had been completed. This over-supply of housing was taken into account in the Five-year Housing Land Supply Statement in the calculation of the five-year supply, giving rise to the claimant's figure in the SOCG of 4.37 years, or an under-supply of 180 dwellings.

8. The claimant made closing submissions in writing to the Inspector at the public inquiry which included submissions in relation to the housing land supply position. In that regard the claimant's submissions recorded as follows:

> "**10. Housing Land Supply.** Currently the Council cannot demonstrate a 5-year housing land supply. The issue before the Inquiry, which was considered at the round table session, was the extent of the shortfall. There is a range with the appellant claiming the Council can only demonstrate 1.82 years whereas the Council claims it can demonstrate 4.37 years. The Council acknowledges that the shortfall, on its own figures, is significant.
>
> The basis for the divergence between the two sides is how previous over delivery against the HLS is taken into account. The Appellants claim it cannot be taken into account, whereas, the Council claims it can be and should be.
>
> The Council's case is that taking account of previous oversupply is not against either the requirement of paragraph 73 of the NPPF

> and is consistent with PPG. In particular, paragraphs 31 and 32. The PPG is silent on over supply but provides advice on under supply. Paragraph 32 "Where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years" (Ref ID 68-032-20190722). The Council submits that logic implies a symmetrical approach would follow and therefore previous over supply should be credited against any future under supply over the 5-year period.
>
> If this approach cannot be taken previous oversupply is, in effect, lost. The houses are built, and occupied, but in effect disappear. This is not what the NPPF intended as it could amount to a perverse incentive to restrict supply in early years of the period to ensure there is no shortfall in the latter years. This would work against the desire to boost the supply of homes. (paragraph 59 NPPF).
>
> Lastly, there is nothing within the NPPF nor the PPG to stipulate that this approach cannot be taken."

9. In determining the appeal, the Inspector had to address a number of material considerations related to the development plan, the interests of the AONB and the impact of the proposals on the village of Gotherington. Amongst the matters assessed by the Inspector was the extent of the shortfall in the five-year housing land supply.

10. In the light of the nature of the issues that the Inspector had to address, and the contentions raised by the parties in this case, it is necessary to set out her conclusions in respect of the housing land supply issues in some detail. Having set out the differences between each party's assessment of the five-year housing land supply she addressed the question of the additional or oversupply of housing, and the role it might play in calculating the five-year housing land supply, in the following paragraphs:

> "*Additional supply*
>
> 58. The Council indicate that their approach to incorporating additional supply is consistent with Planning Practice Guidance (PPG) paragraph 32. This states that "*where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years*". However, paragraph 73 of the Framework states "*LPAs should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies*".
>
> 59. The policy in the Framework makes no allowance for subtracting additional supply from the annual requirement. Moreover, whilst the guidance in the PPG enables LPAs to take additional supply into account, there is no requirement to do so.

> It is not a symmetrical approach to dealing with undersupply as advocated by the Council.
>
> 60. PPG paragraph 32 details that the additional supply can be used to offset shortfalls against requirements from previous years. Therefore, shortfalls against requirements from previous years would be necessary, in order to take account of any additional supply. The requirement from previous years, being those since the development plan was adopted, is 495 dwellings per annum (dpa). In the 3 years since adoption, there has been an overall surplus of 797 dwellings, and since the base date there has been an overall surplus of 1,115 dwellings. Therefore, there is no shortfall against requirements from previous years which could conceivably be offset.
>
> 61. Furthermore, for a site to be considered deliverable, it should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. Housing already delivered cannot possibly meet this definition.
>
> 62. The Council's argument that the loss of additional housing delivery would have significant implications for plan making, potentially resulting in Council's holding back sites and restricting sites, is unfounded. This is because it would be unreasonable to refuse planning permission for housing if there had been additional supply, bearing in mind the Government's objective of significantly boosting the supply of homes. Additionally, Policy SP1 of the JCS requires at least 9,899 new homes. There is no maximum number.
>
> 63. Whilst it is clear that housing above the annual requirements has been delivered in the area and housing supply has been boosted in line with the Framework; it is my view that additional supply is not a tool that can be used to discount the Council's housing requirement set out in its adopted strategic policies. Consequently, the annual requirement should be 495 dpa as set out in the adopted strategic policies, and the future supply should reflect this. Therefore, the past additional supply should be removed from the 5-year housing requirement. As detailed by the appellant, this would reduce the housing land supply to 2.4 years."

11. The Inspector then addressed the disputed sites and concluded that neither of them could properly be incorporated within the assessment of the five-year housing land supply. The Inspector then went on to assess evidence in relation to future supply before reaching her conclusion in respect of the overall issue. She reasoned these matters as follows:

> "*Future supply*

> 68. Aside from the 2 disputed sites and windfall developments, there is only one other site beyond years 1 and 2 in the trajectory which is predicted to deliver 5 dwellings. Notwithstanding my findings on the above sites, this is a grave situation.
>
> 69. The Council asserts that the eLP contains numerous housing allocations, which will feed into the supply following adoption. However, at the current time, the plan is of limited weight and these allocations should not be included in the trajectory. Furthermore, the eLP details that it is not the role of the Plan to meet the shortfall identified by the JCS, but it could contribute towards meeting some of this housing need.
>
> 70. The JCS was adopted with a shortfall, which was to be remedied by an immediate review on the plan. It is now 3 years later and there is little progress towards this.
>
> 71. The trajectory does not include sites which have a resolution to permit awaiting planning obligations. I also have very little evidence to indicate if any of these would come forward in the next 5 years. There are also, it is asserted, numerous major applications for housing being considered. Nonetheless, as these sites are not been included in the trajectory, I have little evidence whether these would be deliverable.
>
> 72. Therefore, despite the Council's arguments, the future supply in the borough, at the current time is deeply concerning.
>
> *Conclusion on housing land supply*
>
> 73. Considering my conclusions on the additional supply and the disputed sites, the housing land supply would reduce to 1.82 years. This reflects the appellant's conclusions. Additionally, the lack of supply beyond year 3 is deeply concerning; and, even if I had taken account of the additional supply, the Council would still not have a 5-year housing land supply and the past trend of additional supply is not projected to continue."

12. The Inspector's overall conclusions in relation to the planning balance drew the threads of her assessment together in the following terms:

> "**Planning Balance**
>
> 90. The proposal would conflict with the spatial strategy of the area and the NDP. It is clearly not plan-led development. However, given my conclusions on the housing land supply, the policies which govern the spatial strategy and housing development in the area are deemed out of date by Framework paragraph 11 d). Because of the very poor housing land supply position, this indicates that the spatial strategy is not effective and therefore these policies are of limited weight.

> 91. There would be limited harm to landscape character and appearance of the area and the setting of the AONB, and moderate harm to views from the AONB. This would conflict with the JCS, NDP, LP, Framework 172 and the MP in this regard. However, the harm is limited for the purposes of the character and appearance of the area and this attracts limited weight against the proposal. Nevertheless, I give great weight to the moderate harm to the AONB as required by the Framework.
>
> 92. In favour of the development is the provision of housing in general, affordable housing, net gains in biodiversity and the delivery of onsite facilities that would contribute towards the village's social wellbeing. The delivery of affordable and market housing would be a very significant benefit, of overriding importance when considering the chronic housing land supply position. The net gains in biodiversity are of considerable weight and the onsite public open space would be of moderate weight. Additionally, there would be economic benefits during construction and from the additional residents that would contribute towards spending in the area. This is of moderate weight.
>
> 93. Framework paragraph 11 d) requires permission to be granted unless [i.] the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed. Even giving great weight to the moderate harm to the AONB, it is my view that this does not provide a clear reason for refusing the development.
>
> 94. Taking account of all the above, the adverse impacts of granting planning permission would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. As such, the material considerations indicate a decision other than in accordance with the development plan."

13. Prior to the appeal with which this case is concerned there had been an earlier appeal made by the interested parties in relation to a similar application made on 2nd August 2016 and refused on 21st February 2017. The interested parties appealed, and the matter was determined following a hearing on the 7th December 2017. The appeal was dismissed in a decision letter dated 27th April 2018. There was an issue in that appeal in relation to housing land supply, related in particular to housing delivery. The Inspector set out the dispute and his views in the following paragraphs:

> "*Other matters – housing land supply, heritage and highways*
>
> 38. In relation to housing land supply there are a number of areas of agreement between the main parties. Most importantly the housing requirement as set out in the JCS is agreed (9,899) along with completions. The Borough has an identified shortfall, as set

> out in the JCS Inspector's report, of around 2,400 dwellings against Objectively Assessed Need.
>
> 39. The main difference is how to deal with delivery. The Council's position is to deal with this over 5 years whilst the appellant advocates delivery over the whole plan period. The parties agreed that there is no established approach, but I have some sympathy with the Council's position which is that the houses in question are largely already in existence, and that to spread delivery over the whole plan period would be an artificial approach. There is also a difference related to build out rates.
>
> 40. The appellants have evidenced a 4.19 year supply based on their assessment of the housing target, surplus and supply, with a 20% buffer and the oversupply addressed across the plan period. The appellant has also calculated the position based on the Council's housing target and supply figures, with the oversupply spread across the plan period and a 20% buffer. This gives a 4.94 year supply. In either case, on the appellants' figures, the authority does not have a five-year housing land supply.
>
> 41. The authority considers it has a 5.3 year supply (applying a 20% buffer) or 6.06 years with a 5% buffer. The Council's evidence, especially the Tewkesbury Borough Housing Land Supply Statement (2017), represents a robust evidence base which persuasively demonstrates more than a 5-year housing land supply."

14. The Inspector set out his view that the JCS was a robust and recently adopted plan and ultimately concluded that a five-year housing land supply had been demonstrated and that the "tilted balance" from the National Planning Policy Framework ("the Framework"), a concept discussed below, was not engaged. The appeal was dismissed.

Relevant policy

15. National Planning Policy is contained within the Framework at chapter 5. The introductory paragraphs to this chapter provide as follows:

> "5. Delivering a sufficient supply of homes
>
> 59. To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay.
>
> 60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national

> planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for."

16. The Framework goes on to describe the need for diversity in size, type and tenure of housing to ensure that all of the communities' housing needs are met. The Framework then describes the approach to be taken in relation to identifying a housing requirement and land for housing in the following terms:

> "65. Strategic policy making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need (and any needs that cannot be met within neighbouring areas) can be met over the plan period. Within this overall requirement, strategic policies should also set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations.
>
> 66. Where it is not possible to provide a requirement figure for a neighbourhood area, the local planning authority should provide an indicative figure, if requested to do so by the neighbourhood planning body. This figure should take into account factors such as the latest evidence of local housing need, the population of the neighbourhood area and the most recently available planning strategy of the local planning authority.
>
> Identifying land for homes
>
> 67. Strategic policy-making authorities should have a clear understanding of the land available in their area through the preparation of a strategic housing land availability assessment. From this, planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability, and likely economic viability. Planning policies should identify a supply of:
>
> (a) specific, deliverable sites for years one to five of the plan period; and
>
> (b) specific, deliverable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15 of the plan."

17. In respect of maintaining an appropriate housing land supply the Framework provides as follows in paragraphs 73 and 74:

> "Maintaining supply and delivery

> 73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:
>
> (a) 5% to ensure choice and competition in the market for land;
>
> (b) 10% where the local planning authority wishes to demonstrate a five-year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or
>
> (c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply.
>
> 74. A five-year supply of deliverable housing sites, with the appropriate buffer, can be demonstrated where it has been established in a recently adopted plan, or in a subsequent annual position statement which:
>
> a) has been produced through engagement with developers and others who have an impact on delivery, and been considered by the Secretary of State; and
>
> b) incorporates the recommendation of the Secretary of State, where the position on specific sites could not be agreed during the engagement process."

18. The failure to demonstrate a five-year supply of housing land has policy consequences in terms of the provisions of the Framework. In particular, paragraph 11, which addresses the presumption in favour of sustainable development, together with footnote 7 of the Framework that requires that applications are determined through an assessment using what is known in common parlance as the tilted balance in cases where a five year land supply cannot be demonstrated. The relevant provisions of the Framework in this respect are as follows:

> "The presumption in favour of sustainable development
>
> 11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> …

> For decision-taking this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date [footnote 7], granting permission unless:
>
> i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
>
> ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
>
> …
>
> Footnote 7: This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer as set out in paragraph 73)"

19. Additional assistance in relation to the application of the Framework can be derived from the defendant's Planning Practice Guidance ("the PPG") in relation to the how an undersupply in the earlier years of the plan period should be addressed. The PPG provides the following guidance:

> "How can past shortfalls in housing completions against planned requirements be addressed?
>
> Where shortfalls in housing completions have been identified against planned requirements, strategic policy-making authorities may consider what factors might have led to this and whether there are any measures that the authority can take, either alone or jointly with other authorities, which may counter the trend. Where the standard method for assessing local housing need is used as the starting point in forming the planned requirement for housing, Step 2 of the standard method factors in past under-delivery as part of the affordability ratio, so there is no requirement to specifically address under-delivery separately when establishing the minimum annual local housing need figure. Under-delivery may need to be considered where the plan being prepared is part way through its proposed plan period, and delivery falls below the housing requirement level set out in the emerging relevant strategic policies for housing.

> Where relevant, strategic policy-makers will need to consider the recommendations from the local authority's action plan prepared as a result of past under-delivery, as confirmed by the Housing Delivery Test.
>
> The level of deficit or shortfall will need to be calculated from the base date of the adopted plan and should be added to the plan requirements for the next 5-year period (the Sedgefield approach), then the appropriate buffer should be applied. If a strategic policy-making authority wishes to deal with past under delivery over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal.
>
> Where strategic policy-making authorities are unable to address shortfalls over a 5-year period due to their scale, they may need to reconsider their approach to bringing land forward and the assumptions which they make. For example, by considering developers' past performance on delivery; reducing the length of time a permission is valid; re-prioritising reserve sites which are 'ready to go'; delivering development directly or through arms' length organisations; or sub-dividing major sites where appropriate, and where it can be demonstrated that this would not be detrimental to the quality or deliverability of a scheme.
>
> Paragraph: 031 Reference ID: 68-031-20190722
>
> Revision date: 22 July 2019
>
> How can past oversupply of housing completions against planned requirements be addressed?
>
> Where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years.
>
> Paragraph: 032 Reference ID: 68-032-20190722
>
> Revision date: 22 July 2019"

20. The relevant element of the development plan for present purposes is the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy 2011 – 2031 which was adopted in December 2017 ("the JCS"). Part 3 of the JCS set out its key spatial policies for the relevant area. Policy SP1 identified that in relation to housing the claimant should provide "at least 9,899 new homes". This figure was reiterated in policy SP2.

21. Within the JCS at paragraph 7.1.36 a chart was provided which set out year by year the volume of completions and projected completions measured against an annual housing requirement from the JCS of 495 dwellings. This assessment, which included forecasting for future years, was said to demonstrate "sufficient housing land supply, including a five-year supply, until the middle of the plan period at 2024/25 where there

is a shortfall against the cumulative requirement". The purpose of noting this was to identify that this would "enable adequate time to undertake an immediate review of Tewkesbury's housing supply while maintaining a five-year supply." The immediate review required by the JCS is currently in process.

The law

22. The decision whether to grant planning permission is principally governed by section 70 of the Town and Country Planning Act 1990. Section 70(1) provides the power to approve or refuse planning permission, and section 70(2) provides that when dealing with an application for planning permission the local planning authority shall have regard to the provisions of the development plan so far as material and any other material considerations. For present purposes the Framework is one such material consideration. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that the determination of a planning application shall be in accordance with the development plan unless a material consideration indicates otherwise.

23. The question of the interpretation of planning policy, whether contained within the Framework or the development plan (or other less formal policy) is a question of law for the court: see *Tesco Stores v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983. When considering questions of interpretation, it is important to recognise the nature and status of planning policy. Planning policy should not be construed as if it were a statute or contract, or some other similar legal instrument. As Lord Reed observed in paragraph 19 of *Tesco Stores,* development plans are often full of broad statements of policy which may superficially conflict with each other and require to be balanced in order to undertake the exercise of planning judgment on any given decision against the background of the factual circumstances of the case under consideration. These points were reemphasised by Lord Carnwath in *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37; [2017] 1 WLR 1865, in which he noted that, in addition to the role of the court not being overstated, the role of specialist planning inspectors should be respected in relation to the interpretation and understanding of planning policy.

24. When considering the correct interpretation of planning policy the context of the policy, and in particular its subject matter and objectives, will undoubtedly be of considerable importance and assistance. It will also frequently be necessary to consider the wider policy framework within which the policy being interpreted sits, and to which it therefore relates as part of the context. This point was emphasised by Lord Reed in *Tesco Stores* at paragraph 18.

25. In understanding the role of the court it is essential to distinguish between what is properly the interpretation of a policy and, by contrast, what in truth amounts to its application. Whilst the interpretation of policy is, where it is required, a question for the court, the application of a policy will be a matter of planning judgment for the decision maker and therefore, subject to the limits of rationality, not a matter for the court. In paragraph 21 of Lord Reed's judgment in *Tesco Stores*, and paragraph 24 of Lord Carnwath's judgment in *Hopkins Homes*, it was emphasised that a question of interpretation arose in *Tesco Stores* on the basis that the question of whether the word "suitable" meant "suitable for the development proposed by the applicant" or, alternatively, "suitable for meeting identified deficiencies in retail provision in the area". This was a question of the interpretation of the term "suitable" which arose logically prior to the exercise of judgment in respect of a site's suitability measured

against the correct understanding of the language of the policy. In short, the question of interpretation related to resolving an understanding of the language of policy prior to the application of planning judgment in relation to the particular facts of the case.

26. In addition to this understanding of the nature of the interpretation of planning policies, as set out above it needs to be borne in mind that policies will often include broad statements or broad terms which, as Lord Carnwath observed, "may not require, nor lend themselves to, the same level of legal analysis" as the word suitable in the *Tesco Stores* case. Further, whilst an important aspect of the interpretation of planning policy is that it is to be understood and applied by the public for whose benefit the policy is developed, it is also produced to be understood and applied by planning professionals, and as such will on occasion contain planning concepts or terms of art.

27. An example of this would be the use of the term "openness" in Green Belt policy, which is a policy concept introduced and developed by planning professionals and policy makers. As was noted by Lord Carnwath in paragraphs 22 and following of his judgment in *R (Samuel Smith Old Brewery) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, "openness" is an example of the kind of broad policy concept which was being referred to in *Tesco Stores* set out above. At paragraph 23 of his judgment in the *Samuel Smith* case Lord Carnwath expressed his surprise in relation to the legal controversy which was to be discerned in the authorities with respect to the relationship between openness and visual impact. At paragraph 39 of his judgment Lord Carnwath concluded, having reviewed the authorities, that "the matters relevant to openness in any particular case are a matter of planning judgment not law". Thus, it is necessary to observe that within planning policy there will be references to broad policy concepts which are themselves the signal for the need for the application of planning judgment rather than amounting to terms requiring interpretation by lawyers.

28. Returning to the question of the five year housing land supply, as set out above, on the facts of the present case there was no dispute as to the failure of the claimant to demonstrate a five year supply of housing: the issue in question was the extent of such a shortfall. The potential materiality of the extent of any shortfall in the five year housing land supply was the subject of examination by the Court of Appeal in *Hallam Land Management Ltd v SSCLG* [2018] EWCA Civ 1808; [2019] JPL 63. Lindblom LJ gave consideration to the policies in relation to housing need and housing land supply in the following terms:

> "50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in the NPPF paras 47 and 49 and the corresponding guidance in the Planning Practice Guidance ("the PPG"). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definition or footnotes, sometimes not (see *Oadby and Wigston BC v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040 at [33]; *Jelson Ltd* at [24] and [25]; and *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 at [36] and [37]; [2018] JPL 398). It is

> not the role of the court to add or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.
>
> 51. Secondly, the policies in the NPPF paras 14 and 49 do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet.
>
> 52. Thirdly, the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker. It will not be the same in every case. The parties will sometimes be able to agree whether or not there is a five-year supply, and if there is a shortfall, what that shortfall actually is. Often there will be disagreement, which the decision-maker will have to resolve with as much certainty as the decision requires. In some cases, the parties will not be able to agree whether there is a shortfall. And in others, it will be agreed that a shortfall exists, but its extent will be in dispute. Typically, however, the question for the decision-maker will not simply be whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule apples. But it seems implicit in the policies in the NPPF paras 47, 49 and 14 that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given to both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant "non-housing policies" in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in *Hopkins Homes Ltd*. It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land."

29. Adding observations of his own in relation to these matters Davis LJ observed as follows:

> "81. Clearly a determination of whether or not there is a shortfall in the five-year housing supply in any particular case is a key

> issue. For if there is then the "tilted balance" for the purposes of the NPPF para.14 comes into play.
>
> 82. Here, it was common ground that there was such a shortfall. That being so, I have the greatest difficult in seeing how an overall planning judgment thereafter could properly be made without having at least some appreciation of the extent of the shortfall. That is not to say that the extent of the shortfall will itself be a key consideration. It may or not be: that itself a planning judgment, to be assessed in the light of the various policies and other relevant considerations. But it ordinarily will be a relevant and material consideration, requiring to be evaluated.
>
> 83. The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is borne out by the observations of Lindblom LJ in the Court of Appeal at [47] of *Hopkins Homes*. I agree also with the observations of Lang J at [27] and [28] of her judgment in the *Shropshire Council* case and in particular with her statements that "…Inspectors generally will be required to make judgments about housing need and supply". However these will not involve the kind of detailed analysis which would be appropriate at an "Development Plan inquiry" and that "the extent of any shortfall may well be relevant to the balancing exercise required under NPPF 14". I do not regard the decisions of Gilbart J, cited above, when properly analysed, as contrary to this approach.
>
> 84. Thus exact quantification of the shortfall, even if that were feasible at that stage, as though some local plan process was involved, is not necessarily called for: nor did Mr Hill QC so argue. An evaluation of some "broad magnitude" (in the phrase of Lindblom LJ in his judgment) may for this purpose be legitimate. But, as I see it, at least some assessment of the extent of the shortfall should ordinarily be made; for without it the overall weighing process will be undermined. And even if some exception may in some cases be admitted (as connoted by the use by Lang J in *Shropshire Council* of the word "generally") that will, by definition, connote some degree of exceptionality: and there is no exceptionality in the present case."

30. Thus, in addition to the question of whether or not the tilted balance in paragraph 11 of the Framework is engaged by virtue of the inability of the local planning authority to demonstrate a five year housing land supply, consideration should be given to the question of the extent of any shortfall, even in terms of a broad magnitude, so as to enable the decision-maker to understand the weight which can properly be given to that shortfall as a material consideration, albeit there may be exceptional cases where it is simply not possible for that to be done. None of the parties in the present case suggested that that exception was relevant.

31. Another form of material consideration which features in the submissions in the present case is the existence of an earlier relevant appeal decision. In that connection the correct approach was identified by Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137 as follows:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An Inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the Inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the Inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

32. Finally, the claimant makes submissions as to the adequacy of the Inspector's reasoning in the present case. The correct approach to judging whether reasons are legally adequate in respect of an Inspector's appeal decision are to be found in the well-known observations of Lord Brown at paragraphs 35 and 36 of his speech in *South Bucks District Council v Porter (2)* [2004] UKHL 33; [2004] 1 WLR 1953.

The Grounds

33. The claimant's ground 1 is that whilst the Framework does not explicitly address the question of how past housing over-supply should be taken into account, the correct interpretation of the Framework and in particular paragraph 73 is that over-supply is to be taken into account when carrying out the assessment of the available five year

housing land supply. The context in which this interpretation arises is as follows. Firstly, the planning objective of the policy is to maintain a supply and delivery of sufficient homes in order to meet the local planning authorities' areas' assessed needs'. The purpose of the requirement to demonstrate a five-year supply is to ensure delivery of the housing requirement across the whole of the plan period and it is the total housing need rather than annualised figures that are the housing requirement. If oversupply against the annualised housing requirement was not taken into account, then the five-year supply would not be being calculated against the housing requirement but instead against an arbitrary figure which would change from year to year. This approach to interpretation is supported by the PPG in which in paragraph 032 a specific point is made in relation to taking account of additional supply in offsetting any shortfalls against requirements from previous years. Thus, in context, the reference to "the housing requirement" in paragraph 73 of the Framework is a reference to the total requirement over the plan period, and it follows that as the plan period progresses account needs to be taken of progress towards meeting the requirement, which includes acknowledgement of where the annual requirement has been exceeded. The claimant points out that this is not simply a semantic point, as failure to account for oversupply has the potential to apply the tilted balance in circumstances for which it was not designed. The purpose of the tilted balance is to foster the grant of planning permission for housing in order to assist in alleviating shortfalls in housing land supply, not in circumstances where there has been a history of oversupply against the plan's requirement.

34. The claimant goes on to observe that, therefore, the Inspector misinterpreted the policy of the Framework in concluding that the oversupply in the present case should be left out of account. Indeed, the claimant submits that it is clear from the Inspector's reasoning that she proceeded on an inaccurate basis, namely that the Framework prohibited her from taking account of identified past oversupply. Her observation in paragraph 59 that the Framework made no allowance for subtracting additional supply from the annual requirement illustrated this, along with her observations in paragraphs 61 and 63 of the decision letter where she indicated that housing already delivered could not fall within the definition of deliverable housing supply, and that past oversupply was not a tool to be used by the claimant to discount a housing requirement set out in the JCS. This reasoning was predicated upon the false assumption that the Framework precluded taking account of oversupply of housing in earlier years.

35. The defendant's response to these contentions is that in truth the Framework and the PPG are silent on the topic of whether or not any oversupply of housing in previous years should be taken into account when calculating the current five-year housing land requirement. Thus, there is no policy on this issue to be interpreted, as neither the Framework nor the PPG seek to address it. It is not the task of the court to create policy by filling gaps where policy might have been introduced but the policy-maker did not do so. It is open to a policy-maker to produce a policy which does not have universal coverage, but which leaves gaps to be addressed by the exercise of planning judgment in individual cases. In any event, the defendant points out that there are a variety of different policy options which would be available were the previous oversupply to be taken into account in the calculation. The defendant rejects the claimant's contention that the Inspector considered that she was prohibited from taking past oversupply into account. The defendant submits that properly understood the Inspector was simply

rejecting each of the reasons given by the claimant for taking account of the oversupply, providing her justification for why the interested parties' approach was to be preferred.

36. The claimant's ground 2 is, in effect, an alternative to ground 1. The claimant submits that if the court is satisfied that the Framework is silent in relation to the treatment of past over-supply, and the Inspector did not regard herself as prohibited from taking it into account, then it was *Wednesbury* unreasonable for her to have taken no account of it in assessing the housing land supply calculation. The claimant contends that the past oversupply of housing was such an obvious consideration, in particular where it amounted to in excess of 1,000 homes, that the Inspector was bound to take it into account. Furthermore, her reference in paragraph 90 of the decision to the poor housing landing supply position indicating that the spatial strategy was not effective was a conclusion that was simply not open to her on the basis that the development plan policies had already delivered 1,000 homes in excess of the requirement to that point in the plan period.

37. In response to these submissions the defendant contends that since this ground proceeds on the basis that national policy was silent as to how to treat an element of oversupply in previous years it was open to the Inspector to exercise her own planning judgment as to how to do so. There were a wide range of alternatives available to her in respect of how to address past oversupply, including not taking it into account at all. In the absence of any policy it could not properly be said to be irrational for the Inspector in the circumstances of the particular case to determine that no credit should be given for it in calculating the five-year housing land supply.

38. The claimant's ground 3 is the contention that it was irrational for the Inspector to take account in reaching her conclusions that houses already delivered could not meet the definition of deliverable housing contained within the Framework. This was quite irrelevant to the issue that the Inspector was addressing namely whether oversupply could be taken into account in calculating the five-year housing land supply. Secondly it was irrational of the Inspector at paragraph 62 of the decision letter to rely upon the observation that the housing requirement of 9,899 dwellings contained in the JCS for the plan period was not a maximum. Whilst that observation was correct it was nothing to the point in relation to whether or not past oversupply should not be taken into account in calculating the five-year housing land supply. Thus, under ground 3 it is contended that two irrelevant considerations were taken into account rendering the Inspector's conclusions irrational.

39. In response to this contention the defendant submits that, once the decision is read as a whole, it is clear that in relation to the point relating to deliverable housing the Inspector was merely looking at the other side of the equation and confirming for completeness that housing already delivered could not be added to the supply and be part of a supply of deliverable housing for the purposes of the five year housing land supply calculation. Secondly, in relation to her reference to the JCS housing requirement not being a maximum number the defendant submits that the Inspector's observations were accurate and rational. She was simply pointing out that the housing requirement was not a maximum as part of her justification for her conclusion that it would be unreasonable for the claimant to refuse planning permissions as a result of past oversupply.

40. The claimant's ground 4 is a criticism of the Inspector's reasoning. Firstly, the claimant criticises the adequacy of the Inspector's reasons in rejecting all of the points which were made by the claimant in favour of taking the past oversupply of housing into account. The Inspector's reasons do not deal with all the points raised. Further, the Inspector failed to deal at all with the decision of the previous Inspector in relation to the interested parties' earlier appeal and its bearing upon the current appeal in circumstances where it was an agreed position in that earlier appeal that oversupply should be taken into account in calculating the five year housing land supply.

41. Replying to these submissions the defendant contends that the Inspector's reasons were clear and adequate in relation to her rejection of the taking into account of the oversupply of housing in previous years. In respect of the earlier appeal decision the claimant had not suggested that that decision had a relevant bearing upon the question of the five-year housing land supply calculation. In addition the interested parties draws attention to the fact that the point now relied upon by the claimant simply did not arise in the earlier appeal decision. The point which the Inspector in that case had to resolve was a debate in relation to the Liverpool or Sedgefield method of calculation the five year housing land supply, not the question of whether oversupply should be taken into account in the way contended for by the claimant. There were in reality no reasons provided by the earlier Inspector with which this Inspector needed to become engaged.

Conclusions

42. In relation to ground 1, I am unable to accept the primary submission made by the claimant that the provisions of the Framework require any oversupply prior to the period for which a five-year housing land supply is being calculated to be taken into account. Firstly, the text of the Framework does not include any such suggestion. The claimant's argument depends upon this conclusion being a necessary inference from the way in which the Framework has been drafted. It is not an inference which, in my judgment, can properly be drawn. Whilst it is clear that the intention of the Framework is that planning authorities should meet the housing requirements set out in adopted strategic policies, that does not necessarily mean that any oversupply in earlier years as in the present case will automatically be counted within the five-year supply calculation. The text of the Framework is silent, or alternatively does not deal, with what account if any should be taken of oversupply achieved in earlier years when calculating the five-year supply.

43. In the absence of any specific provision within the Framework there is no text falling for interpretation, and it is not the task of the court to seek to fill in gaps in the policy of the Framework. It is far from uncommon for there to be gaps in the coverage of relevant planning policies: they will seldom be able to be designed to cover every conceivable situation which may arise for consideration. Again, that is perhaps unsurprising given the breadth of the potential scenarios which may arise in the context of a planning application on any particular topic, especially where it is a high level policy with a broad scope like the Framework which is being considered. When it arises that there is no policy covering the situation under consideration then it calls for the exercise of planning judgment by the decision-maker to make the necessary assessment of the issue to determine the weight to be placed within the planning balance in respect of it. In the absence of policy within the Framework on the question of whether or not to take account of oversupply of housing prior to the five year period being assessed in the calculation of the five-year housing land supply the question of whether or not to

do so will be a matter of planning judgment for the decision-maker bearing in mind the particular circumstances of the case being considered.

44. I do not consider that the claimant's argument is assisted by the guidance contained within the PPG. Whilst the claimant contends that the observations within paragraphs 31 and 32 of the PPG should be mirrored in relation to over-supply as a whole, I see no warrant for drawing that inference. It is clear that the PPG has sought to address a particular circumstance, namely where there has been some shortfall as well as some oversupply in previous years. However, the PPG does not engage with the particular situation with which this case is concerned, and there is no reason to suppose that the defendant has done other than leave the particular question arising in this case to the exercise of planning judgment on a case-by-case basis. Had it been thought appropriate to offer specific guidance the defendant would have done so. The defendant did not and therefore the matter is left as a question of judgment for the situations in which the issue arises.

45. Further submissions were offered by the claimant in relation to the purpose of the policy in relation to the five year housing land supply requirement and the consequences of it not being demonstrated, in order to support their contentions that it can be inferred to be the policy of the Framework that an oversupply of housing in earlier years should be taken into account. I am not dissuaded from the conclusion I have reached by those arguments. In particular, they are predicated on the assumption that it is appropriate for the court to introduce, by way of inference, text into the policy of the Framework which does not exist. As set out above that is in my judgment a clearly inappropriate course. Secondly, the points raised by the claimant in relation to the objective of the policy being to meet the strategic housing requirement across the plan period and the tilted balance being introduced by the five year housing land supply to address circumstances where planning permissions are required to improve the prospects of meeting that requirement are contentions which would undoubtedly form part of the planning judgment to be made in each particular case as to whether or not earlier oversupply should be taken into account, and, if so, how.

46. My conclusions in relation to the claimant's primary argument on ground 1 are reinforced by the practical considerations referred to by the defendant in the course of argument. These practical considerations provide some illuminating context as to why it may be that the defendant has left the issue which arises in this case to the exercise of planning judgment in individual applications. The defendant pointed out that whilst the assumption of the claimant's argument is that there is a binary or arithmetical choice between either taking past oversupply into account or not, the reality is that in practical terms there are several broad policy approaches which might be taken to the question of how to account for past oversupply in calculating the five year supply. It might be taken into account on a one-for-one basis as essentially sought by the claimant; the oversupply might be credited but applied over the remaining plan period which would be likely to be less than one-for-one in terms of the credit allowed in calculating the five-year housing land supply; the policy choice might be that past oversupply cannot be credited at all; the question of whether credit is made in the next five years or carried across the remaining plan period could be a matter left for the planning judgment of the decision-maker; finally the issue could be one left in its entirety to the planning judgment of the decision-maker in each case. Thus, the issue is perhaps not as simple as the claimant's primary submission would suggest, and in addition to the concerns set

out above the defendant's submission reinforces the concern of the court as to the propriety of second guessing these policy choices.

47. It follows that for all of these reasons the claimant's primary submission under ground 1, that the Framework required the oversupply from earlier years to be taken into account in the five-year housing land supply calculation, cannot succeed. The claimant contends that this primary submission proceeds on the basis that it is not the claimant's case as to the interpretation of the Framework that paragraph 73 of the Framework prescribes how an oversupply should be taken into account, but rather that whether to take it into account at all cannot be simply a matter of planning judgment but is required by the Framework. Again, similar points arise in relation to the absence from the Framework of any policy text which would justify such an approach. The Framework does not say, nor does the PPG, that oversupply must be taken into account in all circumstances. For the reasons already given it is not for the court to supplement or add to the existing text of the policy. The question of whether or not to take into account past oversupply in the circumstances of the present case is, like the question of how it is to be taken into account, a question of planning judgment which is not addressed by the Framework or the PPG and for which therefore there is no policy. No doubt in at least most cases the question of oversupply will need to be considered in assessing housing needs and requirements. The fact this may be the case does not require the court to provide policy in relation to this issue which the policy maker has chosen not to include.

48. The claimant's second submission in relation to ground 1 is the contention that the Inspector proceeded on an incorrect basis namely that the Framework prohibited her from taking account of the identified past oversupply. In particular the claimant relies upon paragraph 59 of the decision letter in which the Inspector noted that the policy in the Framework "makes no allowance for subtracting additional supply from the annual requirement", going on to allude to the absence of a symmetrical approach to that in paragraph 32 of the PPG in respect of earlier oversupply. Additionally, in paragraph 61 of the decision letter the Inspector observed that previous housing completions could not bring themselves within the definition of deliverable housing. At paragraph 63 of the decision letter the Inspector observed that "additional supply is not a tool that can be used to discount the council's housing requirement set out in its adopted strategic policies". Thus, the claimant contends that the Inspector misinterpreted the Framework as preventing her from taking any account of oversupply in addressing the five-year housing supply calculation.

49. In my judgment there are, first and foremost, two important pieces of context in relation to the claimant's argument. The first, which is trite, is that the Inspector's decision letter must be read fairly and as a whole, in the spirit that its purpose is to convey an administrative decision on a planning appeal rather than it being some form of legal instrument. Secondly, the purpose of the decision letter must be borne in mind, namely, to address the issues raised in the appeal by the parties. Bearing these factors in mind it is clear to me, firstly, that the Inspector's observations in relation to additional supply must be read in the context of the overall section of her decision entitled Housing Land Supply. The section in relation to additional supply must be read together with that pertaining to future supply in order to understand the Inspector's overall conclusions on housing land supply and the planning judgments which she reached. Secondly, the issues which the Inspector was addressing were those which were identified by the

claimant and the interested parties. For instance, in neither the SOCG nor the claimant's closing submissions which have been set out above was the Inspector being asked to rule definitively on an interpretation of paragraph 73 of the Framework. Rather, the contention made by the claimant was that in the particular circumstances of the case the earlier oversupply should be taken into account and could be taken into account, consistently with the policies of the Framework and the guidance in the PPG.

50. In that context the observations of the Inspector in paragraph 59 that there is no requirement in the PPG to take account of earlier oversupply reflects the need to exercise planning judgment and were consistent with the approach that in the absence of specific policy in the Framework it was necessary for the Inspector to exercise her own planning judgment in relation to the question of whether to take oversupply into account. Her observation in paragraph 61 about delivered housing not falling within the definition of deliverable housing simply reflected the reality of what could properly be taken account of as forward supply. The conclusion in paragraph 63 is one which is clearly cast with the particular circumstances of the case in mind, and has to be put in the context of the additional conclusions. These included the Inspector's conclusions at paragraphs 68 to 72 of the decision letter in relation to the shape of the future trajectory for housing supply in the claimant's administrative area, which she concluded was deeply concerning, particularly in relation to a lack of supply beyond year 3 in the calculation. This led to her conclusions in paragraph 73 of the decision letter on housing land supply, incorporating the observation reflecting the concern about lack of supply beyond year 3, and that "the past trend of additional supply is not projected to continue". Thus, read in context and as a whole, the Inspector's conclusions on housing land supply are in my view an expression of the application of planning judgment to the particular circumstances of the claimant's five year housing land supply calculation, and do not proceed on the basis that the Inspector was reading the Framework as prohibiting her from taking into account earlier additional supply. Indeed, her overall conclusion in paragraph 73 addresses the position even had she taken it into account. I am therefore unpersuaded that there is any merit in the alternative way in which the claimant presents ground 1.

51. Ground 2 is the contention that even if the claimant is wrong in relation to ground 1, the oversupply was so obviously material that it was irrational for the Inspector not to have taken it into account. It was so obvious in the light of the fact that there had been an oversupply of over 1,000 homes that it should be taken into account her failure to do so was plainly wrong, as was her observation that the spatial strategy was not effective (see paragraph 90 of the decision letter).

52. I am unable to accept this submission. Firstly, it is very clear from the section of the decision dealing with housing land supply issues that the Inspector was acutely aware of the earlier oversupply as a material consideration for her to address in her decision. She concluded, correctly, that how that was to be dealt with was a matter for the exercise of her planning judgment. The conclusion which she reached in relation to how the earlier oversupply was to be taken into account, if at all, was articulated in paragraph 73 of the decision letter which drew attention not only to her observations in relation to the claimant's arguments which she made in paragraphs 58 to 63, but also her concerns in relation to the viability of the supply beyond year 3 of the five year housing land supply calculation. The shape of the housing trajectory was also reflected in the weight

which she gave to this issue in the planning balance and I am unable to find any basis to characterise her approach as being irrational.

53. Turning to ground 3 the focus of the claimant's case is on two paragraphs within the decision letter: firstly, paragraph 61 in which, as set out above, the Inspector observes that delivered housing cannot meet the definition of deliverable housing, and the second is paragraph 62 in which the Inspector observed that the housing requirement in policy SP1 of the JCS was not a maximum figure. The claimant contends that both of these observations were matters which it was irrational for the Inspector to have taken into account. It is submitted that these are both relied upon by the Inspector as reasons for not taking oversupply into account and it was irrational to rely upon them.

54. I am unpersuaded that there is any substance in these contentions. Reading the decision letter as a whole, the observation at paragraph 61 of the decision letter was, as the defendant observes, simply observing the other side of the equation, or the other side of the coin, in relation to a five year housing land supply by looking at housing delivery. It was a piece of context rather than the Inspector relying upon this observation as a freestanding reason not to take account of previous additional supply. Similarly, the final sentence of paragraph 62 of the decision letter is merely expressing an additional reason for concluding that the council's argument about the loss of additional housing leading to local planning authorities holding back or restricting housing permissions for sites to be unfounded. Again, this observation was not a freestanding reason not to take account of previous oversupply. There is, therefore, in my view no substance in the complaints raised under ground 3 in relation to these matters.

55. Turning, finally, to ground 4 the claimant contends that the Inspector's reasons were inadequate in two principal respects. Firstly, she failed to provide adequate reasons to explain why she had failed to take into account past oversupply and fully engage with the reasons that the claimant had identified for taking past oversupply into account. Secondly, she failed to deal with the previous Inspector's decision on the same site in the relatively recent past, within which it was agreed that past oversupply should be taken into account (the issue being how it was to be taken into account).

56. In assessing these submissions it is necessary to bear in mind, firstly, that, as set out above, the Inspector's conclusions on the issue raised in this case are not solely to be found in paragraphs 58 to 63 where she deals with the particular arguments raised by the claimant on oversupply in the circumstances of the present case, but also in the other paragraphs addressing housing land supply concerns and in particular paragraph 73. Those reasons reflect that a part of the exercise of her planning judgment was her concern about the shape of the future trajectory of housing land supply during the five-year period. Secondly, it needs to be borne in mind, consistently with the approach from *South Bucks*, that the Inspector is not obliged to deal with every point raised by the claimant by providing reasons to support her conclusions on the main matters in issue.

57. Having reviewed the relevant material, and in particular the SOCG and the claimant's closing submissions, I am satisfied that the principal issues which were raised were addressed in the decision and, further, that the Inspector's reasons for reaching the conclusions which she did are clear anrd fully explained. It was not necessary for the Inspector to address every single point raised by the claimant in support of its contention that the oversupply in earlier years should be credited. She provided clear reasons for rejecting the claimant's approach and articulated the basis for her concerns in relation

to the shape of the trajectory, which underpinned her judgment that on the facts of the present case the correct judgment was that the oversupply ought not to be taken into account, leading to greater weight being attributed to the shortfall in the five-year housing land supply.

58. I accept the submissions made by the defendant and, in particular, the first interested party in relation to the earlier appeal decision on the same site. That appeal decision did not raise the question which the Inspector had to address in the present case: indeed, it was common ground that oversupply should be taken into account. In effect, therefore, the Inspector in the present case was determining that issue for the first time and there was nothing in the reasoning of the earlier Inspector which has been set out above with which this Inspector was required to deal in order to provide adequate reasons. In the circumstances for the reasons set out above I do not consider that there is substance in the claimant's ground 4.

59. For all of the reasons set out above I have concluded that the claimant cannot succeed in relation to each of the four grounds which have been advanced, and therefore the claimant has no entitlement to relief in the present case.

Neutral Citation Number: [2021] EWHC 3271 (Admin

Case No: CO/1307/2021 & CO/1313/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

East Riding of Yorkshire Council	**Claimant**
- and -	
(1) Secretary of State for Levelling up, Housing and Communities	**Defendants**
(2) Gladman Developments Limited	

- -
- -

Charles Banner QC and Matthew Henderson (instructed by **Solicitor for East Riding of Yorkshire**) for the **Claimant**
Sarah Sackman (instructed by **Government Legal Department**) for the **First Defendant**
Richard Kimblin QC and Thea Osmund-Smith (instructed by **Addleshaw Goddard LLP**) for the **Second Defendant**

Hearing dates: 12th October 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE DOVE

Mr Justice Dove:

Introduction.

1. This judgment addresses two claims for statutory review bought pursuant to section 288 of The Town and Country Planning Act 1990 in relation to two decisions following appeals conducted by way of public inquiry in respect of two refusals of planning permission by the claimant. Whilst these are two separate decisions, because of issues which each appeal had in common the same Inspector was appointed to determine both appeals. The second defendant was the applicant for planning permission in both applications. The details of the appeals were as follows.

2. At land North West of Swanland Equestrian Centre, West Field Lane, Swanland, East Riding of Yorkshire the second defendants applied for outline planning permission for up to 150 residential dwellings, including 25% affordable housing, alongside associated structural landscaping, public open space and surface water attenuation, with all matters reserved apart from site and emergency access. The appeal was allowed on 17th March 2021. For convenience this is referred to as the Swanland appeal.

3. At land North and East of Mayfields, The Balk, Pocklington, East Riding of Yorkshire, the second defendants applied for outline planning permission for up to 380 residential dwellings including 25% affordable housing, a local centre with children's day nursery, convenience store and 60 bed care home, together with landscaping and public open space, surface water attenuation features with all matters reserved other than the details of vehicular access points. Again, the appeal was allowed on 17th March 2021.

4. The public inquiries in relation to both of these appeals were held jointly, and the Inspector explained that there were some broad matters which were common to both appeals. It is in relation to one of those matters in common that the claimant brings both challenges. At the hearing of this matter it was agreed that it would be sensible for this judgment to focus upon the Swanland appeal, on the basis that were the court persuaded of the merit of the claimant's case in relation to that appeal then the Pocklington appeal would fall to be decided similarly.

5. The claims are brought by the claimant on two grounds. The first ground is that the Inspector failed to give reasons for rejecting an argument presented by the claimant in respect of paragraph 48 of the National Planning Policy Framework ("the Framework") which is more fully described below, and which in particular depends upon the allegation that the Inspector failed to provide proper reasons to distinguish two earlier appeal decisions upon which the claimant relied. The second ground is that if the Inspector did give reasons which were legally adequate, there was an error of law on the basis that the Inspector had misinterpreted paragraph 48 of the Framework and/or acted irrationally.

6. As set out above the claimant was represented by Mr Charles Banner QC and Mr Matthew Henderson, the first defendant by Ms Sarah Sackman, and the second defendant by Mr Richard Kimblin QC and Ms Thea Osmund-Smith. All references to the parties' submissions hereafter should be read accordingly. I would wish to place on record my gratitude to all counsel for the careful and focussed written and oral submissions which they provided to the court which have been of considerable assistance. I also express my thanks to those responsible for preparing the papers for

the hearing in this case: a bundle of thoughtfully edited papers was presented for the purposes of the hearing containing all of the documents which were referred to and ensuring that pre-hearing preparation could be undertaken efficiently.

The facts.

7. One of the points of difference between the claimant and the second defendant in the debate over the appeals was the question of whether or not the claimant was able to demonstrate a five-year supply of housing land. The significance of this issue in the decision-making process when determining a planning application for residential development is well-known. In essence, where a local planning authority is unable to demonstrate a five-year supply of deliverable housing land footnote 8 of the Framework indicates that this is a situation where it is to be considered that there are no relevant development plan policies, or the policies which are most important for determining the application are out of date, leading to the use of a tilted balance when assessing the merits of the application. In the present case, which did not involve policies covered by footnote 7 of the Framework, that tilted balance required "granting permission unless… any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole".

8. In December 2020, shortly prior to the exchange of evidence in the appeal, the claimant published its Housing Land Supply Position Statement. The analysis in table 12 of that document indicated that using the housing requirement from the East Riding Local Plan the claimant could demonstrate exactly five years of housing land supply. However, the document observed that by the start of year two of the five-year housing land supply calculation it would have been more than five years since the adoption of the East Riding Local Plan. The significance of that point is that paragraph 73 of the Framework, which contains the requirement to demonstrate a five-year housing land supply, and the accompanying footnote 37 provide as follows:

> "73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies or against their local housing need where the strategic policies are more than five years old[37]. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period of):
>
> a) 5% to ensure choice and competition in the market for land; or
>
> b) 10% where the local planning authority wishes to demonstrate a five-year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year, or

> c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply.
>
> 37 Unless these strategic policies have been reviewed and found not to require updating. Where local housing need is used as the basis for assessing whether a five-year supply of specific deliverable sites exists, it should be calculated using the standard method set out in national planning guidance."

9. In the light of this policy the Housing Land Supply Position Statement proposed an alternative approach to calculating the five-year housing land supply requirement which became known as the hybrid approach. This approach deployed the local plan requirement from the East Riding Local Plan of 1,400 dwellings for the first year of the five-year housing supply calculation, and then four years using the housing requirement calculated using the standard method of 909 dwellings per annum. This, plainly, gave rise to a lower requirement figure, and the calculation within table 13 of the Housing Land Supply Position Statement demonstrated a 6.2 year supply using the hybrid approach.

10. Shortly after the production of the Housing Land Supply Position Statement proofs of evidence were exchanged in relation to the appeals. The claimant's planning witness, who addressed issues of five-year housing land supply, was Mr Owen Robinson. Within his proof of evidence he set out the five-year housing land supply of precisely five-years from the Housing Land Supply Position Statement, but went on to advocate the hybrid approach based on the fact that at the time of writing his proof the five year anniversary of the adoption of the East Riding of Yorkshire local plan was just four months away. Thus, Mr Robinson contended that the Inspector could have certainty that the requirement figure would reduce to reflect the smaller housing requirement based on the standard method, and therefore should adopt the hybrid approach which had been foreshadowed in the Housing Land Supply Position Statement. Mr Robinson contended in his proof of evidence that equal weight should be afforded to the two alternative approaches to calculation, the first based on the local plan only and the second on the hybrid approach, in reaching the decision.

11. Mr Robinson placed reliance on a recent decision by the first defendant in respect of land at the VIP Trading Estate in London ("the VIP decision"). The first defendant's decision was made following receipt of an Inspector's report in which the Inspector had recommended the refusal of permission. That was, overall, a recommendation with which the first defendant agreed. In paragraph 14 of the decision letter the first defendant noted in relation to emerging plans that there was a draft New London Plan and an emerging Royal Borough of Greenwich Site Allocations Development Plan Document. Further, the first defendant observed that the emerging London Plan was at an advanced stage of preparation, and that the first defendant had directed the areas of the plan where changes were required. Where directions had been made by the first defendant, he considered that moderate weight could be afforded to the policies of the emerging London Plan. Where no modifications had been directed the first defendant considered that policies carried significant weight. An issue in the decision was the question of the five-year housing land supply, and in that respect the first defendant observed as follows:

> "26. The Secretary of State has carefully considered the Inspector's analysis of the 5 Year Housing Land Supply at IR15.193-15.216. The Secretary of State has noted the Inspector's findings that the Council are unable to demonstrate a 5YHLS but could be considered to have a supply of 4.99 years with a worst-case scenario of 4.49 years (IR15.214). The Secretary of State has also noted that the Inspector considers the shortfall is very small and, of more importance, that on adoption of the draft London Plan, the revised housing targets in the draft London Plan will result in there being a demonstrable 5YHLS in the Borough (IR15.215).
>
> 27. The Secretary of State has taken into consideration that the borough housing targets in policy H1 of the draft London Plan are not to be modified and he has given significant weight to this policy (paragraph 13 of this letter refers). He is satisfied, therefore, for the purposes of this appeal that the Council can demonstrate a 5YHLS. On this basis he disagrees with the Inspector that the presumption in favour of sustainable development applies in this appeal (IR15.215)."

12. In the event this disagreement with the Inspector made no difference to the first defendant's conclusion as to whether or not the appeal should be allowed.

13. Shortly before the public inquiry was due to open the parties completed a Statement of Common Ground. Within the section of the document referring to matters which were disagreed, the argument between the parties as to the status of the hybrid housing requirement was noted. By this stage it was the claimant's position that the five-year housing land supply calculation should be established using the hybrid approach, which acknowledged that within four months the local plan would be five-years old bringing the need for the calculation to be based upon the standard method.

14. By contrast the second defendant considered the supply position should be based upon the local plan housing requirement for the full five-year period. The planning witness called on behalf of the second defendant in relation to the Swanland Appeal was Mr Ben Pycroft. In his proof of evidence, he explained why he considered that the use of the hybrid approach was problematic. The reasons he provided included that such an approach could, if adopted, apply to a number of authorities, including areas where in fact the local housing need was higher than the adopted housing requirement, leading to a failure to demonstrate a five-year housing land supply even in relation to a relatively recently adopted local plan. Secondly, the hybrid approach was difficult to apply in areas such as that of the claimant where there was significant past shortfall against the adopted housing requirement, for reasons associated with the mechanism for calculating the figure for local housing need. Thirdly, the local housing need calculation under the standard method changes from year to year depending on the ten year period over which average annual housing growth was used, and the applicability of the latest affordability ratio. Fourthly, the claimant's hybrid approach overlooked its own Local Development Scheme that indicated that the local plan review was to be adopted in July 2022. In short Mr Pycroft contended that national policy and guidance was clear as to how the five-year housing land supply was to be measured, and this

approach should be taken leading to a conclusion that the claimant could not demonstrate a five-year supply.

15. In response to the initial exchange of evidence, rebuttal proofs were produced by the parties for the purposes of the debate at the public inquiry. Mr Robinson pointed out in response to Mr Pycroft's views that none of the issues he raised were problematic or represented a principled reason for not taking the hybrid approach. Indeed, Mr Robinson expressed the view that the claimant was not going as far as the first defendant had in the VIP decision where the Secretary of State had not applied the adopted local plan requirement at all. The claimant accepted that for the first year of the calculation the local plan requirement should be used.

16. In a rebuttal proof produced on behalf of the second defendant an analysis was presented of the VIP decision, in which it was pointed out that the conclusion of the first defendant was that permission should be refused whether or not a five-year housing land supply had been demonstrated. It was observed that it was unclear whether the first defendant was engaging with a departure from national policy in making the decision, but it was unsurprising that there was no challenge to the legality of this approach since it would have made no difference to the decision. In the rebuttal proof the second defendant did not accept that the approach by the first defendant in reaching this decision was correct.

17. It appears that after the exchange of evidence, and the subsequent rebuttal proofs which were provided in January 2020, two further matters emerged. Firstly, in further discussions in relation to the five-year housing land supply there were adjustments made to the figures in relation to the available housing supply, leading to the conclusion that even on the claimant's own supply figures it could not demonstrate a five-year housing land supply using a calculation based on the local plan requirement.

18. Secondly, on 7th January 2021 the first defendant's duly appointed Inspector issued a decision letter in relation to an appeal at 700 St Johns Road and St Johns Nursery site, Earls Hall Drive, Clacton-on-Sea ("the Clacton decision"). The question of whether or not the local planning authority could demonstrate a five-year housing land supply was a contentious issue. Having addressed issues in relation to the question of which sites could be properly incorporated within the local planning authority's housing land supply the Inspector noted that, firstly, the strategic policies of the local plan were more than five years old and therefore the standard method of calculation should be used giving rise to a housing need of 865 dwellings per year. Secondly, he noted that in the examination in respect of section 1 of the emerging Local Plan a housing requirement of 550 dwellings per year had been found to be sound.

19. The Inspector addressed the issues in respect of the five-year supply of housing and reached conclusions in relation to them in the following paragraphs from his decision:

> "85. Until Section 1 of the eLP is adopted then paragraph 73 (including footnote 37) of the Framework, advises that the SM should, rather than must, be used to establish a local housing need figure for Tendring. That national policy is a material consideration of great weight. However, the examination of Section 1 of the eLP has established that the official household projections for Tendring are subject to distortion due to errors

arising from the UPC. In that regard there is evidence available demonstrating that the ONS recognises that for Tendring there is an error with the midyear estimates, which feed into the calculation of the household projections, with a '*migration error ... likely to be in the range of 5-6,000 people*'. That migration error being thought to represent 47% to 57% of the UPC for Tendring, with the positive UPC figure for Tendring being around 10,500 and *'... one of the biggest of any LPA in England*'.

86. With Section 1 of the eLP so recently having been found to be sound, it seems likely that this part of the eLP, including emerging Policy SP3, will imminently progress to adoption. I consider those circumstances to be a very important material consideration, outweighing the advice in paragraph 73 of the Framework that the SM should be used. That approach being consistent with the advice stated in paragraph 48 of the Framework, because Section 1 of the eLP has reached such an advanced stage in its preparation. When an annual housing requirement of 550 dwellings is used and a historic shortfall allowance of 212 dwellings and a 5% buffer are added, then a total five-year requirement of 3,110 dwellings has been identified by the Council in the SHLAA.

87. Against a requirement of 3,110 dwellings the Council is able to demonstrate the availability of a 5yrHS of 6.14 years, including the deduction of 225 dwellings from the four resolution sites as set out in CD13.12. A 5yrHS of 6.14 years represents a surplus of around 20% when considered against a five-year requirement of 3,110 dwellings.

88. Even if the adoption of Section 1 of the eLP does not happen in January 2021, as currently envisaged by the Council, on the evidence available to me I consider that the SM derived local housing need figure of 865 dwellings per year is so erroneous it simply cannot be relied upon as the basis for assessing the current 5yrHS position for Tendring. That is because of the distortion caused by the UPC, with the 2014 based household projection for Tendring, an essential input into the SM, being subject to a significant statistical error that the ONS has recognised exists. Given those circumstances I consider the SM yields a deeply flawed local housing need figure for Tendring.

89. I recognise that my approach to the consideration of this matter differs to that of the Inspectors who have determined four other appeals in the Council's area drawn to my attention. However, there has been a very recent material change of circumstances postdating the determination of those other appeals, namely the completion of the examination for Section 1 of the eLP. That means that what was an 'interim finding'

> of the EI that a housing requirement based on 550 dwellings per year was likely to be acceptable, as was for example the situation when the Mistley appeal was determined on 23 December 2019, has now become a firm conclusion."

20. The question of the adoption of the hybrid approach was a matter which was touched upon in the opening submissions of both parties to the public inquiry. Similarly, the hybrid approach featured in the closing submissions of both parties. In the second defendant's closing submissions reference was made to the concession in cross-examination made by the claimant's planning witness that the claimant was effectively asking the Inspector to depart from national policy. Further reference was made to the VIP and the Clacton decisions. In particular, the second defendant pointed out that the issues involved in those cases were engaged with paragraph 48 of the Framework and the weight to be attached to emerging policies in decision-making. Paragraph 48 of the Framework provides as follows:

> "48. Local planning authorities may give weight to relevant policies in emerging plans according to;
>
> a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given);
>
> b) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
>
> c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

21. It was submitted by the second defendant that there was no evidence that the first defendant was seeking to lay down any general principals in relation to departure from paragraph 73 in the decisions which were relied upon by the claimant, indeed the first defendant did not address paragraph 73 of the Framework in those decisions at all. In the present case the second defendant observed there was not a recently examined and sound housing requirement soon to be adopted: the claimant's hybrid approach was an entirely different proposition to that accepted in the VIP decision related to paragraph 48 of the Framework. Similar points were raised in relation to the Clacton decision, where it was plain that although the plan was more than five years old, the errors in the data for the material informing the household projections meant that the standard method figure was not a reliable basis for decision-making. The adoption of a new plan with a figure which had been found sound was close at hand, and again paragraph 48 of the Framework was in play. The second defendant submitted the circumstances in the Clacton decision were very different from the present case.

22. By contrast, in the claimant's closing submissions emphasis was placed upon the imminence and certainty of the use of the standard methodology figure as a result of the operation of footnote 37. Reliance was placed upon the VIP decision as demonstrating that the first defendant departed from paragraph 73 of the Framework in

the light of an imminent change in the housing requirement figure in that case. That approach, it was submitted, was applicable to the appeals. Reliance by the second defendant on the involvement of paragraph 48 of the Framework was misplaced, on the basis that all that that paragraph did was reflect a basic public law proposition in relation to the weight to be attached to an emerging plan as a material consideration. It did not provide a basis for distinguishing between the circumstances of the VIP and Clacton decisions and the present appeals, on the basis that there was an imminent and certain application of the local housing need figure derived from the standard method in the case under consideration. The matters relied upon in paragraph 48 as bearing upon the weight to be given to emerging local plans reflected the degree of certainty and imminence of its adoption which again reflected the circumstances in the appeals under consideration with respect to the use of the local housing need figure derived from the standard method. The Clacton decision also supported this approach.

23. The Inspector addressed these contentions in relation to whether or not the claimant could demonstrate a five-year housing land supply in the following paragraphs of the decision letter:

> "Current situation
>
> 23. Paragraph 73 of the Framework requires that Council should identify and update annually a supply of specific deliverable sites to provide a minimum of 5 years' worth of housing against their housing requirement set out in adopted strategic policies. Where strategic policies are more than 5 years old, and unless the strategic policies have been reviewed and found not to require updating, this should be calculated against their local housing need (LHN). The LHN is the number of homes identified as needed through the application of the Standard Method (SM), which is detailed in National Planning Practice Guidance (PPG).
>
> 24. The agreed supply period for the determination of this appeal is 1 April 2020- 31 March 2025. The LPSD is not yet 5 years old, although it will become so on the 7 April. The SM calculation would then kick in for the LHN.
>
> 25. As set out in the relevant Statement of Common Ground (SOCG)6 and the updated scenarios (INQ31), against the LPSD housing requirement the Council is currently unable to demonstrate a 5-year supply, with the Council considering they can currently demonstrate 4.96 years. This position has changed from the publication of the Housing Land Supply Position Statement (HLSPS) dated December 2020 which gives a figure of 5.0 years. This was due to concessions made in respect of some of the sites assessed as deliverable by the Council, including from communal accommodation.

26. Due to debate over the deliverable sites included in the Council's calculation, the appellant considers that the Council can only demonstrate a supply of 4.17 years against the LPSD requirement. Nevertheless, even at the Council's preferred figure, the so called 'tilted-balance' under paragraph 11(d)(ii) of the Framework would be engaged.

Hybrid Calculation

27. The Council's position is that as the LPSD will be over 5 years old imminently, a hybrid figure which is based on the LPSD requirement for year 1 and the SM for years 2-5 should be used. This position was adopted for the joined appeals and is not reflected in the most recent published HLSPS.

28. Under the SM calculation, the housing figure is considerably lower than the adopted plan requirement – a reduction from 1400 to 909. Even when adding in a calculation for a shortfall and 5% buffer (the former is not a requirement of the SM calculation) the Council's position is that 6.15 years supply can be demonstrated. While the appellant disputes this approach and accounting for differences relating to site deliverability, the appellant considers that under this method, the Council could demonstrate 5.17 years supply. It is on this basis that the Council submits that the tilted balance should not apply.

29. Parties agreed that this appeal, and indeed the linked Pocklington appeal, provide the first time such an approach will have been formally tested. However, two appeal decisions in support of the Council's position were put before me.

30. The first is a Secretary of State (SoS) decision known as VIP Trading which was dated 3 June 2020. Here, the SoS disagreed with the Inspector that the presumption in favour of sustainable development applied due to the supply being between 4.49-4.99 years. This was on the basis that on adoption of the draft London Plan, revised housing targets would result in a 5-year housing land supply and it was noted that the housing targets in the draft plan were not due to be modified.

31. The second decision was for a site at Clacton-on-Sea dated 7 January 2021. While the Inspector acknowledges that, based on the SM the Council couldn't demonstrate the requisite 5-year supply, due to the imminent adoption of a new local plan with a different housing requirement figure indicating 6.14-year supply, the Inspector opted to rely on the new figure. Again, it was held that the presumption in favour of sustainable development did not therefore apply.

32. I accept there was a departure from paragraph 73 of the Framework in both examples. However, these decisions are

materially different to the appeals now before me. Significant weight was given to the emerging housing figures and more specifically, the Inspector and SoS in both examples engaged paragraph 48 of the Framework which sets out criteria for determining what weight to give to emerging plans in accordance with their stage of preparation, the extent of unresolved objections, and consistency to the Framework.

33. The Council argues that paragraph 48 provides no basis for distinguishing the present circumstances, but there is no such direction in the Framework, or indeed in the PPG relating to the circumstances presented as part of these appeals in the way that there is for emerging local plans in paragraph 48.

34. The Framework adopts a clear period of 5 years in terms of housing land supply, and also in terms of local plan preparation and review. Paragraph 73 of the Framework is clear that a minimum of 5 years' worth of deliverable sites should be calculated against either the housing requirement in the adopted strategic policies or the local housing need where the strategic policies are more than 5 years old (my emphasis). As part of this, the SM was introduced in 2018 in order to be simpler, quicker and more transparent and I am of the firm view that to adopt a hybrid approach would undermine that efficiency and transparency.

Future Supply

35. It should be noted that there was broad agreement that from 7 April 2021, the Council are highly likely to be able to demonstrate a 5 year supply based on the full SM calculation, although a precise figure could not yet be determined due to all the data required not yet being available.

36. I accept that in the very near future, this is a matter which would no longer be for debate as the need to use the SM will automatically kick in. This would also be as certain as the adoption of the new requirement figures in the above-mentioned appeals. However, based on my reasons above, that is itself not a reason to justify departure from paragraph 73 in such circumstances as presented here.

Conclusions on Housing Land Supply

37. To sum up, the LPSD requirement should be used and based on this, the Council are unable to demonstrate 5 years supply of housing. In accordance with footnote 7 of the Framework, the policies which are most important for determining the application, that being S3, S4 and S5, are deemed to be out of date. The tilted balance thus applies.

> 38. I will return to the matter of the extent of the shortfall and the weight to be given to this in light of the immanency of the 5-year anniversary of the LPSD in my section on the planning balance."

24. In drawing her conclusions together and striking the planning balance, applying the tilted balance required by paragraph 11 of the Framework, the Inspector concluded that, amongst other matters, substantial weight should be afforded to affordable housing as a benefit of the proposal, and moderate weight to general housing delivery. She took into account the adverse effects which she accepted in respect of policy conflict and the loss of best and most versatile agricultural land. Her conclusions were that these adverse effects would not significantly and demonstrably outweigh the benefits of the proposals and that therefore the appeal should be allowed.

The law.

25. The question of whether or not to grant planning permission for development is governed, initially, by section 70 of the 1990 Act which provides that when an application for planning permission is made to a local planning authority they may grant planning permission either unconditionally or subject to conditions as they see fit, as well as refuse it. Pursuant to section 70(2) the local planning authority is required to have regard to the provisions of the development plan so far as material to the application; indeed in applying section 38(6) of the Planning and Compulsory Purchase Act 2004 the local planning authority is required to determine the application in accordance with the development plan unless material considerations indicate otherwise. Material considerations which are obviously relevant to this exercise include the policy contained within the provisions of the Framework.

26. Pursuant to Rule 19(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 where an appeal is determined by an Inspector it is necessary that both the decision and the reasons for it are provided to the parties in writing. The leading authority in relation to the provision of reasons in this context is *South Bucks District Council and another v Porter (2)* [2004] UKHL 33. Lord Brown summarised the legal principals at paragraphs 35 and 36 of his speech as follows:

> "35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention of the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.
>
> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principle important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on

> the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straight-forward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

27. An illustration of the importance of the requirement to provide reasons is provided by the decision of the Court of Appeal in *Horada (on behalf of the Shepherds Bush Market Tennants Association) and others v Secretary of State for Communities and Local Government and others* [2016] EWCA Crim 169. The claimant drew particular attention to two features of the decision of the Court of Appeal in *Horada*. Firstly, the emphasis in paragraph 49 of Lewison LJ's judgment on the fact that although the decision may be addressed to a well informed readership, that does not excuse the failure to properly address the need to provide reasons for the decision which has been reached, which was in that case a decision disagreeing with the recommendation of the first defendant's Inspector. Secondly, the claimant draws attention to the observation, again in paragraph 49 of Lewison LJ's judgment, as well as in the substance of the reasons for his decision in paragraphs 51 and 53 of his judgment, upon not downgrading to the status of material considerations matters which were properly understood to be principle controversial issues in reaching the decision.

28. Turning to the issues associated with the interpretation of planning policy the legal principles concerned in relation to addressing this issue are well established. The interpretation of planning policy is a matter of law for the court: see *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983. Allied to the case of *Tesco Stores,* the question of the approach to the interpretation of planning policy has been addressed in the following cases: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865; *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88; *Mansell v Tonbridge and Malling Borough Council* [2018] JPL 176; *St Modwin Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746; *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81, and have been recently summarised by this court in *Tewkesbury Borough Council v Secretary of State for Communities and Local Government* [2021] EWHC 278 (Admin).

Submissions and Conclusions.

29. The claimant's submission in relation to ground 1 is that the question of whether or not the VIP and Clacton decisions justified a departure from national policy so as to adopt the hybrid approach to the housing requirement for the purposes of the five-year housing land supply, and whether paragraph 48 of the Framework was a distinguishing feature which justified not following their approach to the use of an imminent and certain change in the housing requirement, was one of the principal controversial issues in the case. The planning balance was resolved by the Inspector using the tilted balance pursuant to paragraph 11 of the Framework, and the requirement that the tilted balance was used depended upon the question of whether or not paragraph 73 required the Local Plan housing requirement to apply in terms to the calculation of the five-year housing land supply, or the hybrid approach was to be taken to calculating it. The justification for taking the hybrid approach included the support that it was submitted it gained from the appeal decisions, and thus the question of whether or not these appeal decisions justified the hybrid approach was a question which went to the heart of the decision.

30. On the basis that the question of whether the VIP and Clacton decisions amounted to a justification for adopting the hybrid approach was a principal controversial issue in the case, the claimant complains that the Inspector's reasoning did not address the specific points raised by the claimant for contending that paragraph 48 of the Framework did not justify distinguishing those appeal decisions from the present case. In the claimant's closing submissions, as set out above, the claimant had contended that paragraph 48 of the Framework did nothing more or less than reflect the basic public law proposition that weight attributable to an emerging plan as a material consideration increases as it comes closer to adoption. The second defendant had accepted that the imminent application of the local housing needs figure derived from the standard methodology was a material consideration, which again it was contended replicated the approach to an emerging local plan, and rendered the second defendant's reliance on paragraph 48 of the Framework as a distinguishing feature misplaced. The claimant had also relied upon Mr Pycroft accepting in cross-examination that the considerations set out in paragraph 48 in relation to the weight to be attached to emerging local plan policies reflected the degree of certainty and imminence in relation to its adoption further reinforcing the claimant's arguments. None of these matters, it is submitted, are addressed in the reasons which the Inspector gives for her conclusions on the issue. The failure to provide reasons in this connection amounts to an error of law and it follows than the claimant has been substantially prejudiced by this failure.

31. By contrast with these submissions, the first and second defendants submit that the question of whether or not the appeal decisions could be distinguished was not a principal controversial issue for the Inspector to engage with. The principal controversial issue in the present case was the question of whether or not the claimant could demonstrate a five-year housing land supply. Once that is understood as being the principal controversial issue, then it is submitted it is clear that the reasons were more than ample to deal with that question.

32. In any event, the first and second defendant submit that the reasons provided by the Inspector dealt with the claimant's contention that the hybrid approach should be adopted, and explained that the role of paragraph 48 of the Framework and emerging development plan policies made a difference or distinction between the VIP and Clacton decisions and the case which she was considering. The first defendant draws particular attention to paragraphs 32 to 34, and paragraph 34 in particular, which deal

both with the reasons for rejecting the submission that paragraph 48 provides no basis for distinguishing the VIP and the Clacton decisions, and also the submission made by the claimant in relation to certainty and imminence. Paragraph 33 explains that there is no direction in the Framework suggesting that as the use of a local housing needs figure derived from the standard methodology approaches there should be a different approach, taken in the same way as paragraph 48 addresses the issues relating to emerging local plans. Paragraph 34 of the decision explains following on from this that paragraph 73 presents a clear binary approach depending on whether or not the local plan is five years old. The Inspector's reasons record that the standard methodology was introduced in order to be simpler, quicker and more transparent, and that the adoption of a hybrid approach would undermine that efficiency and transparency. Both the first and second defendants emphasise that these are the reasons for the Inspector's decision, and that they address the points raised by the claimant.

33. Having reflected on the submissions of all parties, I remain to be convinced that the answer to the claimant's reasons challenge is to be found in the definition of whether the principle controversial issue in the case was simply whether or not the claimant could demonstrate a five-year housing land supply. As the approach taken by the Court of Appeal in the case of *Horada* encourages, it is important not to relegate to mere incidental material considerations, about which no reasons would be required, matters which were important, if not critical, to the basis of the decision under consideration.

34. At an even higher level of generality the second defendant drew attention to paragraph 5 of the decision letter in the Swanland appeal, and the identification of the "main issue" as simply "whether the site is suitable for development, in the light of the locational policies in the development plan and other material considerations, including the housing land supply position." Again, I am unconvinced that the resolution of this case can be arrived at relying upon this definition of the main issue for two reasons. Firstly, it is in my judgment important not to zoom out so far from the issues presented to the Inspector that the duty to give reasons becomes purposeless, and fails to address the objectives of the provision of reasons set out in paragraph 36 of Lord Brown's speech in the *South Bucks* case. Secondly, the reality is that the Inspector did give reasons in relation to both paragraph 48 of the Framework and the VIP and Clacton decisions. Thus the question which arises is whether or not those reasons were fit for purpose, in the context of an understanding of the decision which the Inspector reached relating to the principal important controversial issues which the parties debated over the course of the inquiry addressing whether or not a five-year housing land supply could be demonstrated by the claimant.

35. I am in no doubt that the reasons which were provided were legally adequate. Two important points of principal need to be borne in mind. Firstly, the Inspector's decision must be read as a whole as well as in a straightforward manner. Secondly, the Inspector is giving the reasons for her decision, and it is in the context of understanding why the Inspector has decided as she has that the duty to give reasons arises. If the reasons are adequate to explain the Inspector's decision it is not necessary for her to give reasons for her reasons. A party to the decision cannot elevate the importance of an argument they make beyond that which the decision-maker considers its role should be simply by affording it exaggerated prominence in the presentation of their case. In most cases, its significance is to be gauged by its importance to the decision reached in the case, rather necessarily the importance ascribed it by a party to the case.

36. Against the backdrop of these principles the following observations arise. Paragraphs 30 and 31 of the decision letter provided an adequate and accurate summary of the VIP and the Clacton decisions, and the basis of the approach which was taken within them. In paragraph 32 of the decision letter the Inspector points out that her view is that the decisions are "materially different to the appeals now before me". She explains the reason for that in terms of emerging housing figures and the engagement of paragraph 48 of the Framework setting out criteria for determining what weight to give to housing requirements in emerging plans in accordance with various factors. These reasons are clear, and immediately explain the factual and policy distinction between the VIP and Clacton decisions and the appeal at hand, in which a different point is raised on the basis of footnote 37 of the Framework.

37. In paragraph 33 the Inspector notes the claimant's argument that paragraph 48 is not a basis for distinguishing the present circumstances, but rejects this on the basis that there is no direction in the Framework to treat the circumstances in the current appeals, where there is the imminent prospect of the standard methodology being deployed, in the same way as there is in relation to emerging local plans to which paragraph 48 applies. This reasoning is clear and reinforced by the complimentary paragraph 34, in which the Inspector points out the Framework's adoption of a clear period of five years for both housing land supply and also local plan preparation and review, which is reflected, as she observes, in the binary choice between the use of the housing requirement in adopted policies, or alternatively the local housing need generated by the standard methodology where those strategic policies are more than five years old. As her added emphasis to the words "either" and "or" notes, the calculation requires use of either a local plan housing requirement or (when the circumstances come within footnote 37) the local housing need figure, but not both. She observes that this "simpler, quicker and more transparent" approach would be undermined by the adoption of a hybrid approach. Thus, the Inspector decided not to depart from paragraph 73 of the Framework.

38. The claimant submitted during the course of argument that paragraph 34 of the decision letter was not to be seen as part of the reasoning relating to the differentiation of the VIP and Clacton decisions, but merely a restatement of the policy. In my judgment that clearly underplays the role of paragraph 34 in the Inspector's overall reasoning. It needs to be read alongside paragraph 33 of the decision, as set out above, as explaining why there is no warrant for concluding that the imminent arrival of a sound housing requirement in an emerging local plan is to be equated to the engagement of footnote 37 in the near future. The provisions of paragraph 73 present a binary choice, and were introduced to create a simple, quick and transparent method of determining whether a five-year housing land supply has been demonstrated at the point in time at which a decision is being made.

39. These reasons in my judgment clearly explain why the Inspector reached the conclusion that she did that there was no basis to depart from paragraph 73 of the Framework. To explain the decision which she made it was not necessary for the Inspector to address each and every argument which the claimant raised in the course of its evidence and submissions. The reasons provided in paragraphs 33 and 34 explain why the Inspector did not propose to depart from paragraph 73 of the Framework in order to evaluate the question of the five-year housing land supply. I do not consider that there is any substance in the complaints raised by the claimant under ground 1.

40. I turn to ground 2. In support of ground 2 the claimant submits that even were the Inspector's reasons adequate they amounted to a misinterpretation of paragraph 48 of the Framework. The claimant contends that when the Inspector observed in paragraph 33 of the decision letter that "there is no such direction in the Framework, or indeed in the PPG relating to the circumstances presented as part of these appeals in the way that there is for emerging local plans in paragraph 48" that was a misinterpretation, since paragraph 48 simply records a basic public law position in respect of emerging policies. The claimant submits that since the imminent introduction of the local housing needs figure generated by the standard methodology was a material consideration, it followed that paragraph 48 of the Framework provided no basis for distinguishing the VIP or the Clacton decisions, because the imminent introduction of the local housing need figure was a material consideration in the appeal which operated in substance in the same way as the imminent adoption of a local plan housing requirement in the VIP and the Clacton decisions. Thus, the Inspector misunderstood and misinterpreted the effect of paragraph 48, or reached an irrational conclusion on the basis that there was no sensible basis to distinguish between the two material considerations.

41. The first defendant responds to this submission by observing, firstly, that in paragraph 32 it is clear that the Inspector has fully understood paragraph 48 of the Framework, and there is no sensible basis upon which it could be concluded that she misinterpreted that paragraph. Furthermore, she clearly understood, and it appeared it was undisputed, that paragraph 48 was not engaged in the circumstances of these appeals. So far as the contention that the Inspector reached an irrational conclusion on the basis that there was no difference between the imminent adoption of a local plan housing requirement which had been found sound, and the imminent use of a local housing need figure derived from the standard method, the first defendant submits that there are clear and obvious differences between those two figures, which is why the Inspector's conclusions were entirely rational and open to her.

42. Firstly, as is obvious from paragraphs 48 and 73 of the Framework, there is no basis to assume that the imminent use of a local housing need figure as a result of the approach of the fifth anniversary of the adoption of strategic policies is to be equated with the housing requirement in an emerging plan which is soon to be adopted having been found sound following independent scrutiny. The two housing requirement figures are derived from different sources and treated differently in national policy. In particular the first defendant points out that the housing requirements in an emerging local plan which has been found sound will arise from both calculations of need and also the consideration of local constraints, leading to the satisfaction of the test of the soundness in relation to the figure. This is quite different from the calculation of the local housing need using set inputs and a universally applicable formula provided for derivation of the standard method requirement. The second defendant makes similar submissions, and also observations in relation to the claimant's contentions about the relationship between planning policy and public law principles that, whilst they are of interest, they do not arise in the present case.

43. I am in no doubt that the first and second defendants' submissions in relation to ground 2 are clearly correct. The Inspector is a specialist tribunal and therefore can be assumed to have a familiarity with, in particular, the Framework which is a compendium of policies that she will be working with on a daily basis. Paragraph 48 of the Framework is clear and unambiguous, and I accept the submission that in paragraph 32 of the

decision letter the Inspector demonstrates that she has clearly understood the policy which it contains. Whilst the claimant submits that the Framework cannot render a material consideration of something which would not otherwise be a material consideration, and that paragraph 48 does not make an emerging plan a material consideration as it would be one in any event, none of this takes the claimant's arguments any further forward.

44. It was neither irrational, nor a misunderstanding of paragraph 48 of the Framework for the Inspector to treat as materially different the situation where paragraph 48 of the Framework was engaged in the light of an emerging sound plan providing a new housing requirement, and the situation where imminent use of a local housing need figure as a result of the approach of the fifth anniversary of the adoption of a local plan was about to occur. Whilst both these possibilities are imminent and certain, that does not mean that they are to be treated as equivalent in planning policy terms in the absence of such policy being specified. Apart from the possibility of them being imminent and certain they are in their nature two quite different housing requirements. The housing requirement from the emerging local plan is one which has been planned and prepared for taking account of all of the requirements necessary to demonstrate to independent scrutiny that the figure is sound. The local housing needs figure produced by the standard methodology is produced through the application of a set calculation. As is clearly identified in the Inspector's reasoning, they both have different roles to play when viewed through the prism of national planning policy. I am unable to accept either that the Inspector misinterpreted paragraph 48 of the Framework, or alternatively reached a conclusion which was irrational.

45. For all of the reasons set out above in my judgment both grounds upon which these claims have been brought must be rejected, and the claims dismissed.

The Planning Inspectorate

Appeal Decision

Inquiry Held on 11- 14 October 2021
Site visit made on 14 October 2021

by Helen B Hockenhull BA (Hons) B.Pl MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd February 2022

Appeal Ref: APP/D2320/W/21/3275691
Land adjacent to Blainscough Hall, Blainscough Lane, Coppull, Chorley

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
- The appeal is made by Lea Hough and Co LLP against the decision of Chorley Borough Council.
- The application Ref 20/01399/OUTMAJ, dated 23 December 2020, was refused by notice dated 13 April 2021.
- The development proposed is the erection of up to 123 dwellings (including 30% affordable housing) with public open space provision, structural planting and landscaping and vehicular access points from Grange Drive.

Decision

1. The appeal is allowed, and planning permission is granted for the erection of up to 123 dwellings (including 30% affordable housing) with public open space provision, structural planting and landscaping and vehicular access points from Grange Drive on land adjacent to Blainscough Hall, Blainscough Lane, Coppull, Chorley in accordance with the terms of the application, Ref 20/01399/OUTMAJ, dated 23 December 2020, subject to the conditions in the attached schedule.

Procedural matters

2. The application is in outline with all matters except for means of access reserved for later approval. The submitted Illustrative Masterplan and Parameters Plan are for indicative purposes only and I have considered them accordingly.

3. The address of the appeal site as stated on the original planning application form did not include a road name. In the interest of clarity, I have included reference to Blainscough Lane in the banner heading and in my decision above.

4. A draft planning obligation by way of an agreement made under section 106 of the Town and Country Planning Act 1990 (s106) between the appellant and the Council was submitted at the Inquiry. A signed and dated version was submitted after the event. The obligation relates to the provision of affordable housing, the management of public open space, and financial contributions towards the provision of public open space, playing pitches and secondary school education. I shall discuss this document in more detail later in my

decision, particularly the education contribution which is disputed by the appellant.

5. The Council refused planning permission citing four reasons. It is agreed between the parties that all matters relating to reasons 2, 3 and 4, regarding ecology, highways and the piecemeal approach to development, have been addressed with the submission of additional information. As there remain no differences between the Council and appellant on these matters, I do not deal with them as main issues. However, as ecology and highway issues remain of concern to several residents, I have addressed them in other matters.

6. Several other appeal decisions have been brought to my attention as they are relevant to the determination of this appeal. Two appeals, Land at Cardwell Farm, Garston Road, Barton, Preston[1], (the Cardwell Farm decision) and Land to the south of Chain House Lane, Whitestake, Preston[2] (the Chain House Lane (2) decision) have been challenged. The decisions remain in place until quashed by order of the High Court. Together with the other appeals referred to, I take them into account in my decision.

Main Issues

7. In light of the above, the main issues in this case are:

- Whether or not the Council can demonstrate a 5 year supply of deliverable housing land, having particular regard to the development plan, relevant national policy and guidance, the housing need or requirement in Chorley and the deliverability of the housing land supply;
- Whether or not the most important policies of the development plan for determining the appeal are out of date, having particular regard to the 5 year housing land supply position and relevant national policy;
- Whether this, or any other material consideration, would justify the proposed development on safeguarded land at this time.
- Whether or not there are adequate secondary school places to serve the development.

Reasons

Policy background

8. Section 70(2) of the Town and Country Planning Act 1990 requires regard to be had to, amongst other things, the provisions of the development plan, so far as material to the application, and to any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that if regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise. The National Planning Policy Framework (the Framework) is such a material consideration.

9. The development plan for the area comprises the Central Lancashire Core Strategy (CLCS), adopted in July 2012, and the Chorley Local Plan 2012-2026

[1] Ref APP/N2345/W/20/3258889
[2] Ref: APP/F2360/W/19/3234070

(Site Allocations and Development Management Policies Development Plan Document) adopted in July 2015. Policy 1 of the CLCS focusses growth and investment in the Preston/South Ribble urban area, Key Service Centres of Chorley and Leyland, strategic sites and Urban and Rural Local Service Centres. Part d) of the policy identifies Coppull as forming an Urban Local Service Centre to help meet housing and employment needs. Policy 4 a) of the CLCS sets out a minimum housing requirement of 22,158 dwellings over the plan period, 2010-2026, and sets out a minimum requirement for Chorley of 417 dwellings per annum.

10. The appeal site is located outside but adjacent to the settlement boundary of Coppull. It is designated as safeguarded land in Policy BNE3.6 of the Chorley Local Plan (CLP).

11. The three Central Lancashire Authorities have commenced work on a Central Lancashire Local Plan, to replace the adopted CLCS and the individual Local Plans adopted by the three authorities. The emerging local plan (eLP) is anticipated to be adopted in late 2023. As the plan is still at an early stage of preparation, the parties agree that it should be afforded limited weight. I have no reason to take a different view.

Principle of development.

12. The Framework outlines that the essential characteristics of the Green Belt is its permanence and its openness. It goes on to say that where necessary, plans should identify areas of safeguarded land between urban areas and the Green Belt, to meet longer term development needs stretching well beyond the plan period.

13. Chorley Local Plan in paragraph 7.16 confirms that the purpose of safeguarded land is to ensure that Green Belt boundaries are long lasting. The Framework states in paragraph 143 d) that plans should make it clear that safeguarded land is not allocated for development at the present time and that planning permission should only be granted following an update to a plan that proposes the development. It is common ground that to grant consent for the development of the appeal site now would conflict with the Framework and with Policy BNE.3 of the Local Plan.

14. The appeal site was designated as safeguarded land in 1997 in the Chorley Local Plan (1991-2006), nearly 25 years ago. This designation was retained in the 2003 and 2015 local plans. The Council consider the site to be capable of development when needed. It is agreed that the site forms a sustainable location for housing development[3], there are no technical constraints and no objections have been raised by statutory consultees. Accordingly, the principal of residential development on the site is acceptable and the site can be regarded as a suitable location for development.

15. Whilst not advancing a prematurity argument, the Council consider that the grant of consent for the site now, could cause harm to the plan led system and undermine the eLP.

16. The eLP aims to provide a minimum of 15,495 homes over the plan period 2021-2036. The proposed 123 homes on the appeal site, would not be so substantial, in isolation, as to undermine the plan strategy. Whilst I agree with

[3] SoCG paragraph 4.5 and 4.6

the Council that no firm decisions have yet been made on the future housing requirements for Central Lancashire or the sites to be allocated, it is highly likely that the appeal site would be selected. This is because the Council will understandably look towards non-Green Belt sites, in particular safeguarded land, to meet future needs before considering the release of land in the Green Belt. Additionally, the site is identified in the CLLP Issues and Options consultation paper as a possible housing site. I am therefore not persuaded that the development of the site now, would undermine the eLP.

17. The Council assert that if planning permission for the appeal proposal was granted, there would be a reduction in the amount of available safeguarded land, which would result in a need to increase the amount of Green Belt released through the eLP. However, should planning permission be granted for the development of the appeal site now, the appellant estimates that completions would commence in the early part of 2024. Therefore, the site would deliver homes within the eLP plan period, 2021-2036, and would contribute towards the 5-year housing land supply. Under cross examination the Council conceded this point and agreed that there would be no implications for the amount of Green Belt land required to be released through the eLP.

Housing requirement in Chorley

18. Paragraph 74 of the Framework requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted policies, or against their local housing need where the strategic policies are more than five years old. Footnote 39 to this paragraph explains that this applies unless strategic policies have been reviewed and found not to require updating.

19. The CLCS was adopted in 2012. Policy 4 sets out an annual requirement of 417 dwellings for Chorley. This is based on the Regional Spatial Strategy for the North West housing requirement, which was manually adjusted to reflect the spatial strategy of promoting greater growth in Preston.

20. Recognising that the strategic housing policies were more than 5 years old, the Central Lancashire Authorities commissioned a review of the housing requirement in Policy 4. A Strategic Housing Market Assessment was produced under the requirements of the 2012 National Planning Policy Framework (the Framework) and the 2014 Planning Practice Guidance (PPG). This led to a Joint Memorandum of Understanding and Statement of Cooperation, referred to as MOU1, which concluded that the housing requirement as set out in Policy 4 should be upheld. It is common ground between the parties that MOU1 constituted a review under the then Footnote 37, now Footnote 39. This was agreed by the respective Inspectors in the Cardwell Farm and Chain House Lane (2) appeals, a conclusion with which I concur.

21. MOU1 included a commitment to undertake a review no less than every 3 years or when new evidence that rendered it out of date emerged. Accordingly, the authorities commissioned the Central Lancashire Housing Study (CLHS) in 2020 to inform a further joint agreement on the calculation and apportionment of housing need in the Housing Market Area (HMA). This further agreement became known as MOU2. In line with the 2018 Framework, the CLHS focused on Local Housing Need (LHN) using the Standard Methodology (SM). The Study concluded that the housing requirement for Chorley, using SM, should be 569

dwellings per annum, 191 for Preston and 250 for South Ribble. The figure for Chorley was significantly greater than that in Policy 4. The CLHS then redistributed the housing need between the three Central Lancashire authorities taking account of sustainable development patterns, population and jobs. This resulted in 27.5% of the housing need being distributed to Chorley, 282 dwellings per annum.

22. In the Pear Tree Lane[4] decision, the Inspector gave consideration to MOU2, and the proposed redistribution of housing need. He concluded that apportionment should be subject to testing through the local plan process and attributed limited weight to the document. This conclusion was also reached by the Inspectors at Cardwell Farm and Chain House Lane (2). I see no reason to disagree. It is the current position of Preston and South Ribble Council's that, LHN and SM should be used for assessing the housing requirement.

23. The Council, whilst agreeing that MOU2 is defunct, takes a different approach to the other two Central Lancashire authorities, reverting to CLCS Policy 4. That being said, the Council continues to work collaboratively with Preston and South Ribble Council's on the eLP, where all 3 authorities accept that the SM should be used to calculate the future housing requirement.

24. The Council argues that SM is not an appropriate basis for calculating housing requirements in Chorley. This is because, in the context of the three Central Lancashire authorities, the application of the SM, skews development to Chorley. This is explained by the fact that the calculation relies on 2014 based population projections and makes use of data from the previous 6 years, 2009-2014. These figures are influenced by migration and the level of development achieved in a borough. Chorley was achieving high delivery rates during this period, around 60% of the housing completions in the HMA, predominantly due to the Buckshaw Village strategic development site. This has resulted in a higher LHN figure for Chorley compared to Preston and South Ribble.

25. It appears to me that this is a criticism of the methodology itself. Whilst I acknowledge the Council's arguments, it is not within my remit to question the appropriateness of the SM, rather it is my role to interpret and apply development plan policy and account for any other considerations material to the determination of any such appeal.

26. After identifying the local housing need figures for each of the Central Lancashire Authorities, the CLHS then sought to redistribute the need taking into account the distribution of population, workforce and jobs, affordability and environmental constraints such as Green Belt. I accept that a straight application of the SM would not have regard to such factors. It would represent a move away from the current spatial strategy and housing distribution set out in CLCS Policy 1, which focusses a greater proportion of growth to Preston.

27. This growth includes the Cottam Strategic Site and North West Preston Strategic Location, developments underpinned by the economic growth aspirations and investment in infrastructure provided by the Preston, South Ribble and Lancashire City Deal. There is no evidence before me to support the suggestion that the application of the SM would have negative effect on development in these areas or any other developments which accord with the spatial pattern of the CLCS.

[4] Ref: APP/D2320/W/20/3247136

28. I agree with the Council that there is nothing to suggest that MOU1 is out of date simply because it is now more than 3 years old. Whilst it is agreed that limited weight should be given to MOU2, I note in paragraph 2.4 it recognises that maintaining the housing requirements in Policy 4, which it states are now out of date, until such time as the review of the local plan is complete, is not appropriate and has been superseded by the standard methodology. All three Central Lancashire authorities endorsed this conclusion. I acknowledge that there is nothing explicit in MOU2 to suggest that the SM should be used if Policy 4 figures are not applied. However, in my view, this would be the logical conclusion.

29. Having come to the agreed position, that Policy 4 is out of date, the Council's current approach is to revert back to using it to assess the housing need. This seems to me to be a contradictory step.

30. The introduction of the SM has resulted in a change in the way that housing need is calculated since MOU1 was agreed in 2017. However, what is important in this case, is not that the SM has been introduced, but that it results in a significant change in the housing need figures for Chorley and also a change in the distribution of housing need in the HMA. Notably, the housing requirement for Chorley increases from 417 to 537 dwellings a year, an increase of around 30%.

31. PPG states that where strategic policies are more than 5 years old but have been reviewed and found not to need updating, the housing requirement figures in these strategic policies should be used. I accept that there is nothing in national policy or guidance to suggest that if strategic policies have been reviewed in advance of the introduction of the SM, that this approach should be modified.

32. Notwithstanding the above, the Framework in paragraph 33 states that relevant strategic policies will need updating at least once every 5 years if the applicable local housing need figure has changed significantly. The PPG[5] sets out that local housing need will be considered to have changed significantly where a plan has been adopted prior to the standard method being implemented on the basis of a number that is significantly below the number generated using the standard method. This is the case here.

33. I acknowledge that work has commenced on the eLP for Central Lancashire, but it is not anticipated to be adopted until late 2023 at the earliest. I accept that it is most likely that local housing need would be redistributed between the three Central Lancashire authorities. However, this stage is some way off. The question is how should local housing need be assessed in the interim.

34. I have carefully considered the various appeals brought to my attention, in particular Pear Tree Farm, Cardwell Farm and the Chain House Lane (2) appeals. The respective Inspectors came to different conclusions based on the evidence and arguments put to them.

35. The Courts[6] have held that planning policies can become out of date as a result of events which have happened since adoption such as a change in national policy. In this case, there has been such a change, resulting in a very different method to calculating local housing need and in this case, a significant

[5] Paragraph 062
[6] CD 9.16 CD9.13

difference between the LHN figure and that of Policy 4. I find that these factors amount to a significant change which renders Policy 4 out of date.

36. Accordingly, I conclude that based on the evidence before me, the housing requirement should be calculated against LHN using the SM.

Oversupply

37. At the Inquiry there was discussion about whether reference should be made to 'oversupply' or 'over delivery'. The appellant suggested that there is no oversupply just over delivery. This to my mind is semantics. The terms are interchangeable, there is no misunderstanding as to their meaning. Both terms have been used in appeal decisions, court judgments and national planning policy and guidance. For the purposes of this appeal however, I shall refer to oversupply.

38. The housing requirement for Chorley over the plan period, 2010-2026 is a minimum of 6834 dwellings. Chorley have achieved completions of 6316 dwellings in the period 2010-2021. The deliverable supply over the remainder of the plan period, is either 1504 on the Councils case or 1377 on the appellant's case. Either way the minimum requirement would be exceeded by the end of the plan period.

39. The Council's approach is to take the remaining minimum requirement over the last 5 years of the plan period, ie 518 dwellings (6834-6316) and use that to determine an annual requirement of 104 dwellings[7] to 2026 (518 divided by 5).

40. The difficulty with this methodology is that it results in the plan requirement becoming a target. However, it is not. It is the minimum figure needed to meet the housing needs of the borough. This approach therefore conflicts with the Frameworks objective of significantly boosting the supply of housing.

41. I acknowledge that the Core Strategy Inspector considered the local plan requirement against the 2012 Framework including the need to significantly boost the supply of housing and found the plan to be sound in this respect. It follows therefore that the plan requirement can be considered to represent a significant boost to housing supply. However, an over delivery would achieve this to a greater extent.

42. CLCS Policy 4a) sets a minimum requirement of 417 dwellings per annum for Chorley. Setting a residual annual requirement of 104 dwellings a year would be inconsistent with this part of the policy. Policy 4c) requires a continuous forward looking 5-year supply from the start of each monitoring period. The Council's approach not only looks backwards to the start of the plan period, but it would also not ensure a rolling 5 year housing land supply. On this basis, the Council's approach would be inconsistent with part c) of the policy.

43. I agree with the Council that the need for housing in Chorley is a need expressed over the plan period. It is then annualised to provide a figure of 417 dwellings per year. Delivery may not be constant year on year. The PPG recognises this to the extent that it provides guidance that where areas deliver more completions than required, the additional supply may be used to offset any shortfalls against the requirement from previous years. This ensures that the overall plan requirement is met.

[7] This figure excludes the 5% buffer, which if applied would mount to 109 dwellings

44. I do not accept that it therefore follows or indeed that it is logical that oversupply in earlier years of the plan period can be used to offset future supply. The guidance refers to only one particular circumstance and it cannot be deduced that an oversupply in earlier years should be taken into account.

45. The CLP anticipated strong housing delivery in the early part of the plan period, in the main due to the development at Buckshaw Village, with delivery tailing off towards the end of the plan. The plan was found to be sound despite a trajectory indicating that there would not be a delivery of at least 417 dwellings at the end of the plan period. This is not surprising. The CLP is a non-strategic plan which must be consistent with the CLCS. It made adequate provision for the housing requirement over the plan period. The purpose of the trajectory was to demonstrate that the requirement could be met. As it achieved this, the plan was found to be sound.

46. The projected reduction in supply in the latter part of the plan period does not negate the importance of maintaining a 5 year housing land supply. The implications of not doing so bring into play paragraph 11d) of the Framework and the application of the tilted balance for decision making and as I have outlined above in paragraph 39 above, would conflict with Policy 4c).

47. It also has implications for the Housing Delivery Test (HDT). Where the HDT indicates that delivery has fallen below 95% of the local planning authorities housing requirement over the previous three years, the authority is required to prepare an action plan. The purpose of the plan as set out in paragraph 76 of the Framework is to increase delivery in future years. Whilst the HDT is separate to the requirement of a 5-year housing land supply, it is a complementary tool aimed at achieving the Government objective of boosting supply. It is therefore in my view a further material consideration.

48. It is common ground that there is an absence of policy or guidance on this matter. The Courts[8] have confirmed that in this situation it calls for the exercise of planning judgment by the decision maker. This is reflected in the differing conclusions made by Inspectors in the various appeal decisions brought to my attention.

49. In the Middleton Cheney case[9], the Inspector came to the view that a failure to take into account previous years over supply could lead to an artificial inflation of the housing land requirement, a lack of 5-year housing land supply, engagement of the tilted balance and the provision of housing in inappropriate locations. However, in the Oakridge[10] case the Secretary of State made it clear that such an approach would be contrary to the national objective of significantly boosting the supply of housing.

50. The purpose of the 5-year housing land supply is to ensure sufficient housing to meet need and improve affordability. Constraining supply as proposed by the Council, would reduce the ability to meet future housing needs. Furthermore, in the context of an acute shortfall of affordable housing in the borough, it would reduce the ability of the Council to ensure that adequate provision is made.

51. Given the above, based on the evidence before me in this case, I conclude that an oversupply from previous years should not be used to offset future housing

[8] Most recently in Tewkesbury BC v SSHCLG & JJ Gallagher & R Cook [2021] EWHC 2782 (Admin)
[9] Ref: APP/Z2830/W/20/3261483
[10] Ref: PCU/APP/G1630/W/3184272

needs. Such an approach would run counter to the aims of the Framework to determine a minimum number of homes required and the demonstration of a minimum 5-year supply of housing to meet this requirement. It would therefore fail to significantly boost the supply of housing. Such a conclusion would also be consistent with the approach set out in the aforementioned Tewkesbury judgement. I shall address the implication of my finding on housing land supply below.

Housing supply

52. There is dispute between the parties on the level of housing supply over the 5 year period 2012-2026. The anticipated delivery in relation to certain sites is questioned. The difference between the parties amounts to 127 dwellings. The Council's assessment suggests the supply is 1504 dwellings while the appellant considers it is 1377 dwellings. It is common ground that this difference is not material to the respective cases or the outcome of the appeal. This is because even if I accepted the appellant's position, the 5-year housing land supply would still be significantly below 5 years calculated using either Policy 4 or the local housing need figure. Only when oversupply is taken into account would the Council be able to demonstrate a 5-year supply.

53. In light of my findings above, based on local housing need using the SM, with no accounting for oversupply, the 5-year housing land supply is between 2.4 and 2.6 years. As this is clearly below 5 years, in accordance with paragraph 11d) of the Framework, the tilted balance is engaged.

Most Important Policies for determination

54. There is agreement that the most important policies for determining this appeal are Policy 1 and Policy 4 of the CLCS and Policy BNE3 of the CLP. I agree with this assessment. As I have found that a 5-year housing land supply cannot be demonstrated, I do not need to determine whether the most important policies are out of date as the tilted balance is engaged in any event. However, I as have found Policy 4 to be out of date for the reasons I have explained above, it follows that CLP Policy BNE3 would also be out of date because it has been based on the Policy 4 housing requirement.

Education contribution

55. The CIL Regulations and the Framework require that a planning obligation can only be sought where it is:

    a) Necessary to make the development acceptable in planning terms

    b) Directly related to the development and

    c) Fairly and reasonably related in scale and kind to the development.

56. The appellant disputes the first two tests. It is argued that the contribution is not necessary and that it is not directly related to the development. The appellant argues that pupils coming from Wigan, outside the County, take up places at local secondary schools. Pupils occupying the development would displace these children, so that there would be no shortfall in places and no need for a contribution. A contribution would not be directly related to the development because Wigan pupils are coming into the catchment and occupying places.

57. Lancashire County Council Education Authority (LEA) calculate the education contribution based on an adopted methodology. First introduced in 2011, this method has been updated and the current version was adopted by Lancashire County Council in July 2021.

58. The education contribution assessment identifies the projected school place requirements for a development by assessing the projected future capacity of schools within a catchment radius of the development, that is 2 miles for primary provision and 3 miles for secondary schools. At outline planning application stage, as the dwelling mix has not been finalised, it is assumed that all properties will be 4 beds. At reserved matters stage, the assessment is re run when the actual dwelling composition is known. Using 5-year pupil projections, which consider pupil census data, births, migration and the projected additional housing from new development, the assessment determines whether the proposed development would result in a shortfall of school places.

59. In respect to this appeal, the assessment calculates that the pupil yield for primary places would be 47 and for secondary, 18 places. In terms of primary school provision, it is considered that there would be no shortfall in places in 5 years' time and no contribution is therefore necessary. However, for secondary school places, a shortfall is identified, and a contribution is requested.

60. There are two areas of dispute between the LEA and the appellant. Firstly, how the catchment area is defined and secondly that Wigan schools are not included in the assessment. I deal with each below.

Catchment radius

61. The 3 mile catchment radius used by the LEA is taken as the 'crow flies'. It does not, as the appellant suggests, consider safe walking distances. The difficulty in using safe walking distances is that there can be disagreement on what that route should be. This is evident in the assessments undertaken by the two parties in this appeal. The modelling used by the appellant produces a different result to that provided by the LEA.

62. I have been made aware of an appeal for a residential development in Heath Charnock[11] where the method used to define the catchment area was also challenged. The appellant in this case argued that the driving or walking distance should be used in the assessment. The Inspector disagreed.

63. The Department for Education (DfE) guidance on securing developer contributions[12] refers to the value in local approaches and that the guidance is not meant to replace these approaches. It was confirmed at the Inquiry that there is no DfE guidance on how catchment areas should be defined.

64. There is nothing in the evidence before me to demonstrate that the LEA approach conflicts with any national guidance or policy. The methodology is clear and has been used for some time. I am not persuaded that the LEA approach is flawed or unreasonable.

65. The LEA provided an alternative assessment based on a catchment defined using safe walking distances. This concluded a lower shortfall in places and

[11] APP/D2320/A/13/2196354
[12] Department for Education, Securing developer contributions for education, April 2019

therefore resulted in a lower contribution being required. In light of my finding above, I do not need to consider this further.

Wigan schools

66. The LEA do not include Wigan schools in their assessment. This is because they are responsible for providing a school place for every Lancashire child. The assessment they produce is therefore a worst-case scenario, assuming that all pupils from a development would want a place in a Lancashire school.

67. I accept that pupils from Wigan may be educated in a Lancashire school. Equally Lancashire pupils may attend a Wigan school. DfE guidance states that in securing development contributions, pupil migration across planning areas must be considered. I am advised that the LEA pupil projections factor in migration as part of the 'take up rate' in Lancashire schools.

68. The appellant has provided a detailed analysis of the availability of school places which conclude that, when Wigan schools are included in the 3 mile catchment, there would be no shortfall of places and no contribution required. I acknowledge that there have been difficulties obtaining up to date data for schools in Wigan and the assessment provided is therefore the best that can be achieved in the circumstances. However, this data is from 2019 and fails to take account of any planning approvals since that date and where pupils for those developments may access a school place. The fact that up-to-date pupil projection data has not been available, brings into question the accuracy and reliability of the assessment.

69. Furthermore, the information provided by the appellant suggests the demand for places in the Shavington and Standish planning area is 22,191. The latest published net capacity information for the DfE shows a capacity of 2140, a shortfall of 51 places. On this basis there would be no difference in the final assessment, a contribution towards school places would be required. Even if a surplus had been shown, it would not have been possible to determine which schools would have these surplus places as only the planning area data is available.

70. I accept that admission criteria for individual schools and parent preferences will affect the demand for school places at different schools. However, this is outside the control of the LEA and not something that a methodology can take into account.

71. The appellant has brought my attention to an appeal decision in Malpas[13] where the Inspector concluded that in the long term, any children from the development could be accommodated in the existing school, as they would take priority in the allocation process and the number accepted from outside the catchment area would be reduced. It is not clarified in the decision whether children from outside the catchment area would be from outside the LEA area. It is therefore unclear whether this decision relates to a situation comparable to that in this appeal.

Conclusion

72. In summary, I conclude that the methodology used by the LEA to calculate the need for a contribution to education provision is robust. A shortfall in secondary

[13] APP/A0665/A/13/2193956

school places has been demonstrated and therefore a contribution is required. The requirement is necessary to make the development acceptable in planning terms, is directly related to the development and fairly and reasonably related in scale and kind to the development. It would also comply with Policy 2 and Policy 14 of the CLCS which seek to ensure that funding shortfalls in infrastructure are identified and secured through developer contributions.

Other matters

Heritage

73. Blainscough Hall which lies to the south of the appeal site, forms a moated manor house possibly constructed in the 1200's. It has no statutory designation as a heritage asset. I am advised that there is also a Roman Road in this area, but its exact route is uncertain. There may therefore be the possibility of finds within the appeal site.

74. There is lack of detailed assessment in this regard. However, I am satisfied that this matter can be addressed through an appropriately worded condition requiring a geophysical survey of the site and appropriate recording.

Highway safety

75. Access to the proposed development is sought from two points on Grange Drive. A Statement of Common Ground has been agreed between the appellant and the local highway authority. The addendum Transport Assessment confirms that the vehicular impact of the development at peak times would not be significant. It also concludes that the roundabout junctions at Preston Road/ Spendmore Lane and Spendmore Lane/Grange Drive have capacity to include future years and committed development. No mitigation measures are considered to be necessary.

76. Local residents, local Councillors and the MP have raised concern about the roundabout junction of Grange Drive with Spendmore Lane. It is considered to be dangerous due to poor visibility and the risk of accidents at high, especially as drivers do not always adhere to the 30-mph speed limit. I observed the operation of this junction on my site visit. This was mid-afternoon when parents were collecting children from the nearby school. There was also a significant amount of on street car parking on Spendmore lane and some parking of parents vehicles on Grange Drive itself. I agree that visibility to the west is affected by the position of the boundary wall to the adjoining house and the bend and drop in the road at this point. However, my assessment was that whilst drivers needed to take care emerging from Grange Drive, they were able to do so safely. I have no evidence before me to suggest that the increased use of this roundabout would result in unacceptable highway safety concerns.

77. There are several public footpaths crossing the site which are to be retained as part of the development. Offsite highway improvements are also proposed to provide dropped kerbs and tactile paving between the site and St Oswald's School and Coppull Library including the traffic island outside 308 Spendmore Lane. These measures are to be supported as they improve the sustainability of the site and encourage walking.

78. Local residents also raised concern about construction vehicles using Grange Drive to access the development site, as a result of the narrowness of the

highway, the incidence of on street car parking and the position of the children's play area relatively close to the road. I have sympathy with these concerns, particularly as the construction period may last up to three years. However, the highway authority has not raised concern in this regard. Additionally, should the development proceed, a condition could be imposed requiring a construction management plan. This could include the routing of vehicles carrying plant and materials, provision of parking for site operative vehicles, periods of time when plant and materials trips should not be made and measures to ensure that construction vehicles do not impede access to adjoining properties.

79. Given the above, I am satisfied that the development proposed would not have an unacceptable impact on highway safety. The proposal would therefore comply with paragraph 109 of the Framework and Policy BNE1 of the CLP which seek to ensure that the residual cumulative highways impact is not severe.

Ecology

80. The appeal site consists of improved pasture. A species poor hedgerow runs along the southern site boundary and a gappy sparse hedge runs north-south through the central part of the site. A wooded stream corridor is present along Tanyard Brook. Surveys have found no evidence of protected or notable species, though a tree with bat roost potential has been identified. Invasive Himalayan balsam is present on the site.

81. At the planning application stage, the Council's ecological advisors concluded that most impacts on ecological interests would be satisfactory or could be addressed through the imposition of appropriate conditions. Concern was raised about the adequacy of the submitted survey information in relation to the presence of great crested newts. Further work was undertaken by the appellant which confirmed that the development would have no impact on this species.

82. This culminated in an agreed Statement of Common Ground between the appellant and the Council's advisor. It is agreed that subject to mitigation measures and ecological enhancement measures secured through conditions, the development would not have any adverse effect on biodiversity and a likely net gain can be achieved. I agree with this conclusion. Accordingly, the proposal would comply with paragraphs 170 and 175 of the Framework as well as CLP Policy BNE9 which require that biodiversity and ecological network resources will be protected, conserved, restored and enhanced.

Flood risk

83. Local residents have also raised concern about flood risk. The site lies in Flood Zone 1, an area with the lowest probability of flooding. The applicant is accompanied by a flood risk assessment. Sporadic surface water flooding is identified which could be addressed by ensuring that surface water flows are safely conveyed through the development. An attenuation basin is proposed to the eastern boundary of the site with flows to outfall restricted to green field run off rates. No objections have been raised by statutory consultees subject to the imposition of conditions to ensure that the development includes a satisfactory drainage scheme.

84. I am satisfied that the appeal scheme would be acceptable in this regard, complying with the Framework objective of ensuring that the development would not be at risk of flooding or increase the risk of flooding to the surrounding area.

Planning balance

85. Paragraph 11(d) of the Framework states that planning permission should be granted unless: i) the policies of the Framework that protect areas or assets of particular importance, as defined in Footnote 7, provide a clear reason for refusing the development proposed; or, ii) any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies of the Framework taken as a whole. I have concluded above that the most important policies for this decision are out-of-date, and that the Council is unable to demonstrate a 5 year housing land supply against the standard method LHN for Chorley. As such the 'tilted balance' in paragraph 11(d) is engaged.

86. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

87. Weighing against the proposal is the conflict with the sites safeguarded land designation in Policy BNE.3 of the CLP. I have already found this policy to be out of date. The policy remains generally consistent with paragraph 143 of the Framework, as it seeks to safeguard land for future development needs. However, it is based on a housing requirement set out in CLCS Policy 4 which is out of date and inconsistent with the local housing need methodology and housing requirement. It is therefore for this reason, inconsistent with the Framework. Accordingly, I attribute limited weight to the conflict with Policy BNE.3.

88. In terms of benefits, the site would contribute 123 dwellings to housing supply. In the absence of a 5 year housing land supply, I give this benefit significant weight.

89. The appeal scheme would also provide 37 affordable homes. This is in the context of a significant shortfall of affordable housing. The 2020 CLHS identifies an affordable housing need of 132 dwellings per annum in Chorley. Accounting for under delivery this amounts to an annualised need of 143 dwellings per annum. The Council's deliverable supply would at best deliver 424 affordable dwellings over the next 5 years, 85 dwellings a year. This equates to just under 60% of the affordable housing need in the borough.

90. It is notable that over the last 2 years there has been an increasing affordable housing need in the borough, demonstrated by the significant increase in households on the Council's housing register. This is likely to be because of the pandemic. As circumstances improve, it is uncertain that this rate of increase will continue. Nevertheless, it indicates a significant need for affordable housing, which on the basis of the current deliverable supply would not be met.

91. The parties disagree about the weight to be given to the scheme's contribution to affordable housing. The Council considers significant weight, whilst the appellant suggests very significant weight. Bearing in mind that the affordability in the borough seems to be improving, demonstrated by the

change in the affordability ratio used to calculate the LHN, I attach significant weight to this benefit.

92. The development would secure economic benefits through investment during the construction phase, the creation of jobs and increased demands on the local supply chain impacting on the wider economy. These benefits would however be short term until the development is completed. Furthermore, future occupants of the scheme would spend in the local economy. I take account of the Central Lancashire Employment Skills SPD which seeks to increase employment opportunities, improve skills and help businesses grow. Imposing a planning condition requiring an Employment and Skills Plan, would bring benefits in terms of the creation of apprenticeships, recruitment through local hubs or the job centre and training opportunities. Overall, I attribute moderate weight to these economic benefits.

93. In relation to environmental gains, the scheme proposes to provide around 0.81 hectares of public open space, 15% of the site area. This represents a significant overprovision against Policy HS4A of the CLP. The open space can be used by not only by future residents but also by the existing community. I therefore give this moderate weight in the planning balance. In terms of biodiversity, the site has limited ecological value, though existing trees and hedgerows can be retained. There is however the opportunity for biodiversity net gain. Some of the measures proposed are necessary to make the development policy compliant. I therefore attach limited weight to this benefit.

94. Given the above, I conclude that the adverse impacts of allowing the development are significantly and demonstrably outweighed by the benefits when assessed against the policies of the Framework taken as a whole. Accordingly, the material considerations in this case, including the limited weight to Policy BNE.3, indicate that the development should be determined other than in accordance with the development plan. The appeal should therefore be allowed, and planning permission granted.

Planning Obligation

95. The submitted section 106 agreement would secure 30% affordable housing on the site ie, 37 dwellings, ensuring that the proposal would comply with the provisions of Policy 7 of the CLCS.

96. The provision of amenity greenspace, the improvement of provision for young people and playing pitches would be required in order for the development to comply with CLCS Policy 24, Policies HS4A and HS4B of the CLP and the Central Lancashire Open Space and Playing Pitch Supplementary Planning Document.

97. I have discussed the requirement for an education contribution in detail in my decision and concluded that one is necessary to address the identified shortfall in secondary school places. This is also secured through the s106 agreement in line with CLCS Policy 14.

98. I am satisfied that the above obligations meet the tests in the Framework and regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 (as amended). They are needed to make the development acceptable in planning terms; are directly related to the development; and are fairly and

reasonably related in scale and kind to the development. I have therefore taken them into account in my decision.

Conditions

99. The Council and the appellant agreed a set of conditions that were discussed at the inquiry. I have considered all the conditions in light of the advice within the Framework, and I have revised some of them as discussed at the inquiry, to avoid duplication or in the interests of clarity and enforceability.

100. A condition specifying the approved plans is necessary in the interests of good planning. It is necessary to impose conditions setting out time limits for development and the submission of reserved matters.

101. I have required details of the position, layout and phasing of the public open space and an updated ecological appraisal as part of the reserved matters application. This is to ensure appropriate open space provision is provided and to ensure no impacts on the ecological status of Tanyard Brook.

102. In the interests of safeguarding biodiversity, conditions preventing the removal of trees with bat roost potential, the removal of trees and hedgerows and the provision of external lighting, unless appropriate surveys have been undertaken, are necessary. For the same reason, conditions to protect nesting birds and to require the submission of a Construction Environmental Management Plan, an Ecological Mitigation and Enhancement Plan and a Landscape and Ecological Management Plan are required.

103. In order to ensure the site is satisfactory drained, conditions are imposed to ensure the development proceeds in accordance with the submitted Flood Risk Assessment, that a foul and surface water drainage strategy for the whole site and for each phase of development are submitted together with measures to prevent surface water pollution. I have reworded the drainage conditions to avoid duplication and in the interests of precision. It is necessary to safeguard the development from possible contaminated land. I therefore impose a condition requiring investigation and assessment as well as details of necessary remediation and mitigation measures.

104. A condition requiring an Employment and Skills Plan is a reasonable and necessary requirement to set out the employment and skills training opportunities for the construction phase of the development. This would also accord with Policy 15 of the CLCS.

105. I impose a condition requiring the submission of a super-fast broadband strategy for future occupants of the site. This accords with the Framework expectations for development to support the expansion of electronic communication networks and complies with Policies 1 and 3 of the CLCS.

106. I have required details of external materials, fences, walls and boundary treatments and hard landscaping for each phase of development with any reserved matters application or at a later time specified in the respective condition. These conditions are flexibly worded as I am advised that there are currently issues with obtaining construction materials which may mean that these details are not available at reserved matters stage.

107. In the interest of promoting sustainable travel, a condition is necessary requiring the installation of hard wiring for electric vehicle charging points. A

condition requiring all dwellings on the site to achieve emission rates of 19% above the requirements of the 2013 Buildings Regulations is both necessary and reasonable to comply with Policy 27 of the CLCS.

108. A condition is necessary to require an Estate Street Phasing and Completion Plan to ensure the access roads are completed before dwellings are occupied. I have required a pre commencement condition survey of Grange Drive and the junction with Spendmore Lane to ensure the effects of the development on surrounding roads are mitigated. A condition requiring the new estate roads to be constructed to base course level for a minimum of 10 metres into the site before development takes place and provision for construction vehicles to enter and leave the site in forward gear is necessary in the interests of highway safety.

109. In order to safeguard the amenity of the occupiers of surrounding properties and manage the impact of the development on the highway during construction, the Council suggested a condition requiring a Construction Environment Management Plan (CEMP). Whilst I agree this is necessary, I have changed the name of the document to a Construction Method Statement to avoid confusion as there is already a condition requiring a CEMP but for biodiversity. Conditions requiring the submission of a scheme for the construction of the site access and off-site highway improvement works and their implementation before occupation of any of the dwellings, is required in the interests of highway safety and the efficient operation of the highway. I have removed the phrase 'not limited to' as it is too open ended and suggests other non-specified works may be required.

110. Whilst a Framework Travel Plan accompanies the application, the submission of a Full Travel plan is necessary to encourage sustainable travel and reduce journeys by car. Finally, due to the potential for archaeological finds associated with Blainscough Hall, a condition is necessary to require a phased programme of archaeological work in accordance with a written scheme of investigation.

Conclusion

111. For the reasons given above, and taking account of all other matters raised, I conclude that the appeal should be allowed, subject to the conditions in the attached schedule.

Helen Hockenhull

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Ian Ponter, Barrister

He called

Councillor Peter Wilson	Deputy Executive Leader, Chorley Council

LANCASHIRE COUNTY COUNCIL EDUCATION AUTHORITY:

Vincent Fraser QC

Ben Terry	Provision Planning Manager LCC

(Took part in the Round Table Discussion on Education contributions)

FOR THE APPELLANT:

Giles Cannock QC

He called

Mark Saunders	Director NJL Planning
Neil Tatton	Resolve106 Affordable Housing Consultancy
John Powell	Alfredson York Associates Ltd

INTERESTED PERSONS:

Steve Holgate	Councillor for Coppull, Mayor of Chorley
Julia Berry	Councillor for Coppull and County Councillor
Eric Keary	Resident
Kath Keary	Resident
Lyn Moores	Resident
Mr Winstanley	Resident
Alex Hilton	Councillor for Coppull
The Right Hon Sir Lyndsay Hoyle	MP for Chorley

DOCUMENTS SUBMITTED DURING THE INQUIRY

1. Revised list of agreed conditions.
2. Opening submission on behalf of the Council
3. Opening submission on behalf of the appellant
4. Lancashire County Council Education Contribution Assessment dated 5 October 2021 using 3-mile walking distance.
5. Closing submission on behalf of the Council
6. Closing submission on behalf of the appellant.

DOCUMENTS SUBMITTED AFTER THE INQUIRY

1. Email from appellant dated 14 October 2021 confirming agreement to the pre commencement conditions.
2. Email from the Council dated 14 October 2021 outlining where the playing pitch contribution is likely to be spent.
3. Signed and dated section 106 agreement.

ANNEX: SCHEDULE OF CONDITIONS

1) The development hereby permitted shall be carried out in accordance with the following approved plans: Site Location Plan (LH.BH.LP.01) and the Proposed Access off Grange Drive (2385-FO1).

2) Prior to the commencement of development, full details of the layout, scale, appearance and landscaping (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority and the development shall be carried out as approved.

3) Application for approval of the reserved matters shall be made to the local planning authority no later than 2 years from the date of this permission. The development hereby permitted shall take place no later than 2 years from the date of approval of the last of the reserved matters to be approved.

4) The first reserved matters application shall provide full details of the position, layout and phasing of the public open space to be submitted to and approved in writing by the local planning authority. Thereafter, the provision of these areas shall be carried out in strict accordance with the approved details.

5) The first reserved matters application shall be accompanied by an updated ecological appraisal submitted to and approved in writing by the local planning authority. The Appraisal will demonstrate that there will be no negative impacts on the ecological status/potential of the Tanyard Brook resulting from the disposal of surface water post-development.

6) No trees assessed as having bat roosting potential within the Preliminary Ecological Appraisal dated July 2020, are to be removed under any circumstances unless an up-to-date bat emergence survey has been submitted to and agreed in writing by the local planning authority.

7) Removal of hedgerows and trees and the provision of external lighting has the potential to disrupt bat foraging as identified in the Preliminary Ecological Appraisal by Pennine Ecological dated July 2020 and shall not in any circumstance occur unless:

    a) Bat activity surveys demonstrate the feature/s have low value to bats and/or;

    b) An external lighting strategy has been provided demonstrating no significant effects on features utilised for bat foraging.

8) No works to trees or shrubs shall occur between the 1st March and 31st August in any year unless a detailed bird nest survey by a suitably experienced ecologist has been carried out immediately prior to clearance. Written confirmation shall be provided that no active bird nests are present and this shall be agreed in writing by the local planning authority.

9) No development, site preparation/clearance or earthworks shall commence until a Construction Environmental Management Plan (CEMP: biodiversity) has been submitted to, and approved in writing by, the local planning authority. The approved CEMP (biodiversity) shall specifically include a method statement detailing:

a) A reasonable avoidance method statement for amphibians (common toad, common frog, smooth newt, and palmate newt). If a great crested newt is found during the development all work should cease immediately and a suitably licensed amphibian ecologist shall be employed to assess how best to safeguard the newt(s). Natural England should also be informed;

b) A reasonable avoidance measures method statement for otters;

c) Measures to protect the Tanyard Brook from accidental spillages, dust and debris;

d) Measures to protect retained trees and hedgerows within the site and site boundary. An arboriculturist shall provide reasonable avoidance measures for the site;

e) Lighting control measures to minimise the impact on bats during construction and to avoid light spillage along the Tanyard Brook corridor;

f) Measures to avoid harm to protected species (e.g., water vole, badger) which may potentially be present within the local landscape e.g. any structure capable of capturing, containing or injuring animals must be covered or made safe to prevent access by animals during the night;

g) Providing ecological buffers around sensitive features (e.g. Tanyard Brook, mature trees, and invasive plant species);

h) A method statement detailing eradication and/or control and/or avoidance measures for himalayan balsam.

The approved CEMP: biodiversity shall be adhered to and implemented throughout the construction period strictly in accordance with the approved details.

10) The first reserved matters application shall be accompanied by an Ecological Mitigation and Enhancement Plan to be submitted to and approved in writing by the local planning authority. The ecological mitigation and enhancement plan shall demonstrate how the scheme would achieve a biodiversity net gain. The Plan should include consideration of:

a) Enhancement of the existing habitats along the Tanyard Brook;

b) Habitat creation that strengthens the existing habitats along the Tanyard Brook;

c) Enhancement of retained hedgerows;

d) Mitigation for loss of hedgerow and hedgerow trees;

e) Mitigation for loss of bird nesting habitat;

f) Enhancement measures for bats.

11) A Landscape and Ecological Management Plan (LEMP) shall be submitted to, and be approved in writing by, the local planning authority prior to the commencement of the first phase of development. The content of the LEMP shall include the following:

    a) Description and evaluation of features to be managed;

    b) Ecological trends and constraints on site that might influence management;

    c) Aims and objectives of management;

    d) Appropriate management options for achieving aims and objectives;

    e) Prescriptions for management actions;

    f) Preparation of a work schedule (including an annual work plan capable of being rolled forward over a five-year period);

    g) Details of the body or organization responsible for implementation of the plan;

    h) Ongoing monitoring and remedial measures.

    The LEMP shall also include details of the legal and funding mechanism{s} by which the long-term implementation of the plan will be secured by the developer with the management body(ies) responsible for its delivery. The plan shall also set out (where the results from monitoring show that conservation aims and objectives of the LEMP are not being met) how contingencies and/or remedial action will be identified, agreed and implemented so that the development still delivers the fully functioning biodiversity objectives of the originally approved scheme. All planting, seeding or turfing comprised in the approved details of landscaping shall be carried out in the first planting and seeding seasons following the occupation of any dwellings on each phase or following the completion of the development within the relevant Phase, whichever is the earlier. Any trees or plants which, within a period of 5 years from the completion of the development, die, are removed or become seriously damaged or diseased, shall be replaced in the next planting season with others of a similar size and species, unless the local planning authority gives written consent to any variation.

12) The development hereby permitted shall be carried out in accordance with the principles set out within the Flood Risk Assessment (December 2020, Ref: 6550/R1). The measures shall be fully implemented prior to first occupation of any dwelling and in accordance with the timing / phasing arrangements embodied within the scheme, or within any other period as may subsequently be agreed, in writing, by the local planning authority.

13) No development shall take place until:

    a) a methodology for investigation and assessment of ground contamination has been submitted to and agreed in writing with the local planning authority. The investigation and assessment shall be carried in accordance with current best practice including British Standard 10175:2011+A2:2017 Investigation of potentially contaminated sites - Code of Practice. The objectives of the

investigation shall be, but not limited to, identifying the type(s), nature and extent of contamination present to the site, risks to receptors and potential for migration within and beyond the site boundary.

b) all testing specified in the approved scheme (submitted under a) and the results of the investigation and risk assessment, together with remediation proposals to render the site capable of development have been submitted to the local planning authority.

c) the local planning authority has given written approval to any remediation proposals (submitted under b), which shall include an implementation timetable and monitoring proposals. Upon completion of remediation works a validation report containing any validation sampling results shall be submitted to the local planning authority. Thereafter, the development shall only be carried out in full accordance with the approved remediation proposals. Should, during the course of the development, any contaminated material other than that referred to in the investigation and risk assessment report and identified for treatment in the remediation proposals be discovered, then the development should cease until such time as further remediation proposals have been submitted to and approved in writing by the local planning authority.

14) At the same time as the submission of the first reserved matters application, a Foul and Surface Water Drainage Strategy for the whole site, with a timetable for its implementation, shall be submitted to and approved in writing by the local planning authority. The development hereby permitted shall be carried out only in accordance with the approved drainage strategy.

15) No development shall commence in any phase until a detailed, surface water sustainable drainage strategy for that phase has been submitted to, and approved in writing by, the local planning authority. The detailed sustainable drainage strategy shall be based upon the site-specific flood risk assessment submitted and sustainable drainage principles and requirements set out in the National Planning Policy Framework, Planning Practice Guidance and Defra Technical Standards for Sustainable Drainage Systems and no surface water shall be allowed to discharge to the public foul sewer(s), directly or indirectly. Those details shall include, as a minimum:

a) Sustainable drainage calculations for peak flow control and volume control (1 in 1, 1 in 30 and 1 in 100 + 40% climate change), with allowance for urban creep;

b) Final sustainable drainage plans appropriately labelled to include, as a minimum:

i. Plan identifying areas contributing to the drainage network, including surface water flows from outside the curtilage as necessary;

ii. Sustainable drainage system layout showing all pipe and structure references, dimensions, design levels;
iii. Details of all sustainable drainage components, including landscape drawings showing topography and slope gradient as appropriate;
iv. Flood water exceedance routes in accordance with Defra Technical Standards for Sustainable Drainage Systems;
v. Finished Floor Levels (FFL) in AOD with adjacent ground levels for all sides of each plot to confirm minimum 150mm+ difference for FFL.

c) Measures taken to manage the quality of the surface water runoff to prevent pollution, protects groundwater and surface waters, and delivers suitably clean water to sustainable drainage components.

d) Evidence of an assessment of the site conditions to include site investigation and test results to confirm infiltration rates and groundwater levels in accordance with industry guidance.

The sustainable drainage strategy shall be implemented in accordance with the approved details.

16) No development shall commence until details of how surface water and pollution prevention will be managed during each construction phase have been submitted to and approved in writing by the local planning authority. Those details shall include for each phase, as a minimum:

a) Measures taken to ensure surface water flows are retained on-site during construction phase(s) and, if surface water flows are to be discharged, they are done so at a restricted rate to be agreed with the Lancashire County Council LLFA.
b) Measures taken to prevent siltation and pollutants from the site into any receiving groundwater and/or surface waters, including watercourses, with reference to published guidance.

The development shall be constructed in accordance with the approved details.

17) For each phase, notwithstanding any indication on the approved plans, no development hereby approved shall commence until a scheme for the disposal of foul waters for that phase has been submitted to and approved in writing by the local planning authority. The details shall include levels of the proposed foul drainage system including ground and finished floor levels in AOD. The details for each part or phase must be consistent with the approved Foul and Sustainable Surface Water Drainage Strategy for the whole site. The development shall be carried out in accordance with the approved details.

18) Prior to the first occupation of the development, a sustainable drainage management and maintenance plan for the lifetime of the development shall be submitted to the local planning authority and agreed in writing. The sustainable drainage management and maintenance plan shall include as a minimum:

a) Arrangements for adoption by an appropriate public body or statutory undertaker, or, management and maintenance by a resident's management company; and
b) Arrangements for inspection and ongoing maintenance of all elements of the sustainable drainage system to secure the operation of the surface water drainage scheme throughout its lifetime.

The development shall subsequently be completed, maintained and managed in accordance with the approved plan.

19) No building on any phase (or within an agreed implementation schedule) of the development hereby permitted, shall be occupied until a Verification Report and Operation and Maintenance Plan for the lifetime of the development, pertaining to the surface water drainage system and prepared by a suitably competent person, has been submitted to and approved by the local planning authority.

The Verification Report must demonstrate that the sustainable drainage system has been constructed as per the agreed scheme (or detail any minor variations), and contain information and evidence (including photographs) of details and locations (including national grid reference) of inlets, outlets and control structures; landscape plans; full as built drawings; information pertinent to the installation of those items identified on the critical drainage assets drawing; and, the submission of a final 'operation and maintenance manual' for the sustainable drainage scheme as constructed.

Thereafter the drainage system shall be retained, managed and maintained in accordance with the approved details.

20) The development shall not commence until an Employment and Skills Plan that is tailored to the development and will set out the employment and skills training opportunities for the construction phase of the development has been submitted to, and approved in writing by, the local planning authority. Thereafter, the development shall be carried out in accordance with the approved Plan.

21) Prior to the construction/provision of any utility services, a strategy to facilitate super-fast broadband for future occupants of the site shall be submitted to, and approved in writing, by the local planning authority. The strategy shall seek to ensure that upon occupation of a dwelling, either a landline or ducting to facilitate the provision of a super-fast broadband service to that dwelling from a site-wide network, is in place and provided as part of the initial highway works within the site boundary only.

22) For each phase, with any reserved matters application or prior to excavation of the foundations for any dwellings, samples of all external facing and roofing materials for that phase (notwithstanding any details shown on previously submitted plan(s) and specification) shall be submitted to and approved in writing by the local planning authority. All works shall be undertaken strictly in accordance with the approved details.

23) For each phase, with any reserved matters application or prior to the construction of any part of any dwelling above ground level, full details of

the alignment, height and appearance of all fences, walls and gates to be erected on the site (notwithstanding any such details shown on previously approved plans) for that phase shall be submitted to and approved in writing by the local planning authority. No dwelling shall be occupied until all fences, walls and gates shown on the approved details to bound its plot have been erected in conformity with the approved details. Other boundary treatments shown in the approved details shall be erected in conformity with the approved details prior to occupation of the final dwelling of the development

24) For each phase, with any reserved matters application or prior to the laying of any hard landscaping (ground surfacing materials) full details of their colour, form and texture for that phase shall be submitted to and approved in writing by the local planning authority. The development shall be undertaken strictly in accordance with the approved details and shall be completed in all respects before occupation of the final dwelling in that phase.

25) No dwelling hereby approved shall be occupied until each dwelling has been installed with hard wiring for an electrical vehicle charging point, the details of which shall have been submitted and approved in writing by the local planning authority prior to the installation.

26) All the dwellings hereby approved shall achieve a minimum Dwelling Emission Rate of 19% above 2013 Building Regulations. No dwelling shall be occupied until a SAP assessment (Standard Assessment Procedure), or other alternative proof of compliance (which has been previously approved in writing by the local planning authority) such as an Energy Performance Certificate, has been submitted to and approved in writing by the local planning authority demonstrating that the dwelling has achieved the required Dwelling Emission Rate.

27) No development shall commence other than site enabling works until an Estate Street Phasing and Completion Plan has been submitted to and approved in writing by the local planning authority. The Plan shall set out the development phases and the standards that the estate streets serving each phase of the development will be completed to. No dwelling shall be occupied until the estate street(s) affording access to that dwelling has been completed in accordance with the Lancashire County Council Specification for Construction of Estate Roads.

28) The new estate roads/access onto Grange Drive shall be constructed in accordance with the Lancashire County Council Specification for Construction of Estate Roads to at least base course level for a minimum of 10 metres into the site from the boundary with Grange Drive before any other development takes place within the site. Provisions to enable construction traffic to enter and leave the site in a forward gear (including a vehicular turning space suitable for construction traffic) shall also be laid out within the site and available for use prior to any other development taking place.

29) Prior to the commencement of development, a joint survey shall be carried out between the developer and the local planning authority (in conjunction with the highway authority) to determine the condition of Grange Drive and the junction with Spendmore Lane. A similar survey shall be carried out within one month of the completion of the last house

and the developer shall make good any damage to Grange Drive and the junction with Spendmore Lane to return them to the pre-construction situation.

30) Prior to the commencement of development, a Construction Method Statement (CMS) shall be submitted to and approved in writing by the local planning authority. The approved CMS shall be adhered to throughout the construction period. The CMS shall include and specify the provisions to be made for the following:

a) parking of vehicles of site operatives and visitors;
b) hours of operation (including deliveries) during construction;
c) loading and unloading of plant and materials used in the construction of the development;
d) storage of such plant and materials;
e) the erection of security hoarding where appropriate;
f) wheel washing and/or power wash and hardstanding area with road sweeping facilities, including details of how, when and where the facilities are to be used;
g) measures to mechanically sweep the roads adjacent to the site as required during the full construction period;
h) periods when plant and materials trips should not be made to and from the site (mainly peak hours but the developer to identify times when trips of this nature should not be made);
i) routes to be used by vehicles carrying plant and materials to and from the site;
j) measures to ensure that construction and delivery vehicles do not impede access to adjoining properties;
k) measures to control the emission of dust and dirt during construction.

31) No part of the development hereby approved shall commence until a scheme for the construction of the site access and the off-site works of highway improvement has been submitted to, and approved by, the local planning authority in consultation with the Highway Authority as part of a section 278 agreement, under the Highways Act 1980. The submitted scheme shall include the following:

a) Site access: including assessment of the street lighting and provision of tactile paving.
b) Off-site works: Providing dropped kerbs and tactile paving between the site and St Oswald's Primary School and Coppull Library and to include the traffic island outside 308 Spendmore Lane.

32) No dwelling within the development hereby approved shall be occupied until the approved scheme for the relevant site access has been constructed and completed in accordance with the approved scheme details.

33) No part of the development hereby approved shall be occupied until the approved scheme for the off-site works has been constructed and completed in accordance with the approved scheme details.

34) Prior to the occupation of the development hereby permitted, a Travel Plan shall be submitted to, and approved in writing by, the local planning authority. The Travel Plan shall be implemented within the timescale set out in the approved plan and will be audited and updated at intervals not greater than 18 months to ensure that the approved Plan is carried out over a 5-year period.

35) No development, site clearance/preparation, or demolition shall commence until the applicant or their agent or successors in title has secured the implementation of a phased programme of archaeological work in accordance with a written scheme of investigation, which shall be submitted to, and approved in writing by, the local planning authority. These works shall be undertaken by an appropriately qualified and experienced professional archaeological contractor and comply with the standards and guidance set out by the Chartered Institute for Archaeologists (CIfA). The development shall be carried out in accordance with the agreed details.

Neutral Citation Number: [2022] EWHC 829 (Admin)

Case No: CO/3041/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2022

Before :

THE HONOURABLE MRS JUSTICE THORNTON DBE

- -

Between :

THE LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

(1) THE MINISTER OF STATE FOR HOUSING

(2) WESTMINSTER CITY COUNCIL

Defendants

-and-

(1) THE SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

(2) LEARNING FROM THE RIGHTEOUS

Interested Parties

- -
- -

Richard Drabble QC and **Meyric Lewis** (instructed by **Richard Buxton Solicitors**) for the **Claimant**

Timothy Mould QC and **Matthew Henderson** (instructed by **Government Legal**) for the **First Defendant**

Douglas Edwards QC (instructed by **Bi-borough Legal Services**) for the **Second Defendant** (written submissions only)

Christopher Katkowski QC and **Kate Olley** (instructed by **Government Legal Department**) for the **Secretary of State for Housing Communities and Local Government**

Zack Simons (instructed by **Richard Max & Co LLP**) for **Learning from the Righteous**

Hearing dates: 22nd and 23rd February 2022

- -

Approved Judgment

The Hon. Mrs Justice Thornton :

Introduction

1. This is a claim for statutory review, pursuant to s. 288 of the Town and Country Planning Act 1990, of the decision by the Minister of State for Housing to grant planning permission for the installation of the United Kingdom Holocaust Memorial and Learning Centre at Victoria Tower Gardens in Millbank, London.

2. The proposal for a UK Holocaust Memorial and Learning Centre ('the Holocaust Memorial') was first announced in January 2015 in the Holocaust Commission's Report, 'Britain's Promise to Remember':

> "*there should be a striking new memorial to serve as the focal point for national commemoration of the Holocaust. It should be prominently located in Central London to attract the largest possible number of visitors and to make a bold statement about the importance Britain places on preserving the memory of the Holocaust."*

3. All parties before the Court support the principle of a compelling memorial to the victims of the Holocaust and all those persecuted by the Nazis during those years when, "*humanity was tipped into the abyss of evil and depravity*". The memorial is an essential part of "*Britain's Promise to Remember*" (Holocaust Commission Report). The Trust explained to the Court that many of its supporters are Jewish people whose families were either forced to flee the Holocaust or who perished in it.

4. The issue dividing the parties is the proposed location of the Memorial in Victoria Tower Gardens. Victoria Tower Gardens has considerable cultural, historical and heritage significance. It is located on the north bank of the River Thames immediately south of and adjacent to the Palace of Westminster and Black Rod Garden. It is a Grade II Registered Park and Garden. It contains within it three listed structures; the statue of Emmeline Pankhurst (Grade II listed), the statue of the Burghers of Calais (Grade I listed) and the Buxton Memorial Fountain (Grade II* listed). The site has contained a garden for public recreation since approximately 1880.

5. It is important to emphasise that the merits of the Memorial's proposed location in Victoria Tower Gardens are not a matter for the Court. Its location there may raise matters of legitimate public debate, but they are not matters for the Court to determine. The role of the Court in judicial review is concerned with resolving questions of law and ensuring that public bodies act within the limits of their legal powers.

6. The three issues that arise for consideration by the Court in this challenge are:

    1) Did the inspector err in his assessment of harm to the historic environment of the Gardens; in particular the setting of the Buxton Memorial?

2) Does the London County Council (Improvements) Act 1900 impose a statutory prohibition on locating the Memorial in the Gardens?

3) Did the inspector err in his treatment of alternative sites for the Memorial?

Background

The parties

7. The Claimant is the London Historic Parks and Gardens Trust ('the Trust'). It is a small charity with the principal object of preserving and enhancing the quality and integrity of London's green open spaces. The First Defendant is the Minister of State for Housing ('the Minister') and decision maker on the planning application. The Second Defendant is Westminster City Council, the local planning authority for the area. The First Interested Party is the Secretary of State for Housing, Communities and Local Government and the applicant for planning permission. The Second Interested Party is Learning from the Righteous, a Holocaust Education Charity concerned to highlight the contemporary relevance of Holocaust Education.

The Holocaust Memorial and Learning Centre

8. On 27 January 2014, on Holocaust Memorial Day, the then Prime Minister launched the Holocaust Commission. Its task was to examine what more should be done in Britain to ensure that the memory of the Holocaust is preserved and the lessons it teaches are never forgotten. In January 2015, the Commission published a report titled 'Britain's Promise to Remember'. The report concluded that there should be a striking memorial prominently located in Central London. It would serve as the focal point for national commemoration of the Holocaust. A location in Central London would attract the largest possible number of visitors. The aim would be to make a bold statement about the importance Britain places on preserving the memory of the Holocaust.

Victoria Tower Gardens

9. Victoria Tower Gardens is a Grade II Registered Garden and area of accessible public open space, located on the north bank of the River Thames, immediately south and adjacent to the Palace of Westminster and Black Rod Garden. The site is bounded by Abingdon Street and Millbank to the west, the River Thames to the east and Horseferry Road/Lambeth Bridge to the south.

10. Within the Gardens there are three listed structures: the statue of Emmeline Pankhurst (Grade II listed), the statue of the Burghers of Calais (Grade I listed) and the Buxton Memorial Fountain (Grade II* listed). The Grade II listed River Embankment from the Houses of Parliament to Lambeth Bridge forms the eastern (river) edge of the Gardens.

11. The site is also within the setting of a number of other listed buildings and structures, including the Grade I listed Palace of Westminster, Lambeth Bridge (Grade II listed), Victoria Tower Lodge and Gates to Black Rod Garden (Grade I listed), Norwest House,

Millbank (Grade II listed), The Church Commissioners (Grade II* listed) and Lambeth Palace (Grade I listed).

12. The site is located within the Westminster Abbey and Parliament Square Conservation Area and is immediately south of the Palace of Westminster and Westminster Abbey including St. Margaret's Church World Heritage Site. The site is to the east of the Smith Square Conservation Area.

Site selection

13. The UK Holocaust Memorial Foundation was established with cross-party support to deliver the recommendations of the Holocaust Memorial Commission. Its work included a call for potential sites.

14. In 2015, after studying the available options, three central London sites were identified; the Imperial War Museum; Potter's Field and Millbank. They were all regarded as fulfilling the Commission's objective to provide a striking new memorial prominently located in Central London.

15. In January 2016, the then Prime Minster announced that the memorial would be built in Victoria Tower Gardens. A design competition was launched in September 2016 and in October 2017 it was announced that Adjaye Associates, Ron Arad Architects and the landscape architects Gustafson Porter + Bowman had been selected to design the Memorial and Learning Centre for the Gardens.

16. The selection of Victoria Tower Gardens as the site was controversial. In its closing submissions to the planning inquiry, the Trust expressed concern that the Gardens were chosen without any professional assessment to support the choice of the site and no public consultation as to its suitability, acceptability or desirability as a location. Proper consideration of alternative sites were said to have received scant consideration. The Trust expressed further concern that the site search process was not a matter for scrutiny in the public inquiry. These concerns formed part of the Trust's submissions to the Court on the Inspector's approach to alternative sites.

Planning application

17. In January 2019, the Secretary of State for Housing Communities and Local Government applied to the Council for planning permission for the Memorial to be located in the Gardens. Plans of the design illustrate the Memorial as comprising 23 bronze fins honouring the millions of Jewish men, women and children who lost their lives in the Holocaust, and all other victims of persecution, including Roma, gay and disabled people. The 23 bronze fins will create 22 pathways into and from the Learning Centre which will be constructed below ground.

18. In November 2019, the then Minister for Housing directed that the planning application be referred to her for determination, pursuant to section 77 of the Town and Country Planning Act 1990. Given the Secretary of State was the applicant for planning permission handling arrangements were put in place at the Government Legal Department and the Department for Levelling Up, Housing and Communities (as

renamed since the decision under challenge) to ensure there was, and is, a functional separation between the persons bringing forward the proposal and the persons responsible for determining the proposal. Following a successful legal challenge by the Trust to the decision making arrangements the arrangements were revised and published (London Historic Parks and Gardens Trust v the Secretary of State for Housing Communities and Local Government [2020] EWHC 2580 (Admin)).

The Planning inquiry

19. A public inquiry was held into the application by an Inspector appointed by the Minister for Housing between 6 – 23 October 2020 and 3 – 13 November 2020.

20. The Trust appeared at the inquiry and was formally represented. Whilst supporting the principle of the Memorial, the Trust, and other parties with whom they made common cause, opposed its location in Victoria Tower Gardens on the basis that it represents an exceptionally serious intrusion into a green public open space of the highest heritage significance. The Trust called expert evidence on harm to heritage assets; harm to the character, amenity and significance of Victoria Tower Gardens as a Registered Park and Garden; harm to the mature trees surrounding the park as well as on the availability of an alternative site for the memorial at the Imperial War Museum.

21. Westminster City Council appeared as the local planning authority. Whilst supportive of the principle of the memorial, it opposed its location in the Gardens on the basis of the sensitivities of the location and the impact on the historic environment and the risk of impact to the established trees on the west side of the Gardens. The Council considered that the Gardens might be a suitable location for a more modestly sized scheme.

22. Learning from the Righteous appeared in support of the application and was formally represented at the inquiry. It supported the location of the Memorial in Victoria Tower Gardens.

The Planning Inspector's Report

23. The Inspector's report to the Minister of State for Housing, dated 29 April 2021, is 243 pages long, with 60 pages of analysis. The Inspector identified the main considerations as including:

    a) The effect of the proposal on designated and non-designated heritage assets, including of specific relevance to the challenge; whether the proposed development would preserve the setting of the Buxton Memorial, a Grade II* listed building;

    b) Other material considerations, including any public benefits the proposals might bring; the principle of the proposed development; Victoria Tower Gardens as a location for the memorial, the consideration of alternative sites for the Memorial and the timing and content of the proposals.

24. In summary; the Inspector's main conclusions and recommendations on the issues relevant to this challenge were as follows:

    a) the harm from the development to the Buxton Memorial and the Gardens did not approach anything near the NPPF policy threshold of 'substantial harm' (IR 15.69; 15.94 and 15.117).

    b) Nonetheless, the measure of harm to the Buxton Memorial should be assessed as being of great importance and the weight to that harm should be characterised as considerable. The weight to be apportioned to the (moderate) harm to the Registered Park and Garden should be characterised as considerable (IR 15.69; 15.94 and 15.117).

    c) In terms of public benefit, the proposal fully meets the Holocaust Memorial Commission recommendation for a striking new memorial prominently located in central London. Location of the Memorial adjacent to the Palace of Westminster is a public benefit of great importance. These factors merited considerable weight in the heritage and planning balance (IR15.155-15.161).

    d) Alternative locations should be taken into account when determining the acceptability of the proposal if they would avoid an environmental cost (IR15.164).

    e) Whilst seeming to offer a benign alternative, the Imperial War Museum site lacks a detailed scheme that would meet the core requirements of the HMC and has clear constraints that may hamper delivery. The weight to be afforded to it was therefore very limited (IR15.169).

    f) The two other sites merited still lesser weight than the site at the Imperial War Museum (IR15.169).

    g) Achieving a memorial within the lifetime of survivors of the Holocaust has a resounding moral importance that can be considered a material consideration and a public benefit of great importance meriting considerable weight in the planning balance (IR15.170 -172).

    h) Weighing the public benefits of the proposal (including its location next to Westminster and the delivery of a Memorial within the lifetime of survivors) against the identified heritage harms, and taking account of the limited viability of alternative locations, the balance can be seen to clearly and demonstrably weigh in favour of the proposals (paragraph 196 (now 202) NPPF)(IR 15.186-15.189).

    i) On a fine balance, overall, the proposals cannot be judged to be in accordance with the development plan when read as a whole (IR15.279).

    j) However, the significant range of truly civic, educative, social and even moral, public benefits the proposals offer would demonstrably outweigh the identified harms the proposals have been found to cause. The outcome of this balance amounts to a material consideration of manifestly sufficient weight to indicate

in this case that determination other than in accordance with the development plan is justified (IR15.283).

25. The Inspector recommended that the application be approved, and planning permission granted.

The decision to grant planning permission

26. Following consideration of the Inspector's Report, the Minister granted planning permission by a decision letter dated 29 July 2021. The decision under challenge is the decision of the Minister. However, in the decision letter the Minister agreed with the Inspector's conclusions and recommendation. Accordingly, for the purposes of the present appeal it is not necessary to do more than look at the Inspector's report.

Grounds of challenge

27. The Trust applied for judicial review on five grounds, of which permission was granted on two Grounds:

> Ground 1 – The Planning Inspector (and Minister) applied the wrong legal test to the issue of whether there will be 'substantial harm' to the heritage assets within the Gardens. The correct application of the test would have led inevitably to the conclusion that the harm to the significance of the Buxton Memorial was substantial and which would have led in turn to a very different test for the acceptability of the proposal.
>
> Ground 4 – The Inspector (and Minister) erred in law in considering that in order to attract significant weight, the merits of any alternative sites must be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.

28. Permission was refused on a third ground:

> Ground 3 – The Inspector (and Minister) failed to address the provisions of the London County Council (Improvements) Act 1900, which creates a straightforward prohibition on using the Gardens for the provision of the Memorial in the manner proposed.

29. The Trust subsequently applied to renew its application for permission for judicial review on Ground 3. The parties agreed that the Trust's application should be considered on a rolled-up basis at the substantive hearing into Grounds 1 and 4. In his application to renew, Mr Drabble focussed on section 8(1) of the 1900 Act rather than section 8(8) which had been the focus of submissions before the Permission Judge. As refined by Mr Drabble, the ground is arguable, and I grant permission. Given the refinements to the Trust's case as developed during oral submissions at the hearing, including the production of the Local Law (Greater London Council and Inner London

Borough) Order 1965, I considered it appropriate (and of assistance to the Court) to allow the parties the opportunity to make short written submissions after the hearing.

The Court's jurisdiction under s288 Town and Country Planning Act

30. The correct approach to statutory reviews pursuant to s. 288 TCPA 1990 was summarised by Lindblom LJ in St Modwen Developments Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 1643, [2018] PTSR 746 at [6]. In summary; the relevant principles of focus in submissions by the parties are that:

    1) Decisions of the Secretary of State and his Inspectors are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues.

    2) The reasons for the decision must be intelligible and adequate enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues.

    3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision maker. They are not for the Court. An application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an Inspector's decision.

    4) The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision maker. Statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context.

Ground 1: Harm to heritage assets

The Planning Inspector and Minister applied the wrong legal test to the issue of whether there will be 'substantial harm' to the heritage assets within the Gardens. The correct application of the test would have led inevitably to the conclusion that the harm to the significance of the Buxton Memorial was substantial and which would have led in turn to a very different test for the acceptability of the proposal.

Legal framework

31. The legal framework for consideration of the impact of a proposed development on relevant heritage assets was common ground:

    a) In considering whether to grant planning permission the decision maker is under a general duty to pay special regard to the desirability of preserving the listed buildings potentially affected by the proposals, their settings and any features of special architectural or historic interest which they may possess (Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990). In

this case, the Listed buildings include the Buxton Memorial (Grade II* listed building).

b) The significance of a heritage asset derives not only from an asset's physical presence, but also from its setting. Great weight should be given to the asset's conservation. The more important the asset, the greater the weight that should be given to conservation. Harm to the significance of a designated heritage asset requires clear and convincing justification (NPPF 199, 200).

c) Where potential harm to designated heritage assets is identified, it needs to be categorised as either 'less than substantial' harm or 'substantial' harm (which includes total loss) in order to identify which policies in the NPPF apply (NPPF 200-202). Accordingly, the key concept is whether the harm will be 'substantial'.

d) Substantial harm to grade II listed buildings or registered gardens (which would include Victoria Tower Gardens) should be exceptional. Substantial harm to assets of the highest significance, notably grade II* listed buildings (which will include the Buxton Memorial) should be wholly exceptional. For development that will lead to substantial harm to a designated heritage asset, consent should be refused unless it can be demonstrated that the substantial harm is necessary to achieve substantial public benefits that outweigh that harm (NPPF paras 200-201).

e) Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal (NPPF 202).

f) Whether a proposal causes 'substantial harm' or 'less than substantial harm' will be a matter of judgment for the decision-maker, having regard to the circumstances of the case and the policy in the National Planning Policy Framework. In particular; the effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance – are all matters for the planning decision-maker. This is subject to the decision maker giving considerable importance and weight to the desirability of preserving the setting of a heritage asset (Catesby Estates Ltd v Steer [2019] 1 P. & C.R. 5 per Lindblom LJ at [30]).

g) Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene. This kind of case is a good test of the principle stated by Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] 1 W.L.R. 1865 (at paragraph 25) – that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly" (Catesby Estates Ltd v Steer [2019] 1 P. & C.R. 5 per Lindblom LJ at [30]).

Impact of the development on the historic environment – the Inspector's approach

32. In order to understand the Inspector's approach to the question of harm, it is necessary to understand how matters were put to him. The main parties disagreed on the correct approach to the assessment of harm to the significance of heritage assets. The position of the applicant, the Secretary of State, was that for substantial harm to be demonstrated "*very much if not all of the significance is drained away or that the asset's significance is vitiated altogether or very much reduced"*. This was said to be the threshold for substantial harm set down in the case of Bedford Borough Council v Secretary of State [2012] EWHC 4344 Admin. In contrast, the local planning authority, Westminster Council relied on the Planning Practice Guidance and the guidance that 'substantial' harm to the significance of a heritage asset can arise where the adverse impact of a development "*seriously affects a key element of (the asset's) special architectural or historic interest*" (paragraph 18)

33. The Inspector recorded the differences between the parties and his view of matters at IR15.11 and 15.12:

> *"15.11 In addition to disagreements on the magnitude of harm to DHAs between the parties, there is also divergence in the methodology to be applied to its calibration. The Applicant relies on the definition of substantial harm (and the calibration of lesser harms that flow from it) set out in the Bedford case, broadly defined as a high test. WCC on the other hand (though not making express reference to it in written evidence) prefer to rely on the example of substantial harm set out in paragraph 018 of the PPG, a definition, as I understand it from their oral evidence, which sets the test at a lesser height. Although also reliant on the PPG definition (but again with no reference in written evidence) TIS.SVTG & LGT apply a further, different approach, based on consultancy-developed methodologies for characterising the magnitude of harm. Lastly, other parties present a similar Bedford-based approach to harm calibration, though conclude that the magnitude of harm, specifically with regard to VTG as an RPG, should be judged as substantial."*
>
> *"15.12 My interpretation of this point, also bearing in mind paragraph 018 of the PPG has been formulated in light of the Bedford judgement, is that there is in fact little to call between both interpretations. Bedford turns on the requirement for the harm to be assessed as 'serious' (with significance needing to be very much, if not all, 'drained away') in order that it be deemed substantial. Alternatively, paragraph 018 indicates that an important consideration would be whether the adverse impact 'seriously' affects a key element of special interest. In both interpretations, it is the serious degree of harm to the asset's significance which is the key test. Moreover, in accordance with the logic of the Bedford argument, paragraph 018 explicitly*

acknowledges that substantial harm is a 'high test'. (emphasis added)

34. Mr Drabble submitted that the issue has been bedevilled by the application of the language to be found in the judgment of Jay J in Bedford Borough Council v Secretary of State for Communities and Local Government [2013] EWHC 2847 (Admin) at [24] which apparently requires the impact on significance to be such that "*very much if not all, the significance [is] drained away for harm to be regarded as substantial*." He submits that there is no justification for this gloss and there is accordingly an obvious danger that if one regards the requirement of substantial harm as being synonymous with much if not all of the significance of the asset being drained away then too high a test is being imposed. It is, he submitted, apparent from the Inspector's Report that this is what has happened in this case.

35. In my assessment, however it is apparent from IR15.12 that, having set out the parties' views, the Inspector came to his own interpretation of the relevant test for substantial harm which he expressed as "*the serious degree of harm to the asset's significance*." Mr Drabble accepted he could not object to this formulation of the test which reflects the wording of the Planning Practice Guidance and is an expression of Government policy. Similarly, he accepted that no issue could be taken with the Inspector equating 'substantial' with 'serious'.

36. The Inspector continued his analysis of the task before him at IR 15.13. He went on to describe, in practical terms, the identification of the measure of harm to the designated heritage assets individually and cumulatively and the apportionment of appropriate weight to the harm:

> *15.13 It is a high test indeed and I address these matters in detail below, calibrating the degree of harm identified to each DHA and the weight to be apportioned accordingly. The sum of such harms is then duly considered against any public benefits in the heritage balance anticipated in paragraphs 195 or 196 of the NPPF and, where appropriate, development plan policy."* (emphasis added)

37. It was common ground that no issue can be taken with the Inspector's statement that the test is a 'high test'.

38. Mr Drabble went onto submit that whatever view of matters the Inspector expressed in IR 15.12 - 13, the approach he actually adopted in his task of assessing harm was to apply a test of significance draining away. In this regard Mr Drabble pointed the Court to several passages in the Report (IR15.88; 15.117; and 15.187).

39. I am not however persuaded that the Inspector fell into the error suggested by Mr Drabble.

40. The Inspector assesses the harm to the setting of the Buxton Memorial at IR15.65 – 15.69 as follows:

"The Setting of the Buxton Memorial (BM), a Grade II Listed Building*

15.65 There is no purpose in repeating the assessments of the BM's special architectural and historic interest and significance previously set out in evidence. It is listed at Grade II, reflecting not only the conspicuous idiosyncratic flair of its designer, but also the nationally and internationally important events it memorialises. Despite its relocation from its intended place in Parliament Square, its present location in VTG, commemorating the courageous actions of lawmakers serving in the Palace of Westminster just to the north, remains an element of its special interest and significance.*

15.66 Beyond these primary attributes, it is clear that the open spatial context to the memorial is a constituent of its significance. One element of this significance is the formal, though opportunistic perspective of Dean Stanley Street, where the monument may be viewed and appreciated in framed long perspective. But a more relevant contributor is the sense of space around the structure, allowing the viewer to at first perceive its distant presence, then be drawn by its 'fanciful' play of forms, detail and colour and then, when close, appreciate its memorial purpose and importance.

15.67 As set out above, the safeguarding of the setting of the BM would be most successfully mediated in views looking north along the Embankment path, and along the Embankment itself. Here, the monument would retain its pre-eminence within its wider context. However, from other points, most particularly when viewing the older monument from within the UKHMLC courtyard, or from other points in close proximity to it, its setting would visually become quickly congested. More specifically at this point the radically differing aesthetic moods of existing and proposed structures would collide in uneasy and discordant juxtaposition. And so here, decisively, the visual dominance of the UKHMLC would unsettle and crowd the BM, significantly infringing the viewer's opportunity to settle and contemplate its purpose and architecture, and thus fully appreciate its multi-facetted significance. The wider effects of this relationship on the character and special interest of the park are explored below. (15.91-15.93)

…

15.69 Notwithstanding these effects, the BM would remain physically unaffected by the proposal, and in this respect, its special architectural and historic interest would be preserved. That said, this outcome would fail to preserve the setting of the

BM, a Grade II listed building, in accordance with the expectations of the Act, such a consideration the Courts anticipate being given considerable importance and weight. It would also be contrary to those of paragraphs 193 and 194 of the NPPF, which anticipates great weight being given to the conservation of DHAs and their settings. Accounting for these considerations, I characterise this harm to the setting of the Grade II* memorial as being of great importance. Although this measure remains well below the threshold of substantial, I nevertheless afford this a measure of considerable weight in the heritage balance."*

41. He further considers the impact of the development on the Buxton Memorial in the context of the Registered Park and Garden at 15. 90 – 15.94:

"15. 90 However, as I have determined above, despite the best efforts of the Applicant's multi-disciplinary design team, a successful relationship between the proposed structure and the BM has not been fully achieved. The setting of the Grade II structure would not be preserved, and it is necessary to consider this again here to understand the effect this could have the significance of the RPG.*

15. 91 It is clear to all that the present location of the BM, a relocation after its storage following removal from Parliament Square, has been chosen with some care and that its installation in 1957 represents one of the more prominent post-war interventions into the park. Arguably the location chosen on the axis of Dean Stanley Street at the end of an existing path within the park was one not too difficult to arrive at. After all, such axial devices have been used before in the park, for example in the initial siting of the Pankhurst Memorial on that of Great Peter Street immediately to the north. Such a location borrows the force and symmetry of existing views, whilst giving the monument sufficient space from the others already populating the park to the north (albeit that these had arrived at their respective locations only the year before).

15. 92 Despite the sense that the "fanciful" Gothic of Teulon's expressly architectural structure may have always felt more comfortable amid the hard urban enclosure of Parliament Square (it's intended initial location), it has nevertheless found its place within the park, a point of quiet remove, close to the Embankment and anchored by the axis of the path and streetscape to the west. The compelling logic of this location perhaps also explains a reticence about relocating the memorial as part of the present proposals. However, this too presents a no less difficult challenge: that of safeguarding the setting of the

existing structure whilst delivering the UKHMLC to its design brief.

15.93 This reconciliation is nevertheless pursued through demarking the immediate context of the existing structure, scribing the enclosure of the proposed precinct around it and softening the visual interface between the two with planting. Whilst this would seek to establish an honest and inevitably intimate new relationship between the two, it would not be achieved convincingly. The exuberance of Teulon's structure would sit uncomfortably with the more sober and restrained modernity of the proposal. Moreover, the space such an expressive historic structure needs to be properly appreciated would be demonstrably curtailed. This sense of awkward stylistic juxtaposition and visual congestion would be most obviously understood from views within the UKHMLC complex, but would also have resonances in other views from the north down the Embankment path and the new sinuous route. Whilst these adverse effects would be partly mitigated by the more open and appreciative way the BM would be experienced when viewed from the Embankment walk, it would be impossible to escape the sense that the existing structure's open setting would be materially compromised by the presence of the UKHMLC. It is agreed that the special interest of the BM and the contribution its setting makes to its significance represents a constituent element of that of the park. It follows as a matter of logic therefore that any harm to that significance in turn affects that of the RPG.

15.94 All these matters in respect of VTG as an RPG require drawing together. I conclude that the effect of the proposed development on the significance of VTG, a Grade II RPG, can be best summarised as follows: the primary cause of identified harm to the special interest and significance of the RPG would result from the adverse effect the proposals would have on the setting of the BM. This is compounded, to a very limited degree, by the potential harm to a limited number of trees within the park. However, this degree of harm must also be considered in the context of the sum of the significance of the RPG as a whole. Accounting for this calculation, and also allowing for the range of positive factors that would enhance the character of VTG as an RPG, I conclude that the measure of harm overall would be moderate. Nevertheless, accounting for the expectations of paragraph 193 of the NPPF that great weight be afforded to the conservation of DHAs, I afford this harm considerable weight in the heritage balance."

42. The Inspector draws his conclusions together on the effect on designated heritage assets as follows:

> *"…In respect of each key DHA, the BM, the RPG and the WAPSCA, the modest degree of harm to trees has been added to the final sum of harm in each…in no case, does this aggregated degree of harm to each asset individually approach anything near the substantial threshold established by either Bedford or the PPG. Furthermore, even when the individual harms to DHAs are considered cumulatively, as required, they again still fall well below the substantial threshold established by Bedford and the PPG. Having fully considered such harms, I now turn to the public benefits."* (IR15. 117) (emphasis added)

43. In support of his case, Mr Drabble placed emphasis on the reference to Bedford in the extract quoted above. He also referred to the section of the Report in which the Inspector conducted the heritage balancing exercise required by the NPPF (then paragraph 196 now paragraph 200) and the Inspector's reference to:

> *"15.187 Let us remember, for comparison, that substantial harm requires, in the case of Bedford, that the harm be assessed as 'serious' with significance needing to be very much, if not all, 'drained away'. Alternatively, paragraph 018 of the PPG indicates that an important consideration is whether the adverse impact would 'seriously' affect a key element of special interest. My reasoned judgement is that this bar has not been reached here and, contrary to the views of objecting parties, the harm, calibrated cumulatively at no greater than a medium degree above moderate, (still accounting for the great importance apportioned to the harm to the setting of the BM) would not come close to substantial for any asset, by either measure."*
> (emphasis added)

44. Finally, he pointed the Court to IR 15.88 in the context of the wider analysis of harm to the Registered Park and Garden) and to the Inspector's observation that *"claims that such effects…would in fact vitiate or substantially drain away the significance of the RPG, even justifying deregistration, are in my view considerably overstated…"* as further evidence in this regard.

45. In my judgment, the passages set out above demonstrate the Inspector performing his own straightforward, careful estimation and characterisation of the harm to the Buxton Memorial and, as a consequence, to the Garden. His analysis is a sophisticated and, at times, poetic calibration of the harm. He begins by acknowledging the architectural and historic significance of the Buxton Memorial and the open spatial context in which it sits (IR 15.65/6). Turning to harm, he expresses the view that the '*radically differing aesthetic moods of existing and proposed structures would collide in uneasy and discordant juxtaposition'*. The '*visual dominance of [the memorial] would unsettle and crowd the BM'* (IR15.67). He concludes that whilst the Buxton Memorial would remain physically unaffected by the proposal, it would fail to preserve its setting which he directs himself (correctly) as being of great importance and considerable weight, albeit that the harm '*remains well below the threshold of substantial'* (IR15.69). In the context

of the wider garden, he arrives at the view that "*the exuberance of the Teulon's structure would sit uncomfortably with the more sober and restrained modernity of the proposal*", albeit that "*these adverse effects would be partly mitigated by the more open and appreciative way the BM would be experienced when viewed from the Embankment walk*". He concludes that the measure of harm to the RPG would be moderate (IR15.94).

46. In this context, read fairly and as a whole, his references to the 'Bedford test' alighted on by Mr Drabble at IR15.117 and 15.187 are no more than the Inspector confirming, or cross checking his analysis, conducted by reference to his view of the test as the 'serious degree of harm to the asset's significance', by reference to the case advanced before him. In the case of IR15.88 the reference is no more than the Inspector repeating back the submissions made to him, to dismiss them as '*considerably overstated'*. It follows that I do not accept Mr Drabble's submission that the Inspector's reasoning was dependent on Bedford and thus in error. The Inspector formulated his own test, namely '*the serious degree of harm to the asset's significance'*. This is unimpeachable and Mr Drabble did not attempt to impeach the formulation or propose an alternative formulation.

47. Moreover, the exercise conducted by the Inspector is entirely consistent with the approach to paragraphs 195 and 196 (now 201 and 202) of the NPPF, stipulated by the Court of Appeal in City & County Bramshill Limited v Secretary of State [2021] 1 WLR 5761. The question whether there will be substantial harm to a heritage asset is a matter of fact and planning judgment and will depend on the circumstances. The NPPF does not direct the decision maker to adopt any specific approach to identifying harm or gauging its extent beyond a finding of substantial or less than substantial harm. There is no one approach to the question:

> *"74 The same can be said of the policies in paragraphs 195 and 196 of the NPPF, which refer to the concepts of "substantial harm" and "less than substantial harm" to a "designated heritage asset". What amounts to "substantial harm" or "less than substantial harm" in a particular case will always depend on the circumstances. Whether there will be such "harm", and, if so, whether it will be "substantial", are matters of fact and planning judgment. The NPPF does not direct the decision-maker to adopt any specific approach to identifying "harm" or gauging its extent. It distinguishes the approach required in cases of "substantial harm … (or total loss of significance …)" (paragraph 195) from that required in cases of "less than substantial harm" (paragraph 196). But the decision-maker is not told how to assess what the "harm" to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting."*

48. On behalf of the Secretary of State, Mr Katkowski suggested that I should approach Bramshill with caution and he submitted that paragraph 74 cited above is obiter. Whilst

that might, strictly speaking, be true given the facts of the case, Lindblom LJ's observations directly concern the interpretation of the test of substantial harm and are, in any event, consistent with a line of authority from the Court of Appeal emphasising the self-effacing role of the Court in respecting the expertise of Planning Inspectors and guarding against undue intervention in policy judgments within their areas of specialist competence which do not lend themselves to judicial analysis. (See in this context Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37 and (R (Samuel Smith Old Brewery) v North Yorkshire County Council [2020] PTSR 221)).

49. Before leaving this ground, it is necessary to say a few words about the judgment of Jay J in Bedford Borough Council v Secretary of State [2013] EWHC 2847 (Admin). This is because Mr Drabble submitted the judgment has been misinterpreted, whilst on behalf of the Secretary of State, Mr Katkowski submitted that the ratio of the case is to be found, in part, at the end of paragraph 24 (the impact on significance was required to be serious such that very much if not all of the significance was drained away).

50. In Bedford, the question as to whether the Inspector had misconstrued or misapplied the policy concept of substantial harm was in issue before the Court ([11]). Jay J saw the epithets "*substantial*" and "*serious*" as essentially synonymous in the policy context: see [21] and [26]. In [25], he observed that the decision maker was looking for – *"… an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced"*.

51. Read in context, the final sentence of [24] is Jay J's encapsulation of the Inspector's application of the test of substantial harm in the decision letter which was before him to review.

> *24 "…What the inspector was saying was that for harm to be substantial, the impact on significance was required to be serious such that very much, if not all, of the significance was drained away.*
>
> *25 Plainly in the context of physical harm, this would apply in the case of demolition or destruction, being a case of total loss. It would also apply to a case of serious damage to the structure of the building. In the context of non-physical or indirect harm, the yardstick was effectively the same. One was looking for an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced.*
>
> *26 …I have considered whether the formulation "something approaching demolition or destruction" is putting the matter too high in any event. "Substantial" and "serious" may be regarded as interchangeable adjectives in this context, but does the phrase "something approaching demolition or destruction" add a further layer of seriousness as it were? The answer in my judgment is that it may do, but it does not necessarily. All would*

> *depend on how the inspector interpreted and applied the adjectival phrase "something approaching". It is somewhat flexible in its import. I am not persuaded that the inspector erred in this respect."*

52. It is plain that Jay J saw the Inspector's approach as essentially the same as the approach that he (Jay J) endorsed in [25] as a correct basis for addressing the question, i.e. a decision maker would properly both interpret and apply the concept of substantial harm in the NPPF, if s/he assessed whether the impact of the proposed development was sufficiently serious in its effect that the significance of the designated heritage asset, including the ability to appreciate that asset in its setting, was (if not vitiated altogether) at least very much reduced. Jay J considered the reference to significance being *"very much ...drained away"* as no more than an alternative, metaphorical means of expressing the concept of substantial harm. In considering that "substantial' and 'serious' may be regarded as interchangeable adjectives in this context" [26], his judgment is consistent with the advice in the Planning Policy Guidance that, when considering whether or not any harm is "substantial", an important consideration would be whether the adverse impact seriously affects a key element of special architectural or historic interest

53. Accordingly, read as a whole and in context, Jay J's judgment does not import a test of 'draining away' to the test of substantial harm. He was not seeking to impose a gloss on the term. The judgment in Bedford accords with the approach stated by the Senior President of Tribunals at [74] in Bramshill. It is clear from cases like Tesco v Dundee [2012] UKSC 13; R(Samuel Smith) v North Yorkshire County Council [2020] UKSC 3; Bramshill and others, that a word like 'substantial' in the NPPF means what it says and any attempt to impose a gloss on the meaning of the term has no justification in the context of the NPPF. The policy framework and guidance provide a steer that relevant factors include the degree of impact, the significance of the heritage asset under scrutiny and its setting. It is not appropriate to treat comments made by a Judge assessing the reasoning of an individual decision maker, when applying the test of 'substantial harm' to the circumstances before him/her, as creating a gloss or additional meaning to the test.

54. Accordingly, Ground 1 fails.

Ground 3: The London County Council (Improvements) Act, 1900

A failure to address the provisions of the London County Council (Improvements) Act 1900, which creates a straightforward prohibition on using the Gardens for the provision of the Memorial in the manner proposed.

The legal principles of statutory construction

55. In interpreting a statute, the Court is "*seeking the meaning of the words which Parliament used*". A phrase, or passage, must be read in the context of the section as a

whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained (R (O) v Home Secretary [2022] UKSC 3 (Lord Hodge at 29)).

The wording of the Act

56. It was common ground that the London County Council (Improvements) Act 1900 is a private Act of Parliament, promoted by London County Council, which provided the Council with statutory authority to carry out improvement works to the Thames Embankment area. The long title of the Act is:

> *"An Act to empower the London County Council to make an extension of the Thames Embankment and a new street and improvements at Westminster to widen Mare Street Hackney and to make other street improvements and works in the administrative county of London and for other purposes."*

57. The preamble states that *"Whereas it is expedient to confer on the London County Council (herein-after called "the Council'") powers to make the improvements and works herein-after described and it is also expedient to confer on the Council such powers as are herein-after set forth with regard to the raising of money for the purposes of this Act:"*

58. Sections 4 & 5 details the relevant improvements and works authorised by the Act which include:

> *"1) Thames Embankment Extension and Improvements at Westminster*
>
> *An embankment wall and an embankment on the foreshore of the River Thames in continuation of the existing river embankment south of the Houses of Parliament commencing at the present termination of the existing embankment at the south eastern comer of the Victoria Towne Gardens and terminating at the northern side of Lambeth Bridge*
>
> *A new street consisting in parts of widening of Abingdon Street and Millbank Street commencing in Abingdon Street opposite or nearly opposite the entrance to the Peers Office Court of the House of Lords and terminating at the western end of Lambeth Bridge"*

59. Section 6 entitles the Council to enter upon, use and take specified lands. Section 7 makes provision in relation to the construction of the embankment wall.

60. For present purposes, the critical section is Section 8, the side note to which states: "*For protection of the Commissioners of Works*". The recitals to the section state:

> *"8. Whereas the works authorised by this Act under the heading "Thames Embankment Extension and Improvements at Westminster" (herein-after referred to as "the Westminster improvement") will involve the occupation of certain lands vested in Her Majesty or vested in or under the control of the Commissioners of Works and will also necessitate some interference with the garden adjoining the Houses of Parliament known as the Victoria Tower Garden:*
>
> *……*
>
> *And whereas it has been agreed between the Commissioners of Works and the Council that the said works shall only be executed subject to and in accordance with the provisions herein-after set forth:*
>
> *And whereas for the purposes of the Act a plan has been prepared (in the section referred to as "the signed plan") which for purposes of identification has been signed by the Right Honourable Lord Brougham and Vaux the Chairman of the Committee of the House of Lords to whom the Bill for this Act was referred a copy of which plan has been deposited in the Office of the Clerks of Parliaments."*

61. Section 8(1) to 8(8) provide as follows:

> *(1) "The lands lying to the eastward of the new street described in this Act as consisting in part of widenings of Abingdon Street and Millbank Street which is in this section called "the new street" and between the said street and the new embankment wall shall be laid out and maintained in manner herein-after provided for use as a garden open to the public and as an integral part of the existing Victoria Tower Garden subject to such byelaws and regulations as the Commissioners of Works may determine:*
>
> *(2) The Council shall construct the new embankment wall to the satisfaction of and in accordance with plans approved by the First Commissioner of Works:*
>
> *(3) The Council shall to the satisfaction of the First Commissioner of Works clear and make up to a level suitable to the laying out of the garden the surface of the land between the new street and the new embankment wall to be laid out as a garden (which land is hereinafter referred to as "the new garden land") and in default of their doing so the Commissioners of Works may do all work necessary for that purpose and all costs incurred by the*

Commissioners in relation thereto shall be repaid to the Commissioners by the Council But nothing in this section shall authorise the Council to remove any trees now standing within the garden:

(4) The Council shall do all things necessary to vest the new garden land in the Commissioners:

(5) As soon as that land is so vested in the Commissioners of Works the Commissioners shall remove the existing railings and kerb on the west side of Victoria Tower Garden southward of a point thirty yards southward of the centre of the existing entrance to the Victoria Tower Garden opposite Great College Street and shall erect along the eastern side of the new street southward of the said point from which the existing railings and kerb are to be removed a kerb and railings of a suitable and for that purpose may if they think fit use the existing kerb and railings:

(6) The Commissioners of Works shall lay out as a garden the new garden land so vested in them and may also make such alterations in the paths bedding and turfing of the existing Victoria Tower Garden (in so far as any portion of it is not thrown into the new street) as they may think necessary to secure uniformity of design in the Victoria Tower Garden as extended under the provisions of this section:

(7) The Council shall pay to the Commissioners of Works the cost of the works to be executed by the Commissioners in respect of the removal and erection of railings and kerb and of altering and laying out the garden as before in this section mentioned Provided that the sum so payable shall not exceed five thousand pounds:

(8) The Commissioners shall maintain the garden so laid out and the embankment wall and kerb and railings enclosing it:"

(emphasis added)

62. Sections 8(8) – (14) make provision in relation to a variety of matters including the purchase of a house; identifying land to become part of the widened Street and vacant possession.

63. Sections 8(15) – (18) provide as follows:

"(15) The Council shall not under the powers of this Act alter the level of any streets or places which are under the charge management or control of the Commissioners of Works without having previously obtained the consent in writing of the First Commissioner to such alteration and the Council shall bear the

expense of adapting or adjusting the said streets or places to the requirements of the improvements:

(16) No building fronting the new street at the junction therewith of Great College Street shall be so erected that the main front wall at the north-east corner thereof shall be placed nearer than 80 feet to the line of the existing railings on the west side of the Victoria Tower Garden:

(17) Subject to the provisions of any future Act of Parliament with reference to the reconstruction of Lambeth Bridge and the approaches thereto the frontage of the buildings at the termination of the new street on the western side shall not project in front of the line marked H I on the signed plan:

(18) No new or additional building (including any addition to the height of a building) shall be erected on the west side of the new street other than buildings on the property of Her Majesty or the Commissioners of Works until the elevations and exterior design of such buildings have been approved by the Council and as regards buildings lying to the north of the line marked F G on the signed plan also by the First Commissioner of Works."

64. Subsequent clauses detail provisions for the protection of the Conservators of the River Thames; the London Hydraulic Power Company and other organisations as well as making provision for consequential matters.

65. In 1965, the Local Law (Greater London Council and Inner London Boroughs) Order (SI1965/54) was laid before Parliament and came into operation. Article 5 provides that: *"The enactments specified in Schedule 3 are hereby repealed to the extent mentioned in the third column of that schedule." S*chedule 3 provides that the London County Council (Improvements) Act 1900 is repealed "*other than sections 1 and 7 to 9 and so much of section 2 as is necessary to give effect to those sections."* Accordingly, section 8 of the Act remains in force.

Submissions of the parties

66. Mr Drabble submits that Section 8 (preamble) and section 8(1) provide in mandatory terms for the laying out and maintenance of the relevant land referred to in the Act as the 'new garden land' (s.8(3)) as a garden for the public. Overall, the new garden land is an integral part of Victoria Tower Gardens, and cannot even be used as a separate or distinct garden with a different design. Consistent with the statutory obligation, the new garden land has been maintained for the past century by the Commissioners and its statutory successors in title as a garden open to the public and as an integral part of Victoria Tower Gardens. That obligation currently falls on the Secretary of State for Culture Media and Sport as the owner of the new garden land and ultimate statutory successor to the Commissioners of Works.

67. Mr Mould (whose submissions were endorsed by Mr Katkowski for the Secretary of State) submits that the legislative purpose of the protective provision enacted under s.8(1) of the 1990 Act was (i) the incorporation into the then existing Victoria Tower Gardens of the area of land to the south formed by the extension of the Thames Embankment to the riverside and the re-alignment of Millbank Street to the west; and (ii) the laying out and maintenance of that land as a public garden forming an integral part of Victoria Tower Gardens, subject to regulation by the Commissioners, in whom the land was to be vested under s.8(4) of the 1990 Act. That legislative purpose had been fulfilled by no later than 1914, as is apparent from an Ordnance Survey map of that year. By that date and no doubt earlier, the new garden land had been laid out and was already under maintenance as a garden open to the public and as an integral part of Victoria Tower Gardens as it existed in 1900 (see s.8(1) of the 1990 Act). The statutory objective in s. 8(1) was achieved when Victoria Tower Garden was laid out and vested in the Commissioners to maintain. Or, to use the express language of s.8(1), to maintain "*as hereinafter provided*" as a garden open to the public. Those words plainly look forward to s.8(8) of the 1900 Act and the maintenance obligation therein stated. No further provision was needed to be made for the protection of the Commissioners as the owners of the new garden land – they were plainly to be trusted to control the future use or development of Victoria Tower Gardens in accordance with those byelaws and regulations which they saw fit to impose. There was neither need nor any purpose in Parliament imposing a statutory prohibition on the future use or development of the new garden land, in those circumstances the legislature entrusted such matters to the Commissioners' judgment. The plain words of s.8(1) of the 1900 Act impose no prohibition on development with the new garden land, or indeed any prohibition. Section 8(1) is concerned with requiring things to be done. It is not in any way (expressly or impliedly) concerned with prohibiting things from being done. Had Parliament intended s.8(1) to prohibit things being done in Victoria Tower Gardens after the new garden land had been laid out and integrated into the extended public garden, Parliament would have expressed itself in those terms. Mr Mould invited the Court to compare and contrast ss.8(15)(16)(18)(20)(21) of the 1900 Act, which contain express prohibitions. It is fanciful, he submitted, to suggest that Parliament nevertheless intended s.8(1) to operate as a prohibition by implication.

Analysis

i) Interpretation of Section 8 of the Act

68. The preamble to section 8 of the Act explains that the improvement works would necessitate the occupation of land under the control of the Commissioners or the Crown and interference with the garden already in existence (Victoria Tower Gardens as it was before the extension authorised by the 1900 Act). Accordingly, "*For protection of the Commissioners of Works*" (the side note to s.8 of the Act) it was agreed between the Commissioners and the Council that the works '*shall only be executed subject to and in accordance with'* the provisions of section 8. Section 8 includes, as is common ground, an extension (the new garden land) to the existing Gardens. The preamble refers to a plan signed by the Chairman of the Committee of the House of Lords. The Court was taken to an (unsigned) copy of plan which shows the new garden land coloured in

green. This is in contrast to an earlier Ordnance Survey map which shows a cement works, a wharf and other buildings in the same area.

69. Sections 8(1) - 8(8) create a cascade of obligations which include as follows:

- Section 8(1) provides in mandatory terms that the land shall be laid out and maintained for use as a garden for the public and integral part of Victoria Gardens.

- Section 8(3) provides for London County Council to carry out the clearance and levelling works to the satisfaction of the Commissioner of Works and to vest the land in the Commissioners.

- Section 8(6) provides for the Commissioners to lay the land out as a garden and do related works to secure uniformity of design in the extended Victoria Tower Gardens and

- Section 8(8) provides for the Commissioners to maintain the garden so laid out.

70. Laying out of the land as a public garden integral to the existing gardens was carried out and completed but section 8(1) and (8) provide a continuing obligation to maintain it. Section 8 has not been repealed and accordingly the obligation subsists. The question that arises is whether 'maintained' is to be understood as meaning that the land must be kept for use as a public garden or whether it is limited to meaning to the garden must be kept in good repair/maintenance for so long as it is used as a public garden.

71. I am of the view that the wording of Section 8(1) "*The lands…shall be laid out and maintained…for use as a garden open to the public"* is to be read as a continuing obligation to keep the land in use as a public garden. Mr Mould relied on the words 'in manner herein-after provided' in section 8(1) (*"The lands …shall be laid out and maintained in manner herein-after provided for use as a garden open to the public").* He submitted that the words look forward to s.8(8) of the 1900 Act and the maintenance obligation therein stated ("*The Commissioners shall maintain the garden so laid out and the embankment wall and kerb and railings enclosing it.")*. Thus, he submitted, the statutory objective in s. 8(1) was achieved when Victoria Tower Gardens was laid out and vested in the Commissioners to maintain. However, in my judgment, significance is to be attached to the use of 'maintained' in Section 8(1). Section 8(1) lays down the purpose and object of the section whilst subsections (2) – (8) contain the detail. It is not clear why section 8(1) which sets out the statutory purpose of the section would need to refer to 'maintained' if the word is to read as the relatively trivial obligation to keep the garden in good repair or tidy. It would suffice for 'maintained' to appear in section 8(8) alone. Further, the language in section 8(8) is similar to section 8(1) and the latter refers to 'hereinafter provided'. In my view the language of both section 8(1) and 8(8) is to the same effect – the land must be laid out and thereafter kept as a public garden.

72. Mr Mould's submissions rest on there being a temporal limit to the obligation for the land to be 'laid out and maintained' in section 8(1) of the Act but the words "*shall be laid out and maintained*" do not, of themselves, incorporate within them any sort of time limited expiry date. They suggest the opposite, namely an ongoing obligation ('laid out and maintained). There is, for example, no express wording to the effect that the garden must be kept in good repair, for so long as it remains a garden, which would have supported Mr Mould's interpretation.

73. I do not accept sections 8(15)-(18) of the Act merit the significance which Mr Mould sought to attach to them. He submitted that where Parliament considered it was regulating the future it said so expressly, as with section 8(17) which makes reference to 'subject to the provisions of any future Act of Parliament'. However, in my judgment sections 8(15)-(18) simply impose controls on works that could be carried out, or were not the subject of any absolute prohibition. Their existence does not address the issue of whether sections 8(1) and (8) are to be read as simply requiring a garden to be laid out which could thereafter be used or built upon as the Commissioners desired, or as requiring that the land be thereafter kept for use as a public garden.

74. I accept Mr Mould's submission that the plain words of s.8(1) of the 1900 Act do not impose a prohibition on development in the new garden land. He is correct to say that Section 8(1) is concerned with requiring things to be done but the words create a statutory purpose, which has the effect of imposing a fetter on activities that conflict with the statutory purpose.

75. Mr Mould relied on the reference in Section 8(1) to "*subject to such byelaws and regulations as the Commissioner of Works may determine*" ("*the land .....shall be laid out and maintained in manner herein-after provided for use as a garden open to the public…subject to such byelaws and regulations as the Commissioners of Works may determine")* to submit that future regulation of the Garden is left to the good sense of the Commissioners and no further provision needed to be made for the future or their protection. However, on the basis of the wording of section 8(1), I am of the view that the ordinary and natural reading is that the byelaws and regulations are intended to regulate the detail of the overall purpose, which is the provision of a garden for public use.

ii) Conclusion on the construction of section 8 of the Act

76. Accordingly, I arrive at the following construction of section 8 of the 1900 Act:

    1) On its ordinary and natural meaning, Section 8(1) of the 1900 Act imposes an enduring obligation to lay out and retain the new garden land for use as a public garden and integral part of the existing Victoria Tower Gardens. It is not an obligation which was spent once the Gardens had been laid out so that the land could be turned over to some other use or be developed or built upon at some point after it had been laid out whenever it suited those subject to the obligation.

2) Section 8(8) cannot be read as only covering repair or upkeep. The language is very similar to s.8(1) and the latter says in manner-hereinafter provided. Sections 8(1) and 8(8) are both to the same effect. They require the land to be laid out and thereafter kept as public gardens.

3) The detailed prohibitions in Section 8(15)-(18) do not detract from the substantive obligation in section 8(1). Sections 8(15) - (18) simply impose controls on works that could be carried out (or were not the subject of any absolute prohibition).

4) The repeal of the larger part of the 1900 Act, save for the prospective and continuing obligations in ss. 7-9, confirms the enduring nature of the obligations imposed by them.

5) As was common ground by the end of the hearing, the advent of the modern planning system has no bearing on the obligations in the 1900 Act.

iii) The pre-legislative material

77. The Trust produced evidence from Dr Gerhold, a former House of Commons Clerk and a Fellow of the Royal Historical Society and the Society of Antiquaries. In his witness statement, he stated that he was familiar with the Parliamentary process and with archival work. He explained that he undertook research on the history of the Act using the London Metropolitan Archives and the Parliamentary Archives. The bulk of the material relied on comprises Minutes of the London County Council Improvements and Parliamentary Committees. There are also minutes from Westminster Council (Westminster Vestry) and a letter from the First Commissioner of Works, a position within Government (later to become a Government Department). Dr Gerhold produced a detailed chronology of the history of the Act with references to the documents he had drawn upon to produce the chronology.

78. Mr Drabble submitted that his primary case on section 8 rested on the meaning of the words in the section and was not reliant on the pre-legislative materials produced by Dr Gerhold. Nonetheless, he submitted, the contemporaneous contextual evidence supported his interpretation.

79. No objection was taken at the hearing to Dr Gerhold's evidence by the other parties. His evidence was relied on by Mr Mould for his submissions in relation to the fulfilment of the statutory purpose of section 8(1) once the improvement works had been completed and the garden laid out as a garden, which I consider below. No party submitted before me that the Court could not have regard to the material produced by Dr Gerhold. The context of the Act as a whole includes its legal, social and historical context (Principles of Statutory Construction: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020) (11.1, 11.2 and 11.3)).

80. I turn to Dr Gerhold's chronology of the Act, supplemented with quotes from the documents he relied upon from the archives.

81. In 1867, the northern part of the Gardens was purchased by the Government of the day under the Houses of Parliament Act 1867 (0 & 31 Vict, cap 40). The land was purchased and cleared to reduce the fire risk to the new Palace of Westminster. The Act made no provision about the use of the land. In 1879, the Rt Hon W.H. Smith MP donated £1000 towards laying it out for public use. A further £1400 was voted for by Parliament. W.H. Smith MP asked the then Office of Works to record in a minute that the sum had been accepted to level, turf and gravel the ground "*in order that it may be thrown open to the public and become available as a recreation ground*". The minute requested has not been traced, but later correspondence around negotiations for the 1900 Act, refers to the Government being "*pledged to an agreement with the late Rt Hon WH Smith for the Gardens to be maintained as a public recreation ground*."

82. In 1898, a private syndicate proposed a scheme for rebuilding the Millbank area. The scheme was rejected by the Commons, partly because the plan involved building on the riverside rather than extending the existing open space:

> *"... the bill of the syndicate came on for discussion in the House of Commons. It was strongly opposed by representatives of the Council. Great objection was raised in the debate to the proposal in the bill to rebuild on the area to be cleared of wharves and buildings between Millbank-street and the river. It was contended that this should be laid out as an extension of the Victoria-tower-garden. The representatives of the Council, while not* [illegible but thought to be 'not'] *pledging it to any such scheme undertook that a scheme should be presented for the widening of Millbank-street and the embankment of the river, and that the Council would carefully consider whether it would not be possible to lay out the land between the street and the river as a garden. The bill was rejected by a large majority. It is to be feared, however, that, in the event of the Council not proposing a scheme of its own, the syndicate's scheme will be revived."*
>
> (Further Report of the County Council Improvements Committee, 25th May and 15th June 1898).

83. Prompted by the activity of the private syndicate, London County Council decided to bring forward its own scheme and instructed its Improvements Committee to prepare their own scheme for the area:

> *"Thames-embankment extension at Westminster*

The Council, on 29th March, 1898, passed the following resolution – "That it be referred to the Improvements Committee to prepare and bring up to the Council, at the earliest date practicable a scheme for the embankment of the Thames from the Victoria-tower-garden to Lambeth-bridge, including the widening of Millbank-street, and the utilisation of any surplus land which remains after the carrying out of the improvement."

(Further Report of the Improvements Committee, 25th May and 15th June 1898)

84. On 15 June 1898, the Improvements Committee reported on initial proposals to the Council. They assumed that the existing garden would be extended to Lambeth Bridge. They estimated that the net cost of the scheme would be £642,000. They commented that if, instead of laying out a garden, the land was built on, the cost would only be £71,900. They noted that the difference in cost of £570,600 could not be justified for four acres of land unless Parliament was willing to contribute:

"In pursuance of this reference we have carefully considered a scheme… We also assumed for the purpose of the scheme that all the houses and wharfs east of Millbank-street would be removed, and that the existing garden to the south of the Houses or Parliament would be extended to Lambeth-bridge. If such a scheme were undertaken, Millbank-street being increased in width to 60 feet, the estimated net cost of the necessary property, after deducting recoupment, would be £601,500. To this must be added the cost of constructing the embankment, and making up the widened road, such cost being estimated at £41,000. The total net cost of the scheme is therefore estimated at £642,500.

If in lieu of laying out the land to the east of the street as a garden, the site should be let on building leases, the new buildings to have a frontage to the river and a road between them and the river, the recoupment would be enormously greater and the estimated net cost of the scheme would then be no more than £71,900. The difference between this and the £642,500 (i.e., £570,600) represents the cost to the Council of laying out the land east of Millbank-street as a garden. The area of this land is some 184,000 square feet, or about 4 acres. While recognising the importance of such an improvement in throwing open Millbank-street to the river and extending the public garden, we feel that having regard to other public improvements required in all parts of London, the outlay of £570,600 on the acquisition of about 4 acres of garden could not be justified unless Parliament should be prepared to make a large contribution towards the cost, in view of the importance of improving the access to the Houses of Parliament from the south, and of removing further from them the buildings in Millbank-street."

(Further Report of the Improvements Committee, 25th May and 15th June 1898,

85. The County Council then proposed a scheme in which the land between Millbank and the river would be laid out as a garden. However, in order to increase the County Council's bargaining power with the Government, the Council amended the wording of the resolution so that it would not be committed to laying out the land by the river as a garden:

> *"... the chairman of the Improvements Committee accepted, and the Council adopted, a further amendment moved by Sir Arthur Arnold and seconded by Mr Verney, to provide that Millbank-street should be widened to either 70 or 80 feet, and* ***substituting the words "deal with" for the words "lay out as a garden" in recommendation (a)."***
>
> (Improvements Committee Adjourned Report, 13 March 1900,
>
> *"In the discussion in the Council the opinion was expressed by some members that the Government ought to contribute more to the whole scheme, and* ***we understood that the object of Sir Arthur Arnold's amendment was to assist us in our further negotiations with the Government and the local authority****. When the chairman of the Committee accepted the amendment in the Council he stated that the Chancellor of the Exchequer considered that the Government was not interested in the extension of the garden, but the chairman expressed his willingness to accept the amendment which would enable further negotiations to be opened up with the Government."*
>
> (Improvements Committee Adjourned Report, 13 March 1900, (emphasis added).

86. On 4 July 1899, the Council approved the proposal for submission to Parliament:

> *"Resolved – That, subject to the Council being relieved from widening Abingdon-street, and subject to a contribution by the local authority of £100,000, the Council do apply to Parliament in the session of 1900 for powers to embank the Thames from Victoria-tower-garden to Lambeth-bridge, to widen Millbank-street to 70 or 80 feet****, to acquire and deal with the land between the river and Millbank-street,*** *and to acquire and deal with the property between Millbank-street and Tufton-street, in general accordance with the scheme shown on the plan approved by the Improvements Committee on 7th June, 1899."*

(London County Council Minutes, 4 July 1899) (emphasis added)

87. On 12 July 1899, Westminster Vestry agreed to contribute £100,000 on the condition that the land between Millbank and the river would be converted into a public garden:

> *"Resolved – That this Vestry, recognising…the Westminster Improvement Scheme communicated to them by the London County Council… (3) assent to a contribution of £100,000 towards the Westminster Improvement Scheme of the London County Council, subject to the understanding:…that the space on the East of Millbank-street from the Victoria Tower-garden to Lambeth-bridge be converted into a public garden."*
> (Westminster Vestry minutes, 12 July 1899) (emphasis added)

88. On 11 October the Improvements Committee proposed an amended scheme. The new scheme included a realignment of Millbank so that it was closer to the river. This made more land available for building and reduced the overall cost of the scheme.

> *"Our negotiations with the Government have been somewhat protracted, but we are glad to be in a position to report that by slightly amending the original plan we have obtained the approval of the Government to the scheme, and an undertaking on their part to assist with the Abingdon-street portion. The amendment in question consists chiefly in the alteration of the line of the proposed street.* ***By somewhat altering the line so as to bring the street nearer the river than was originally proposed, a larger amount of land will be available for the purpose of recoupment, and the cost of the scheme to the Council will be accordingly reduced.*** *This amended plan involves the acquisition for the purpose of addition to the public way, of a narrow strip of the existing Victoria-tower-gardens. For the scheme to be complete it is also necessary that portions of the sites of five houses in Abingdon-street, four of which belong to the Government, should be given up, and we have now received a letter from the Lords Commissioner of HM Treasury approving this amended scheme."*
>
> (Report of the Improvements Committee, 11 October 1899) (emphasis added).

89. The Council approved the amended scheme. In around November to December, the Bill was deposited before Parliament accompanied by a plan which did not specify that the land by the river was to become a garden.

90. On 14 December the First Commissioner of Works wrote to the Council objecting that the Bill did not specify the land by the river becoming a garden:

> *"I am to mention, however, that the draft Bill does not fully or accurately provide for carrying out the arrangement provisionally agreed to by the First Commissioner and the Treasury. In particular, the First Commissioner notices that* ***it is not specified that there shall be a Public Garden****, to be formed and maintained by the Council,* ***between the east side of the diverted roadway and the River, in continuation of the Victoria Tower Garden, down to Lambeth Bridge.*** *This public benefit was, in the mind of the First Commissioner, one of the principal considerations in favour of giving up a strip of the existing garden."*
> (Letter on behalf of the First Commissioner of Works to the LCC, 14 December 1899) (emphasis added)

91. On 23 February 1900, the First Commissioner of Works wrote to the Council again insisting that the Bill had to provide for the land by the river to become a garden:

> ***"The Bill should provide, as part of the improvement, for a continuation of the Ornamental Garden****, called the Victoria Tower Garden,* *as far south as Lambeth Bridge, over the space between the new roadway of Millbank Street and the Embankment.* ***This public benefit, as in the first place proposed to the First Commissioner, was one of the principal considerations in his mind in favour of giving up a strip of the existing garden, to maintain which as a public recreation ground the Government are pledged by an agreement with the late Rt. Hon. W.H. Smith M.P. who contributed a great part of the cost of laying it out****."*
> *"As regards the future maintenance of the garden, the First Commissioner considers it essential, in order to ensure uniformity in appearance and regulation between the present garden and its continuation, that both should be under one management… to be maintained by this Board as a garden for public recreation".*
> (First Commissioner of Works' letter dated 23 February 1900) (emphasis added).

92. On 28 February 1900, the Council's Improvements Committee advised the Council's Parliamentary Committee of the First Commissioner's proposed amendments. The Improvements Committee agreed with the First Commissioner, on the basis the Council

had approved plans showing the land as a garden in July and October 1899 which had been the basis for negotiation:

> ***"(1) The First Commissioner contends that the Bill should make it clear that the land between the new road of Millbank Street and the Embankment is to be kept as a garden and is not to be built upon as this was the understanding upon which he agreed to give up the strip of the Victoria Tower Garden.***
> ***The Improvements Committee fully concur*** *with the insertion in the Bill of such a clause, particularly as the Council, on 4th July and 24th October, 1899, decided that the application to Parliament should be made in accordance with the plan submitted to the Council on those dates. On each occasion the plan shewed the land between the new Millbank Street and the river as intended to be kept as a garden. This, in fact, formed the basis of the negotiations with the Government and with the local authority in regard to the improvement, and a condition attached to the offer of the local authority to contribute £100,000 towards the cost of the scheme."*
> (Minutes of Improvements Committee Meeting, 25 February 1900) (emphasis added)

93. A report by the Improvements Committee emphasised that the intention all along had been to extend Victoria Tower Gardens and the Government's decision to give up a small part of the existing Victoria Tower Gardens and five houses in Abingdon Street required for the scheme was conditional on the provision of a garden, as was Westminster Vestry's contribution of £100,000. It noted that it would not be justifiable for the Council to claim a concession from the Government but keep a discretion to either lay the land out as a garden or to build on it. The report also stated that Parliament would be certain to reject the bill given that the private syndicate's plan was rejected because they proposed to build on the land:

> *"From what we have stated it will be seen that the amended scheme approved by the Council was based on the laying out of the land as a garden, that the Government contribution of the strip of the Victoria-tower-garden and the five houses in Abingdon-street was on the same basis, and that the Westminster Vestry made it a condition of their promise to contribute the £100,000. It could not for a moment be contended that the Council would be justified in claiming from the Government the concession of this strip of the Victoria-tower-garden and the five houses in Abingdon-street,* ***leaving it open to the Council either to lay out the land between the road and the river as a garden or to build upon it at its discretion***. ***It is certain that a scheme to build on the land would not obtain the sanction of Parliament,*** *as the scheme introduced by the syndicate was rejected because it was proposed to so deal with the land.*

We have accordingly expressed to the Parliamentary Committee our unanimous opinion that the land should be kept as a garden, and we have asked that Committee to insert the necessary clauses in the Bill.

...

The scheme for which parliamentary sanction is sought, however, will, after deducting the contribution from the local authority and allowing for amounts to be received by the levying of an improvement charge, cost the Council only about £300,000. For this sum a great public improvement will be effected, completing the most important of the very few remaining links in the embankment of the Thames from Blackfriars to Chelsea, widening the approach to the Houses of Parliament and Lambeth-bridge, and getting rid of the reproach which Millbank-street now presents, and greatly improving the district between this street and St. John's Church. ***We feel therefore that we are fully justified in asking the Parliamentary Committee to advise the Council to insert the necessary clauses in the bill making definite provision for the land between the new Millbank-street and the river being kept as a garden for the use of the public for ever."***

(Report of the Improvements Committee, 13 March 1900)

(emphasis added)

94. On 1 March 1900, on the Second Reading of the Bill in the Commons, the First Commissioner said that the bill must be amended to provide that the land between Millbank and the river be laid out as a garden, and that he would otherwise ask the House to reject the bill on its Third Reading.

"THE FIRST COMMISSIONER OF WORKS

(Mr. AKERS DOUGLAS (Kent, St. Augustine's)

I desire to state to the House the attitude of the Government with reference to this measure. We recognise that it aims at a great improvement, but at the same time there are some important Amendments which we must insist on having introduced into the Bill. ***One of the Amendments is that the whole space between the proposed new road and the river should be laid out in continuation of the Victoria Tower Gardens****.* ***There is really no difference in principle between the Government and the County Council as regards the nature of the Amendments.*** *The County Council and the Government would be sorry to see the improvement scheme checked, and I do not propose to object to*

the Second Reading, but I reserve to myself the right to ask the House to reject the Bill on the Third Reading unless the Amendments are inserted."

(Hansard, Volume 79, debated on 1 March 1900) (emphasis added).

95. On 20 March 1900, the Council agreed to accept a clause specifying that the land between Millbank and the river was to be laid out as a garden:

"The Council considered the following recommendation in the report brought upon 6th March –

London County Council (Improvements) Bill – Westminster improvement

2 – That the Parliamentary Committee be authorised to insert in the London County Council (Improvements) Bill a clause to provide that the land between the new Millbank-street to be formed in connection with the Westminster improvement, and the embankment, shall be laid out as a garden. [Adopted]"

(London County Council Minutes, 20 March 1900)

96. Between 2 and 4 May 1900, the Westminster improvements clauses of the bill were considered by the Commons Select Committee on the London County Council (Improvements) Bill. The Committee agreed the amendments to the Bill. On 11 July 1900 the Lords Select Committee on the London County Council (Improvements) Bill considered the Bill. The [Lords] Committee rejected the proposed realignment of Millbank.

97. On 24 July 1900, the Council considered reports from its Improvements and Parliamentary Committees. It agreed to accept the Lords' Committee's proposal and proceed with the improvements on the condition that the Committee approved the plan first proposed by the Improvements Committee in June 1899:

"Resolved – That the Council do proceed with the Improvements Bill, subject to the Select Committee of the House of Lords agreeing that the new street from the southern end of Abingdon-street to Lambeth-bridge shall be carried out in general accordance with the route shown upon the plan approved by the Improvements Committee on 7th June, 1899, sanctioned by the Council on 4th July, 1899, and as shown by blue lines upon the cartoon plan now submitted to the Council, including the widening of the northern end of Abingdon-street as already arranged."

(Special Report of the Improvements Committee, 24 July 1900,

98. On 26 July the Lords Committee implicitly agreed to the June 1899 plan. On 6 August 1900 the Bill received Royal Assent.

iv) Analysis of the historical context

99. The archived documents uncovered by Dr Gerhold bring the Preamble to section 8 of the Act, to life. In particular, they demonstrate that the use of the land in question for a garden was a central part of negotiations during the passage of the 1900 Act. As the First Commissioner explained in his letter of 14 December 1899 *the 'public benefit'* of a public garden *'was, in the mind of the First Commissioner, one of the principal considerations in favour of giving up a strip of the existing garden."*

100. Mr Mould relied on the context in submitting that in return for the disadvantages to the Commissioners of the works, section 8 ensured the land was developed as a garden and not given over to buildings as it had been previously. However, once Millbank had been widened and the gardens laid, as envisaged in the plan in 1900, the legislative purpose of s.8(1) had been fulfilled. The statutory objective in s. 8(1) was therefore achieved when the Garden was laid out and vested in the Commissioners to maintain. This had happened, he submitted, by the latest in 1914 as is apparent from an Ordnance Survey map of 1914. In this context he submitted that no further provision was necessary for the future regulation of the Garden, which could be left to the good sense of the Commissioners using their powers under bylaws and regulations.

101. Mr Mould relied on an Ordnance Survey Map of 1914 which added cogency to his submission that the statutory objective had been fulfilled by the laying out of the Garden. However, the Ordnance Survey map in question post-dates the Act by 14 years. In my judgment, Mr Mould's submissions fall to be tested by their implication that as soon as the improvement works were completed, the protective provision in section 8(1) fell away, with the result that the new garden land could be used for another purpose or built upon again. Viewed from the perspective of 120 years later, this may seem unobjectionable. However, in my judgment, the context demonstrates that it would not have been considered acceptable to those involved in the negotiations of the Act that, say, four – six months after Millbank had been widened and the Garden laid out as extended, the new garden land could be used for some other purpose or built upon. The provision of a garden was of central importance to the negotiation of the Act and its passage into law. A scheme for rebuilding the Millbank area, proposed by the private syndicate in 1898, had been rejected by the Commons, partly because the plan involved building on the riverside rather than extending the existing open space. Mr Mould submitted that the future of the garden could be left to the good sense of the Commissioners. However, the context reveals that it was not just the Commissioners who had an interest in the use of the land as a garden. Westminster Vestry had donated £100,000 to the scheme conditional on the provision of a garden. Moreover, in 1879, the Rt Hon W.H. Smith MP donated £1000 towards laying it out for public use. A further £1400 was voted for by Parliament. W.H. Smith MP asked the then Office of Works to record in a minute that the sum had been accepted to level, turf and gravel the

ground "*in order that it may be thrown open to the public and become available as a recreation ground*". The minute requested has not been traced, but later correspondence around negotiations for the 1900 Act, refers to the Government being "*pledged to an agreement with the late Rt Hon WH Smith for the Gardens to be maintained as a public recreation ground*." In my judgment, the historical context is clear and supports Mr Drabble's interpretation of the wording of section 8 as providing an enduring obligation to keep the land for use as a public garden.

102. Both Mr Drabble and Mr Mould made submissions on the following extract from the Report of the Council's Improvements Committee dated 13 March 1900:

> *"We feel therefore that we are fully justified in asking the Parliamentary Committee to advise the Council to insert the necessary clauses in the bill making definite provision for the land between the new Millbank-street and the river being kept as a garden for the use of the public for ever."* (emphasis added)

103. Mr Drabble did not seek to rely on the extract for his primary case but submitted that, to the extent that the Court considered it necessary to resort to external aids, the reference in the extract to the land 'being kept as a garden for the use of the public for ever" supported his interpretation. Mr Mould submitted in response that the absence of any reference to 'for ever' in the Act indicated that Parliament had not accepted the Committee's aspiration that the garden should be forever. The Trust was, he submitted, asking the Court to infer that, notwithstanding that those words are notably absent from s.8(1) of the 1900 Act, nevertheless they are to be read into that enactment as representing Parliament's true intention. That contention was, he said, simply unsustainable.

104. Both Counsel were, at this juncture, using pre-legislative material to elucidate meaning, rather than context. In R(O) v Secretary of State Lord Hodges expressed the view that "*none of these external aids displace the meanings conveyed by the words of a statute that after consideration of the context are clean and unambiguous and which do not produce absurdity"* [30], Lady Arden was however prepared to consider that: "*There are occasions when pre-legislative material may, depending on the circumstances, go further than simply provide the background or context for the statutory provision in question. It may influence its meaning*." [64]. She considered the benefit of doing so as enabling the Court to reach a better-informed interpretation of a provision [66]).

105. The difficulty in the present case is that the material relied on to elucidate meaning is the minutes of a Committee of the Promoter of a private Bill, a category of material not in the contemplation of Lord Hodge and Lady Arden in R(O) v Secretary of State. The parties did not address me on the admissibility of the material. My conclusions on the construction of section 8 of the Act, do not rely on the pre-legislative material. However, to the extent the Court is able to rely on the pre-legislative material to elucidate meaning

(in addition to context) then, in my view, it provides strong support for the interpretation I have arrived at on the basis of the wording of section 8.

106. Finally, I address briefly, the submission by Mr Mould and Mr Katkowksi that the Gardens had accommodated a number of structures over the years, including the Buxton Memorial, which had not been considered to be contrary to the 1900 Act. I do not consider factual developments since the passage of the Act to be of assistance to my task of ascertaining the meaning of the wording of section 8 of the 1900 Act.

The 1900 Act as a material consideration

107. Mr Drabble submitted that the existence of the 1900 Act makes the Holocaust Memorial effectively undeliverable. Deliverability was a material consideration which the Inspector failed either adequately, or at all, to take into account. This failure has led to an error of law. Mr Mould disputed this analysis. Restrictions in other statutes are ordinarily not material considerations which the planning decision maker is obliged to consider. Mr Mould pointed in this regard to R v Solihull Borough Council, Ex parte Berkswell Parish Council (1999) 77 P. & C.R. 312, considering the Berkswell Enclosure Act 1802. By analogy with that case, no party to the public inquiry into the planning application advanced the alleged statutory restriction as a material consideration which the planning decision maker must take into account and evaluate. If and insofar as s. 8 of the 1900 Act may be found to impose an impediment on the delivery of the Memorial in accordance with the planning permission, that is a matter for those responsible for construction of the Memorial.

108. It is trite law that in deciding whether or not to recommend the grant of planning permission the Inspector (and subsequently the Minister) were obliged to have regard to material considerations (section 70(2) of the Town and Country Planning Act 1999).

109. I accept Mr Mould's submissions to the extent that, in general terms, the grant of planning permission sanctions the carrying out of a development which otherwise would be in contravention of the statutory prohibition against, in general, the carrying out of any development of land without planning permission. It establishes that the construction of a scheme is satisfactory on planning grounds. That decision is without prejudice to any further consents which may or may not be required for implementation of the planning permission. Someone who obtains planning permission may have to overcome any number of hurdles when seeking to implement the permission.

110. However, in this case, when considering the credibility and viability of alternative sites, the Inspector identified the deliverability of the proposal and, in particular its timing as a material consideration meriting considerable weight:

> *"Timing*
>
> *15.170 The HMC report is entitled 'Britain's Promise to Remember'. Now, 75 years after the liberation of the camps, for many in the Jewish community and most poignantly for survivors themselves, this proposal heralds a commitment by the British*

Government to fulfil the recommendations of the HMC. As such, this would represent not only a commitment to honour the memory of the millions lost to the Holocaust, but also a testament to the courage and resilience of those who survived it. This is a matter of importance and, though unusual in planning terms, it is of material weight that such a monument should be raised within the lifetime of at least some of those survivors so that this commitment is seen to be honoured in their living memory.

15.171 In the event the Minister was to refuse permission for the UKHMLC in VTG, as BD points out, this would, in all probability, not be the end of the project. It is suggested that this would be a "beneficial outcome", and that it would probably be sited "at the Imperial War Museum or some other more suitable site". This may or may not be the case. What is clear however is that the detailed process of selection, evaluation, preparation, design, consultation and formal consideration of a new proposal would begin anew, with all the gestation time this implies. If the programme for the current project is applied, this suggests approximately five years of further work. We know that a number of survivors who saw the outcome of the HMC will not have lived long enough to learn of the outcome of this Inquiry. Another five years of renewed planning would only but add to their number.

15.172 Whilst the matter of timing alone would not be of determinative weight, any such new scheme and its location must after all achieve HMC expectations and meet development plan and statutory planning requirements. But achieving a memorial within the lifetime of survivors, so seeking to honour the living as well as the dead, has a resounding moral importance that can legitimately, in my view, be considered a material consideration and a public benefit of great importance, meriting considerable weight in the planning balance in this case."

111. If, as I consider to be the case, installation of the Memorial in the Gardens is contrary to the statutory purpose of section 8 of the 1900 Act then in my judgment this is a material consideration, given the Inspector's emphasis on the importance of the need to deliver the Memorial within the lifetime of the Holocaust survivors. I note that, in May 2020 at least, the Government Legal Department appeared to be of the same view:

"....All substantive matters relating to the planning application will be for the appointed Inspector to consider and to report to the Minister of State in accordance with the procedure laid down by The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the Inquiries Procedure Rules"). Those matters include section 8(1) of the 1900 Act, insofar as it is engaged by the planning application. The Inspector must consider all material considerations, including any relevant

> *legislation, in preparing the inquiry report under rule 17 of the Inquiries Procedure Rules. All parties to the inquiry will have the opportunity to make submissions on those matters to the Inspector at the inquiry."*
>
> (pre-action correspondence dated 18 May 2020)

Raising a new point on appeal

112. The third aspect of Mr Mould's response on this ground was that the Inspector cannot be criticised for not considering the 1900 Act when it was not raised before him. The Trust was well aware of the point of statutory construction, having raised it with the Minister in advance of the inquiry but it did not pursue the matter at the inquiry. It is, he submitted, not tenable to sustain an argument under s288 of the Town and Country Planning Act that the Court should now interfere with the decision of the Minister to grant planning permission on the basis of the disputed effect of private legislation, a point that was only raised in the present proceedings after the decision to grant planning permission had been made. The Inspector cannot be criticised for not considering a matter which the Trust did not raise when it had the opportunity to do so.

113. In response, Mr Drabble submitted that there is no general rule preventing a party from raising an argument in a planning challenge that was not advanced by the party before the Inspector. A person with standing is entitled to a lawful decision. Mr Drabble relied on the following dicta of the Deputy High Court Judge in South Oxfordshire DC v Secretary of State for the Environment Transport and the Regions [2000] 2 All ER 667:

> *"I do not think that there can be any general rule that a party to a planning appeal decision is to be prevented from raising in a challenge to that decision an argument that was not advanced in representations made on the appeal. If the inspector has omitted a material consideration which could have affected his decision the decision may on that account be rendered unlawful, notwithstanding that the matter was not raised in the representations…"*
>
> *"In an appeal against the refusal of planning permission…the issue, defined by the appeal, is whether planning permission should be granted; and the test of materiality is essentially that of relevance (see Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281 at 671 (j) - 678 (b))."*

114. In response, Mr Mould pointed out that the Deputy High Court Judge had nonetheless refused permission for the introduction of other arguments which could have been, but were not, raised, at the inquiry and which would have necessitated factual inquiry:

> *"the grounds of challenge were set out in the notice of motion. In the course of the hearing, Mr Harper sought permission to amend the notice by adding additional grounds. There was no objection to certain of the proposed additions by Mr David Elvin for the First Respondent and Mr David Holgate QC for the Second Respondent, and I allowed those. I refused permission for the other amendments because they sought to advance arguments that could have been raised, but were not raised, at the inquiry. If they had been raised, the Second Respondent would almost certainly have wished to call further evidence and/or have advanced arguments to deal with them. I will say what the points were later. It is sufficient for me to say now that I did not consider the interests of justice required that the council should be allowed to pursue them on this application" (671 at g) -h))*

115. The same point about the significance of factual inquiry was made in Trustees of the Barker Mill Estates v Test Valley Borough Council [2016] EWHC 3028:

> *"77 In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information…"* (Holgate J)

116. Turning to the facts and circumstance of the present case.

117. Firstly, as per the stipulation of Holgate J in Trustees of Barker Mills, I have examined the nature of the point raised and I have concluded that, in my judgment, the 1900 Act is a material consideration because of the impediment it presents to delivery of the Memorial in Victoria Tower Gardens and the importance attached by the Inspector to the delivery of the Memorial in the lifetime of Holocaust survivors. In South Oxfordshire, the Judge identified the omission of a material consideration as a scenario in which the Inspector's decision could be rendered unlawful notwithstanding that the point had not been raised in representations.

118. Secondly, the point was raised at the inquiry. It was raised by Mr Gerhold. The Inspector's decision letter records that 131 written representations were received at the appeal stage. He summarises the representations including the following:

> *"These changes would breach the condition of the donation of £1,000 made by the benefactor W H Smith in 1879, that the land was kept a made by the benefactor W H Smith in 1879, that the land was kept as a garden for the use of the inhabitants of Westminster. It would be in direct contravention of the 1900 Act under which the land was to be used as a park in perpetuity. (12.15)"*

119. I was provided with a copy of Mr Gerhold's written objection which states as follows:

> *"Building on VTG as proposed would be illegal under the Act by which the southern part of it was acquired, as the Act requires that the land be maintained as 'a garden open to the public' (London County Council (Improvements) Act 1900, section 8, still in force). The Government was apparently unaware of this until it was brought to its attention in March 2019 (parliamentary answer 229633). This may not be in strict terms a planning matter, but it provides evidence of an inadequately prepared scheme."*

120. In my view, Mr Mould is in difficulty therefore in submitting that the point was not before the Inspector. It was before the Inspector, albeit it in modest fashion, via written representations and not from one of the main parties. Mr Mould sought to rely on Dr Gerhold's assessment of the point as "*not be[ing] in strict terms a planning matter*". Dr Gerhold is, however, a historian not a lawyer. Moreover, the implication of Mr Mould's submission is that the views of members of the public attract less weight. This runs contrary to the recognised importance of the public to participate in environmental decision making (see for example the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters). Procedural fairness at a planning inquiry requires the Inspector to consider significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so. To hold otherwise would undermine the value of public participation in environmental decision making (Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1145 and Secretary of State v Claire Engbers) [2016] EWCA Civ 1183))

121. Thirdly, the Secretary of State, the applicant for planning permission, was on notice of the point and could reasonably have anticipated that it might be material. On 31 July

2019, the Trust's solicitors wrote to the Secretary of State contending that locating the Memorial in the Gardens would breach s. 8(1) of the 1900 Act:

> *"…there is an important legal impediment which prevents the proposal proceeding at all…*
>
> *Section 8 of the London County Council (Improvements) Act 1900, the statute empowering the LCC to create the southern part of VTG and to pass it to (what was then) the Commissioners of Works, requires that the area in which the Memorial is proposed to be built "shall be laid out* ***and maintained****…for use* ***as a garden open to the public and as an integral part of the existing Victoria Tower Garden****". We have taken advice form counsel Mr Thomas Seymour of Wilberforce Chambers. He has reviewed the proposal and plans and confirms that developing a substantial part of the land as a Memorial and Learning Centre would, unarguably, be in breach of that provision.*
>
> *It would accordingly be unlawful for the Secretary of State, who has ministerial responsibility for the Holocaust Memorial project, to seek to proceed with a proposal in breach of a statutory prohibition. It would likewise be unlawful for the Secretary of State for Culture Media and Sport, to whom title to VTG has passed from the Commissioners of Works, and to whom we are copying this letter, to permit the development to proceed."*

122. The Secretary of State replied on 31 October 2019, stating that the provision of the memorial complied with the 1900 Act:

> *"We are of the view that the proposal for a Holocaust Memorial and Learning Centre compiles with Section 8 of the London County Council (Improvements) Act 1990 and will not be withdrawing the planning application..."*

123. In May 2020, the Trust raised the same point in pre-action correspondence in relation to the call in of the application:

> *"On 31 July 2019 Richard Buxton Solicitors (RB), representing one of the other Rule 6 parties, wrote to the Secretary of State and MHCLG pointing out that the building of the VTG Proposal would infringe the terms of the London County Council (Improvements) Act, 1900, which requires the preservation of VTG. MHCLG replied by stating that it would comply with the relevant section of that Act"*

124. The Government Legal Department replied as follows:

> *"The 1900 Act*
>
> *17. The lawfulness of the decision to call in the planning application is unaffected by section 8(1) of the London County Council (Improvement) Act 1900 ("the 1900 Act"). It is a decision as to the statutory procedure to be followed for the purpose of determining the planning application under Part 3 of the Act. It does not engage section 8(1) of the 1900 Act. Your proposed claim, if pursued, will not place "issues relating to the VTG proposal" before the Court. All substantive matters relating to the planning application will be for the appointed Inspector to consider and to report to the Minister of State in accordance with the procedure laid down by The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the Inquiries Procedure Rules"). Those matters include section 8(1) of the 1900 Act, insofar as it is engaged by the planning application. The Inspector must consider all material considerations, including any relevant legislation, in preparing the inquiry report under rule 17 of the Inquiries Procedure Rules. All parties to the inquiry will have the opportunity to make submissions on those matters to the Inspector at the inquiry."*

125. My attention was also drawn to the following question asked in Parliament of the Secretary of State in March 2019:

> ***"Question:** To ask the Secretary of State for Housing, Communities and Local Government, on what date (a) the Government and (b) the UK Holocaust Memorial Foundation were first informed about the potential application of section 8 (1) of the London County Council (Improvements) Act 1900 to the proposed location of the Holocaust Learning Centre. (229633)*
>
> ***Answer, 14 March 2019: Mrs Heather Wheeler**: The Environmental Statement (Volume 3) submitted with the planning documents in December 2018 identifies that proposals for enlarging Victoria Tower Gardens were adopted under the London County Council (Improvements) Act 1900."*

126. In HJ Banks & Co Ltd v Secretary of State [1997] 2 PLR 50, Lord Woolf was prepared to accept that:

> *"Speaking in general terms, and recognising there are always going to be exceptional situations, it seems to me that, although*

this court should be cautious to avoid encouraging points to be taken for the first time in this court, it is perfectly proper for this court, as a matter of discretion, to allow points to be argued before us, if the material is before this court to enable those matters properly to be considered. In relation to the point which Mr Horton wishes to raise on this particular appeal, which was not raised in the court below, that appears to me to be the position. It also seems to me desirable that we should express an opinion upon the point because, if we do not do so, it will leave an area of uncertainty in relation to planning matters of this nature which would be undesirable, because there are likely to be other appeals where the same point will arise."

127. For the reasons set out above, in the facts and circumstances of the present case, I consider it proper, as a matter of my discretion, to allow the point to be raised.

128. Accordingly, in conclusion on Ground 3, in my judgment, Section 8(1) of the 1900 Act imposes an enduring obligation to retain the new garden land as a public garden and integral part of the existing Victoria Tower Gardens. The potential impediment to delivery of the scheme is a material consideration which was not considered at the inquiry.

129. Ground 3 succeeds.

Ground 4: error of law in relation to alternative sites

The Inspector erred in law in considering that in order to attract significant weight, the merits of any alternatives must be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.

The relevant legal principles

130. The principles on whether alternative sites are an obviously material consideration which must be taken into account are well established. Where there are clear planning objections to development then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it (Trusthouse Forte v Secretary of State for the Environment (1987) 53 P & CR 293 at 299-300).

131. These principles are of obvious application in the present case. As was common ground, locating the Memorial in Victoria Tower Gardens will give rise to harm to the setting of the Buxton Memorial and, as a consequence, the Registered Park and Garden.

The potential of the Imperial War Museum to deliver the acknowledged benefit of the Memorial at a location that will arguably avoid that harm or at least lessen it to a material degree is a material consideration. The Inspector acknowledged the point at IR15.164:

> *"It is reasonable to suggest that if there are alternative locations for a proposal which would avoid an environmental cost, then these should be taken into account when determining the acceptability or otherwise of the proposal at hand. This is a particularly attractive prospect if it is held that there are viable alternatives sites that could accommodate the proposal without attendant harm."* (IR15.164)

132. However, the Inspector went onto express caution about the prospect of alternative sites:

> *"But such an approach has to be treated with caution. Whilst (as the Courts have determined) the desirability of having alternative proposals before the Inquiry may be "relevant and indeed necessary", (though not always essential), in order that it may garner significant weight, the merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.* [501] *[8.62, 9.65]"*

133. This extract formed the basis of Mr Drabble's submission under this ground. He submitted that the passage demonstrates an error of law in that it places a burden of proof on an objector to demonstrate the existence of a feasible alternative scheme showing how a prominent and striking memorial can be provided with less harm than at Victoria Tower Gardens. The application of the error is said to be evident in the Inspector's conclusion that the weight to be afforded to the Imperial War Museum site as an alternative in the planning balance is "*very limited*" as, "*whilst seeming to offer a benign alternative, it lacks a detailed scheme that would meet the core requirements of the HMC and carries clear potential constraints that may hamper its delivery*" (IR15.169). There is, Mr Drabble submitted, no legal requirement or burden of proof on an objector to identify and establish the existence of a specific site as a preferable alternative before an application can be refused on the basis that a particular need can be satisfied elsewhere (Trusthouse Forte at 300-301 and South Cambridgeshire DC v SoSCLG [2009] PTSR 37). In the context of a proposal such as the Memorial, and the site selection process that proceeded it, the burden placed on any objector may well prove impracticable to discharge. The particular facts of this case and the concerns around the lack of transparency in the site selection exercise meant this was a case where the burden in relation to alternative sites was firmly on the developer because of the site selection process. The Secretary of State had it in his power to produce detailed schemes but did not do so. On the very specific facts of this case the Inspector's reliance on the absence of detailed schemes for the alternative sites was unlawful.

134. Case law provides that the extent to which it will be for the developer to establish the need for his proposed development on the application or appeal site rather than for an objector to establish that such need can and should be met elsewhere will vary and is a matter of planning judgment (Trusthouse Forte at 301). The point is amplified in R (Langley Park School for Girls Governing Body) v Bromley London Borough Council. In that case Sullivan LJ referred to Trusthouse Forte when considering when it may be necessary to identify a specific alternative site and said at [52] – [53]).

> *"52. […] There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.*
>
> *53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. […]"*

135. I did not understand Mr Drabble to dispute the proposition that the issue is a matter of planning judgment. His complaint focuses on the alleged impermissibility of an escalation by the Inspector of a matter of planning judgment to a hard-edged principle which places the burden of proof on an objector.

The Inspector's approach to alternatives

136. Before turning to alternative sites, the Inspector considered the suitability of Victoria Tower Gardens as the proposed location for the Memorial:

> *"15.154 The precise process by which VTG became the preferred and definitive location for the UKHMLC is not clear. The apparent realisation of its potential as such a site has*

subsequently been framed as a "moment of genius" (by those on both sides of the argument). But whether bathetic or not, such a choice may well have reasonably been driven by a conclusion that the sites hitherto identified were not adequately meeting the HMC report recommendation requirements, and that further alternatives were necessary.

15.155 What is clear though is how closely the VTG site meets the core expectations of the recommendation…

by virtue of this aesthetic and semiotic boldness combined with its location, the proposal would make a clear and unequivocal statement about the degree of importance we as a nation place on preserving the memory of the Holocaust. A statement moreover that would readily serve as a focal point for its national commemoration. Expressing these attributes, it would indeed stand as an affirmation of the universal human values, and so those also, unashamedly, of British society.

15.156 Such questions of location do however beg the wider questions as to why we raise such memoria, and why we put them where we do. The diverse monumental denizens of Whitehall, Parliament Square, and VTG itself, are all witness to significant national and international events, people or causes. All too, seem held in space by the gravitational mass of the Palace of Westminster, for so long the very epicentre of national and global power. Even to one familiar with these places, the passing observer is compelled to ask of each memorial, "why are you here?" We also know that there are great sensitivities around the relocation of these memoria, such as those to the Pankhursts and to Buxton.

…

15.158… If, as the clear greater majority of those offering a view at the Inquiry and more widely, believe that the commemoration of the Holocaust (and learning of its horrors and contemporary legacy) is profoundly significant, then it follows that the UKHMLC should be located in a place of primary national and indeed international importance. So, locating the combined structure in central London, the nation's capital, adjacent to the Palace of Westminster, the very epicentre of national law-making, would have an inescapable resonance. It should be recalled that this semiotic appeal was not lost on the HMC, who identified one of the merits of the Millbank site as being its relative proximity to the Houses of Parliament. It should also be recalled that the HMC also concluded that the IWM was also very highly regarded, being within easy reach of Westminster. Moreover, if one accepts the primacy of location in recognising

the importance of the Holocaust, it follows that the selection of a less significant location connotes a lesser degree of significance to the purpose of that commemoration. (15.158)

15.159 In addition, the juxtaposition of the UKHMLC with the Palace of Westminster as an ever-present reminder to lawmakers of the dangers of complacency may be considered trite. But as a lesson to nation and Parliament that, in exploring Britain's relationship with the Holocaust, reflecting on its finer moments, its failures, and the terrible consequences of opportunities not taken, honestly and candidly, would remind us of the fallibility of democracy's assumed righteousness, and our responsibility, if not duty, to others in safeguarding it. Such an approach underscores the direct connection between action, or the lack of it in Parliament, and the consequence in relation to the unfolding cataclysm of the Holocaust. The UKHMLC would make tangible that linkage, amplifying the commemorative and cognitive purpose of the combined structure. Lastly, the idea of the Memorial offering a sense of commemorative citizenship (to those from which it was robbed), a symbol that says "British Jews (and others of minority ethnicity and sexuality) are British; your history is our history; your security is a British concern, you belong here", has a very powerful resonance, and one that should indeed be heard in the context of the Palace of Westminster. 15.159

15.161 In broader locational terms therefore, the proposals would fulfil the expectations of the recommendation of the HMC. More specifically, the location next to the Palace of Westminster not only has a resonance with a key positive attribute of the Millbank and IWM sites, it would offer a powerful associative message in itself, which is consistent with that of the memoria of its immediate and wider context. As a measure of the importance attached to the commemorative task it has, and for all the reasons set out above, I conclude that the location of the UKHMLC adjacent to the Palace of Westminster can rightly be considered a public benefit of great importance, meriting considerable weight in the heritage and planning balance. (15.161)"

137. On behalf of Learning from the Righteous, Mr Simons sought to distinguish the present case from other case law on alternatives. The depth and profundity of meaning in locating the Memorial in Victoria Tower Gardens, next to the Houses of Parliament, is exceptional. The Inspector found, he submitted, that the Memorial will not function in the same way or fulfil the same purpose in a different location. This amounts to a material distinction from the many examples in the authorities. Thus: Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 53 P. & C.R. 293 was about a proposal for a new hotel near Bristol; R(Mount Cook Land Ltd) v Westminster City Council [2017] P.T.S.R. 1166 concerned external alterations to a department store on Oxford Street in London; R (Save Stonehenge World Heritage Site Limited) v Secretary

of State for Transport [2021] EWHC 2161 (Admin) was about the construction of a new route for the A303 in Wiltshire; R (J (A Child)) v North Warwickshire BC [2001] P.L.C.R. 31 was about a proposal for eight affordable bungalows for older people; Derbyshire Dales DC v Secretary of State for Communities and Local Government [2010] 1 P. & C.R. 19 concerned a proposal for 4 wind turbines; and R (Langley Park School for Girls Governors) v Bromley LBC [2010] 1 P. & C.R. 10 was about re-building a school in Kent. These examples - a hotel; school building; affordable bungalow; wind turbine – may be located in any number of places and still function in the same way.

138. I accept Mr Simons' submission that the depth of meaning associated with locating the Holocaust Memorial next to the Houses of Parliament sets the present case apart from the other case law on alternatives put before the Court. The Inspector accepted that the proposed location in Victoria Tower Gardens meets the core expectations of the recommendations of the Holocaust Commission's report. Its location would help the scheme to make a "*clear and unequivocal statement about the degree of importance we as a nation place on preserving the memory of the Holocaust*" which would "*readily serve as a focal point for its national commemoration*". He accepted that there is an explicit and direct relationship between the significance and prominence of any given site and the value and status that individuals assign to the events commemorated (IR15.157). The Scheme's location next to Parliament in a place of "*national and indeed international importance*" was found to be justified (15.158). The Inspector continued in the same paragraph that: *if one accepts the primacy of location in recognising the importance of the Holocaust, it follows that the selection of a less significant location connotes a lesser degree of significance to the purpose of that commemoration*." Nonetheless; I did not understand Mr Simons to be proposing a new legal proposition to reflect the distinction. The matter remains one of planning judgment for the Inspector who found in this case that the location in Victoria Tower Gardens merits considerable weight. I agree with Mr Simons that this sets the context for the exercise of his planning judgment in the consideration of alternative sites for the Memorial.

139. Having reached his conclusion on the suitability of Victoria Tower Gardens, the Inspector made the following observation in which he accepted the relevance of alternative sites:

> *"15.163 the belief that if the proposals were moved to another location, specifically the IWM, the clouds of such controversy would lift and a universal consensus on the merits of that location be achieved is, to say the least, optimistic. From what I heard at the Inquiry and saw during my site visit, the debate over the merits of that location, the relationship of its purpose to its host, and the environmental and social costs it might entail, would still prevail. Nevertheless, a consideration of such alternative sites is reasonable and justified in light of the matters raised at the Inquiry." (IR 15.163)* (emphasis added)

140. He further directed himself on the materiality of alternative sites at IR 15.164 whilst expressing caution about the prospect of alternative sites, which, as mentioned, formed the basis of Mr Drabble's submissions on this ground:

> *"It is reasonable to suggest that if there are alternative locations for a proposal which would avoid an environmental cost, then these should be taken into account when determining the acceptability or otherwise of the proposal at hand. This is a particularly attractive prospect if it is held that there are viable alternatives sites that could accommodate the proposal without attendant harm." "But such an approach has to be treated with caution. Whilst (as the Courts have determined) the desirability of having alternative proposals before the Inquiry may be "relevant and indeed necessary", (though not always essential), in order that it may garner significant weight, the merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative. 501 [8.62, 9.65]"*

141. Having identified the three primary alternative sites (IR 15.165) he narrowed his focus to the site at the Imperial War Museum stating that it is on this site *"that the hopes of those opposing the VTG proposal are focused as a credible alternative worthy of weight in the planning balance… Such an interest is not without justification" (IR 15.166)*. He went on to address the relative merits and disadvantages of the Imperial War Museum site. As to its merits: the Imperial War Museum site was one of the sites identified in the Holocaust Memorial Commission report; there are obvious synergies with the existing and proposed Holocaust content of the museum; it is an institution familiar with handling large numbers of people; it has a landscape context that could accommodate a combined Memorial and Learning Centre, and there is a provisional scheme by a distinguished architectural practice testing its feasibility, albeit this is limited in scope. Moreover, the Holocaust Memorial Commission saw the advantage of the site, as previously stated, in it being "*within easy reach of Westminster*". He then turns to address the disadvantages of the site including his view that '*there are serious questions'*, as to whether it would meet the critical Holocaust Memorial Commission requirement for a prominent and striking memorial (IR15.167). Further; he went on to state that *'it is at least apparent to me that the IWM site is not free from constraint.'* He listed the constraints as including: a Grade II listed building and works which could affect its special interest; a conservation area; potential impact on two mature trees on the site; loss of public open space and early years play and learning facility; less well developed security infrastructure and implications for local residents. He concluded that "*Clearly, achieving a combined facility here would also involve the balancing of benefits against possible harms, some not dissimilar to those at VTG"* (15.168). This is the context in which he arrives at the view that *"whilst seeming to offer a benign alternative, IWM lacks a detailed scheme that would meet the core requirements of the HMC and carries clear potential constraints that may hamper its delivery. Together this suggests that the weight to be afforded the IWM alternative in the planning balance is very limited."* (IR 15.169). He then turns to consider timing of construction/installation of the Memorial and the importance of delivering the Memorial during the lifetime of Holocaust survivors, a matter to which considerable

weight should be attached. If the scheme at Victoria Tower Gardens were to be refused, work may have to begin on the scheme at an alternative with consequent further delay (IR15.170-172 set out in full above).

Analysis of Ground 4

142. Mr Drabble's case on this ground is based on one sentence in IR 15.64 by which he seeks to derive a quasi-legal test said to be applied by the Inspector, at IR 15.69. The Courts have on many occasions cautioned against a forensic and overly legalistic focus on individual sentences in the context of, as in this case, a lengthy, sophisticated and nuanced report. The Report must be read as a whole and in proper context.

143. In this respect, the key building blocks to the Inspector's approach to alternative sites were as follows:

1) Great weight should be given to locating the Memorial in Victoria Tower Gardens, next to the Houses of Parliament, given the profound connection between the location and the purpose of the Memorial.

2) There are obvious constraints on locating the Memorial in the Imperial War Museum including that it does not appear able to fulfil a key Commission requirement for a striking and prominent Memorial.

3) Other constraints on the Imperial War Museum site include potential impact on heritage assets; security and impacts on local residents.

4) The suggestion that locating the Memorial in the Imperial War Museum will be free from controversy is optimistic.

5) Though unusual in planning terms, it is of material weight that the Holocaust Memorial should be raised within the lifetime of at least some of those survivors.

6) In the event the Minister was to refuse permission for the Memorial in Victoria Tower Gardens the detailed process of selection, evaluation, preparation, design, consultation and formal consideration of a new proposal would begin again. This suggests approximately five years of further work, which will add to the number of survivors who do not live to see the outcome.

7) Achieving a memorial within the lifetime of survivors has a resounding moral importance that can legitimately be considered a material consideration and a public benefit of great importance, meriting considerable weight in the planning balance in this case."

144. I am not persuaded that the Inspector fell into the error suggested by Mr Drabble in impermissibly elevating a matter of planning judgment into a hard-edged principle about the burden of proof in relation to alternative sites. The first to third sentences of IR 15.64 are unobjectionable and the Trust makes no complaint about them. Mr Drabble focusses on the fourth sentence "*in order that it may garner significant weight, the*

merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.501 [8.62, 9.65]". However, at the end of the sentence, the Inspector inserts a footnote and two cross references. The footnote refers to Trusthouse Forte Hotels Ltd v Secretary of State for Environment (1987) 57 P. & C.R. 293. The first cross-reference is to IR 8.62 where the Inspector records Westminster Council's submission, supported by the Council's reference to Trusthouse Forte, that the absence of detailed and worked up alternatives before the inquiry is not a reason for discounting alternative sites:

> *"WCC believes that the absence of detailed and worked up alternatives before the Inquiry is not a reason for discounting this principle, as the Court said "Although generally speaking it is desirable and preferable that a planning authority (including, of course, the Secretary of State on appeal) should identify and consider that possibility by reference to specifically identifiable alternative sites, it will not always be essential or indeed necessarily appropriate to do so"".*

145. He also cross-referred to IR 9.65 recording the submission by the Trust, made again by reference to Trusthouse Forte that *"[i]t is not accepted that the existence of an alternative proposal or site is only a material consideration if there is a specific scheme in existence (such as occurs in a conjoined planning appeal or otherwise)*".

146. The Inspector's approach accords with Trusthouse Forte and reflects "*the spectrum*" explained in Langley Park *per* Sullivan LJ at [52] – [53] that "*how far evidence in support of [a] possibility, or the lack of it, should have been worked up by the objectors or the applicant for permission [are] all matters of planning judgment"*. His approach at IR 15.164 is an example of the application of planning judgment to that question as it arose in the case before him. He expressly recognises that it is not necessary for a specific alternative site to be placed before the inquiry ("*though not always essential"*) before indicating, unremarkably, that the weight to be given to a proposed alternative will be affected by the evidence of its credibility and viability as an alternative vehicle to meet the need for which the proposed development has been brought forward. The Trust does not identify any authority for the proposition that the credibility and viability of delivery of a proposed alternative is not relevant to the evaluation of an alternative site. It is simply as aspect of the Inspector's planning judgment.

147. Accordingly, I accept Mr Mould's submission that it is incorrect to characterise the Inspector's approach as being to place a burden on objectors to produce a detailed scheme for an alternative location for the proposed development. In the light of the authorities, it was legally permissible for him to evaluate the strength of the case for rejecting the planning application before the Minister by considering (amongst other matters) the level of information before him on proposed alternative schemes, including the extent of the evidence in support of a particular alternative site when determining the weight to be afforded to that alternative in the planning balance.

148. In short, the Inspector accepted that the benefits associated with locating the Holocaust Memorial in Victoria Tower Gardens simply could not be achieved elsewhere or within the same timescale. I accept the submissions by Mr Mould, Mr Katkowski and Mr Simons that, properly understood, the challenge on this ground is an attack on the weight which the Inspector afforded to the alternative site at the Imperial War Museum. In this context, Mr Katkowski took the Court to various references to weight by the Inspector in his assessment of alternatives (IR 15.165; 15.122; 15.126, 15.169 and 15.189.) I also note that the Inspector visited the sites proposed as alternatives and his site visit to the Imperial War Museum was informed by a conceptual design in the Environmental Impact Statement and a comparative analysis which assessed the competing claims of alternative sites. I remind myself that where an Inspector's conclusions are based on impressions received at a site visit, anyone seeking to question those conclusions faces a particularly daunting task (R (Newsmith Stainless Ltd) v Secretary of State [2001] EWHC 74 (Admin) at [8]).

149. As advanced by Mr Drabble, Ground 4 therefore fails. However, I have concluded in relation to Ground 3 that, section 8 of the 1900 Act imposes an enduring statutory obligation to maintain Victoria Tower Gardens as a public garden, This is a material consideration in the context of the Inspector's emphasis on the importance of the need to deliver the scheme within the lifetime of the Holocaust survivors. The Inspector considered the question of alternative sites and the implications of their deliverability without assessment of the deliverability of the location in Victoria Tower Gardens in the context of the issues now presented by the Court's construction of the 1900 Act. In the circumstances, as a consequence, to this extent, Ground 4 succeeds.

Remedy

150. On behalf of the Trust, Mr Drabble submitted that the Court should conclude that the erection and use of the proposed Memorial would plainly contravene the terms of section 8 of the 1900 Act including placing the Secretary of State in breach of the continuing statutory obligation under section 8 to maintain the new garden land as a garden open to the public and an integral part of Victoria Tower Gardens. In his submission, the appropriate remedy is for the Court to quash the decision.

151. For the Secretary of State, Mr Katkowski submitted that, in the event that the Court agreed with the Trust on the point of statutory construction this could not justify quashing the decision as to do so would be wholly disproportionate in relation to a point that wasn't even argued by the Trust at the inquiry. At most, the Court should issue a declaration as doing so would leave the ability to remove the obstacle by repealing the relevant remaining provisions of the 1900 Act.

152. Section 288(5) of the Town and Country Planning Act defines the relief available on an application under the section in the event the Court is satisfied of the unlawfulness of a relevant decision. The Court's discretion extends to a quashing order, not a declaration.

153. In considering the exercise of my discretion, I take into account the existence of an Act of Parliament (the 1900 Act) which specifically regulates the land in question and the statutory basis on which the land must be held (a public garden).

154. In assessing the suitability of the Gardens and in placing little weight on alternative sites, the Inspector placed considerable weight on the timing of deliverability of the Scheme. In his submissions on Ground 4 (alternative sites), Mr Katkowski described the timing aspect of deliverability as a 'powerful' aspect of the Inspector's analysis. However, the Inspector did so without any appreciation of the deliverability issue raised by the 1900 Act.

155. I was not addressed on the mechanics of if, how or when the 1900 Act might be repealed. Mr Drabble posited that it may require hybrid legislation. It was not disputed that the issue raises factual questions of some difficulty and detail which may require exploration of the relative speed of delivery of each site.

156. Mr Drabble submitted it is plain that the proposed scheme will breach the requirements of the 1900 Act, which are that the land be retained as a public garden and integral part of Victoria Tower Gardens. He pointed to the requirement in section 8(6) for uniformity of design in the Gardens.

157. Mr Katkowski pointed me to passages of the Inspector's report which he submitted demonstrated a measured, sensible and nuanced assessment of the likely impact and overall position in relation to the Gardens from the proposals, leading to a conclusion that the Gardens would continue to function as a garden for the public. However, the passages in question do not address the impact in the context of the provisions of the 1900 Act (integral garden; public use; uniformity of design). Moreover, the Inspector's assessment includes the following analysis:

> *15.206 "The UKHMLC has been designed to as far as possible integrate with its context. Nonetheless, its purpose would be to both command attention and generate an emotional response to seeing and visiting it. It would attract large numbers of visitors. From the current highest recorded occupancy level of almost 400, this is anticipated to increase to a maximum of 1,269 people at any one time. The peak number of visitors accessing the secure area per day is estimated as 3,000, with a further 7,000 per day estimated as entering the park to view the Memorial only. Whilst these would be peak rather than typical use figures, it is inevitable that the significant increase in visitor numbers to the park would have an impact on its character and functionality, particularly during the Memorial opening hours proposed as between 09:30-17:30.*

15.207 The degree to which the park could be used in a relaxed and informal way would be constrained by the reduction in size and division of the open flat green space, and inevitably to some extent by the increase in visitor numbers. Its quality as a peaceful breathing space would, to a degree, be diminished and it would become a busier and more structured environment. This would include lighting of the Memorial, and the footpaths leading to it, at night."

158. Given this assessment, it cannot be said that the existence of the 1900 Act makes no difference to the outcome of the decision. On the information before the Court, Mr Drabble's contention is a proper one with real prospects of success. Accordingly, the appropriate remedy is to quash the decision, so as to enable further consideration of the implications of the London County Council (Improvements) Act 1900 for the proposed scheme.

Conclusion

159. For the reasons explained above, the claim fails on Ground 1 (heritage impacts) but succeeds on Ground 3 (London County Council (Improvements) Act 1900) and on Ground 4 (alternative sites), to the extent that the Inspector's assessment of alternative sites was conducted without an appreciation of the implications of the London County Council (Improvements) Act 1900. The Minister's decision is quashed.

Postscript: Permission to appeal

160. After the judgment was circulated in draft to the parties, the Court received applications for permission to appeal from the Minister and the Secretary of State. Submissions in response were filed by the Trust. Having considered the submissions carefully, I refuse permission to appeal for the following reasons.

161. I am not persuaded that the submissions made by the Minister in relation to the construction of the 1900 Act raise points with a real prospect of success. Section 8(1) of the Act provides that the land "*shall be laid out and maintained...for use as a garden open to the public"*. Section 8(1) remains in force. It is the use (as a public garden) that has to be maintained, not just its physical characteristics.

162. Mr Mould seeks to draw an analogy between provisions in the 1900 Act, which predates modern planning control, which regulate the performance and future maintenance of the improvement works, with conditions in a modern planning permission which state and define the ambit of the planning control. However, unlike the modern planning Acts, section 8 of the 1900 Act is specific to Victoria Tower Gardens. The historical context revealed by the passage of the Act, which the appeal

submissions do not address, is clear. It supports the construction of section 8(1) as imposing an enduring restriction on the use of the land. Victoria Tower Gardens is an example of land with a statutory restriction (like, for example, much of National Trust land may be declared inalienable, pursuant to Act of Parliament). Any change to its use as a public garden requires parliamentary approval. If recourse may be had to pre-legislative material for meaning, then the reference in the Report of the Improvements Committee (13 March 1900) to the land being kept as a garden for the use of the public forever' puts the matter beyond doubt. Given the detail available in the archival material, one would have expected to see a great deal written on the matter, had the 'forever' point been controversial.

163. As regards the exercise of discretion to allow Ground 3 to be argued: Mr Mould places reliance on the statement in Trustees of Barker Mills Estates v Test Valley Borough Council [2016] EWHC that "*one factor which weighs strongly against allowing a new point...is that if it had been raised in the earlier inquiry...it would have been necessary for further evidence to be produced and/or additional factual findings or judgments by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions"*. Mr Mould submits that this was precisely the case here. However, there is a clear distinction between the present case and the Barker Mills case. In Barker Mills the point in question had not been raised by any party during the examination, a point the Judge placed emphasis on (*"Furthermore, no one suggests that it was raised by any other party"* (70)). Here, the point was raised by a party and in terms which directly invoke the central point about legality ("*Building on VTG…would be illegal under the Act…as the Act requires that the land be maintained as 'a garden open to the public"*" (extract from the relevant submission)). Having been raised, the Act needed to be grappled with, but it was not. This is the context in which Mr Mould's submission that the parties have been denied an opportunity to adduce evidence on the matter falls to be assessed. In the circumstances of this case, any such missed opportunity cannot amount to a countervailing factor against the exercise of the discretion.

164. On the unusual facts of this case, the 1900 Act was a material planning consideration, for the reasons explained in paragraphs 110, 111, 143, 149 and 154 of the judgment. The Act affects the deliverability of the Memorial in Victoria Tower Gardens and the desirability of implementing the Memorial within a reasonable timescale was an integral part of the Inspector's reasoning.

165. In the absence of a real prospect of success on appeal, there are no other compelling reasons for the appeal to be heard. A 'compelling' reason must be a legally compelling reason. Public interest in the project does not suffice. The argument about construction of section 8 is specific to the present application for planning permission. This is not a case where there is a need to elucidate the legal policy behind section 8 or to investigate the implications of the construction in other factual scenarios.

Neutral Citation Number: [2022] EWHC 208 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2022

Before :

THE HON. MR JUSTICE HOLGATE

Case No: CO/2763/2021

Between :

CAB HOUSING LIMITED **Claimant**

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF BROXBOURNE **Defendants**

Case No: CO/3135/2021

Between :

BEIS NOEH LIMITED

Claimant

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF HARINGEY

Defendants

Case No: CO/3921/2021

Between :

MATI ROTENBERG

Claimant

-and-

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF HARINGEY

Defendants

- -
- -

Charles Streeten (instructed through **Direct Public Access**) for the **Claimants**
Thea Osmund-Smith (instructed by **Government Legal Department**) for the **First Defendant**
The Second Defendants in each case did not appear and were not represented.

Hearing date: 18 January 2022

- -

Approved Judgment

Mr. Justice Holgate:

Introduction

1. The Town and Country Planning (General Permitted Development) (England) Order 2015 – SI 2015 No. 596 ("GPDO 2015") grants planning permission for the Classes of permitted development set out in Schedule 2. Where a landowner is entitled to rely upon such rights, he does not need to make an application for a grant of planning permission to the local planning authority ("LPA") under s.62 of the Town and Country Planning Act 1990 ("TCPA 1990"). However, some permitted development rights are dependent upon an application being made to a LPA for the "prior approval" of a specific proposal. Without that approval, the rights granted by GDPO 2015 cannot be exercised. If a proposal is approved, the development rights granted by the order can only be exercised in accordance with the details approved by the LPA.

2. An application for prior approval is not the same as an application for planning permission. The authority is not entitled to have regard to all material considerations, as is the case of an application for planning permission (contrast s.70(2) of TCPA 1990). The GDPO 2015 specifies those planning matters for which approval must be sought and obtained and hence the details which the landowner must submit in his application. Those specified matters delimit the controls which the LPA is able to exercise and the considerations it is entitled to take into account, when determining an application for prior approval.

3. Where an LPA refuses to grant prior approval, or fails to determine an application within the relevant time limit, the applicant may appeal to the Secretary of State, the defendant. These three applications under s.288 of TCPA 1990 challenge the decisions of three Planning Inspectors to dismiss appeals against the refusal of prior approval under Class AA of Part 1 of Schedule 2 to the GPDO. That Class provides for the enlargement of a single dwelling house by the upwards addition of up to two storeys, or one storey above a single-storey building.

4. Paragraph AA.2 of Part 1 of Schedule 2 to the GPDO 2015 sets out the conditions subject to which the permitted development right in Class AA and paragraph AA.1 is granted. The enlarged dwellinghouse must be used as a single dwelling (see the condition in AA.2(2)(d)).

5. Paragraph AA.2(3) sets out the matters for which prior approval must be obtained:-

> "(3) The conditions in this sub-paragraph are as follows –
>
> (a) before beginning the development, the developer must apply to the local planning authority for prior approval as to –
>
> (i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;
>
> (ii) the external appearance of the dwelling house, including the design and architectural features of –
>
> (aa) the principal elevation of the dwelling house, and

(bb) any side elevation of the dwelling house that fronts a highway;

(iii) air traffic and defence asset impacts of the development; and

(iv) whether, as a result of the siting of the dwelling house, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State."

6. These challenges raise important issues regarding the true interpretation of Class AA of Part 1. First, are the claimants correct in saying that a planning authority's control of impact on amenity limited to effects on properties contiguous with, or abutting, the subject property and are those effects limited to overlooking, privacy and loss of light? Alternatively, does that control embrace impact upon all aspects of the amenity of neighbouring premises, as the Secretary of State contends? Second, is the authority's control of the external appearance of the subject dwelling limited to the "design and architectural features" of its principal elevation and any side elevation fronting a highway, and is it further limited to the effects of those matters upon the subject dwelling itself? The claimants contend for that interpretation and they say that the authority is not allowed to consider the effects of external appearance upon any property outside the subject dwelling. Alternatively, is the correct interpretation, as the Secretary of State contends, that the control covers (1) all aspects of the external appearance of the proposed development, and not simply the two elevations specifically referred to in AA.2(3)(a)(ii)) and (2) impact upon other premises, and not simply the subject dwelling itself?

7. In the decisions challenged in these proceedings, the Inspectors took the broader approach in relation to external appearance and, in two cases, to amenity. It is common ground that if the claimants' construction of the GPDO 2015 is correct, then each of the decisions must be quashed as *ultra vires*. The decisions would have been taken outside the ambit of the powers exercisable by the Inspector. But, if the defendant's interpretation is correct, then it is also common ground that each of the three Inspectors reached decisions which fell within their powers, their decisions are not otherwise open to legal challenge and the applications for statutory review must be dismissed.

8. The claimants point out that other Inspectors have taken a different view upon the scope of the controls exercisable in the determination of an application for prior approval under Class AA of Part 1. It has been said that the decision-maker is not allowed to assess the impact of the external appearance of a proposed addition of 1 or 2 storeys on any area outside the subject building, for example, the streetscape. It has also been said that the principle of an upwards extension of up to 2 storeys is "established" by the permitted development right itself, so that the decision on the application for prior approval should not frustrate, or resile from, that principle. Such statements have even been made in relation to other permitted development rights where the GPDO 2015 requires "external appearance" to be controlled, without going on to refer to specific elevations (see e.g. the decision letter dated 6 July 2021 on Kings Gate, 111, The Drive, Hove). If the Secretary of State's interpretation of the GPDO 2015 is correct, then all these decisions were potentially liable to be quashed on an application under s.288 brought within time. Plainly there are differences of interpretation which need to be resolved. There is also the question: to what extent is it correct to say that the principle

of development is established where a permitted development right is subject to prior approval?

9. The issues in this case also affect the proper construction and ambit of permitted development rights granted by GPDO 2015 under Classes ZA, A, AA, AB, AC and AD of Part 20. These provide for up to two storeys of multiple units of residential units to be erected on top of an existing purpose-built block of flats, or on top of detached or terraced buildings in commercial or mixed use or residential use.

10. The claimants' narrower approach to the legal scope of prior approval in these Classes also has implications for non-residential permitted development rights. For example, the right to erect or extend an agricultural building under Class A of Part 6 of Schedule 2 to the GDPO 2015 is potentially subject to control by prior approval in respect of the "external appearance" of the building proposed. If, as some decision-makers have said, that control is limited to assessing the effects of that appearance on the building itself, then it would follow, for example, that the effects of that external appearance on the setting of a listed building nearby could not be controlled. Can this really be right?

11. The remainder of this judgment is set out under the following headings:

    - A summary of the decision letters
    - The statutory framework
    - A summary of the claimants' submissions
    - Principles of statutory interpretation
    - Discussion.

12. I am grateful for the considerable assistance I have received from Counsel in their written and oral submissions.

A Summary of the Decision Letters

31 Gaywood Avenue. London N8

13. The challenge brought by Cab Housing Limited relates to the decision letter dated 15 June 2021 dismissing its appeal against the refusal of prior approval for the addition of a single storey to the existing single storey dwelling.

14. The Inspector concluded that the proposed development would have an adverse impact in terms of both the amenity of adjoining premises and the external appearance of the dwelling (i.e. paragraph AA.2(3)(a)(i) and (ii)).

15. The appeal property is a detached bungalow within a cluster of bungalows towards the end of a cul-de-sac. There are two-storey terraced dwellings to the south and east of the appeal site, semi-detached two-storey dwellings to the west, and rows of bungalows to the south and south-east. The area has a mixed suburban residential character with some variety of building form, size and style (DL8). Viewed from the front and side of the building, the proposed enlarged dwelling would be assimilated into that character. (DL10).

16. But the front and rear elevations are relatively wide at 19.3m (DL9 and DL14). The garden areas of number 31 are concentrated to its front and sides. A plan shows that number 31 is set at right angles to its neighbour, number 29, and there is only a narrow strip separating the rear elevation of number 31 from the side boundary and garden of number 29, along which that rear elevation would run (DL9).

17. The Inspector said that the design and external appearance of the rear elevation was a relevant consideration under paragraph AA.2(3)(a)(ii) (see DL6). He also said that the effect of the proposed additional storey across the width of the new elevation on the *outlook* of the occupiers of number 29, and whether that effect would be "overbearing", were relevant considerations in the assessment of impact on the amenity of adjoining premises under paragraph AA.2(3)(a)(i) (DL7).

18. The Inspector concluded that the proposal would not harm the amenity of adjoining occupiers under AA.2(3)(a)(i) in terms of overlooking, privacy or loss of light (DL11 to DL13).

19. However, he judged that the heightened bulk of the proposal, in combination with the substantial width of its rear elevation (19.3m), would appear "over dominant" when viewed from the adjacent garden of number 29 (DL14). Moreover, the extent of the row of 5 sets of obscure glazed windows across the first floor rear elevation would "stand out discordantly within the residential suburban scene", which "would draw further attention to the bulk of the proposed and enlarged building, and contribute to its visually jarring impact" (DL14). The Inspector drew together these findings in DL15:

> "The above adverse impacts would largely be contained to views of the proposed rear elevation from neighbouring premises, and so would be relatively localised. Nevertheless, given the substantial width of the proposed building mass and its close proximity to No29, the impact would be substantially discordant in terms of both appearance and outlook, viewed from neighbouring premises".

Those conclusions went to paragraph AA.2(3)(a)(i) and (ii) of Part 1 of Schedule 2 to the GPDO 2015 and formed the reasons for the dismissal of the appeal. Perfectly properly, the claimant makes no attempt to challenge in this court the Inspector's conclusion on the planning merits, which were a matter for him.

20 Franklin Street, London N15

20. The challenge brought by Beis Noeh Limited relates to the decision letter dated 8 September 2021, dismissing its appeal against the refusal of prior approval for the addition of a single storey to a two storey end of terrace dwelling, in a terrace of four houses. In this case the appeal failed solely on the Inspector's assessment of the external appearance of the subject dwelling as proposed to be enlarged (paragraph AA.2(3)(a)(ii)).

21. The Inspector noted that Franklin Street also contains single-storey detached dwellings. Three storey purpose-built blocks of flats lie to the side and rear of the appeal site (DL8).

22. The Inspector rejected the claimant's contention that the assessment of the external appearance of the proposal was confined to its effect on the appeal building, stating at DL10:

> "Moreover, whether the external appearance of a dwelling is acceptable is inherently linked to how it would be seen in relation to neighbouring buildings and the wider street-scene or landscape, as it may be. Appearance is not, therefore, a matter to be assessed in a vacuum or in isolation, particularly in this case where the appeal building is located within a terrace of closely related properties. I therefore consider that it is reasonable, in the planning judgment under paragraph AA.2(3)(a)(ii) to take account of the effect of the proposed external appearance of the dwelling on the wider character and appearance of the area."

23. The Inspector judged that the proposed development would, particularly when seen from Franklin Street and one other road, appear as a dominant, bulky and incongruous addition, disrupting the otherwise homogeneous character of the terrace. The sudden increase in height would jar with the rest of the terrace (DL12).

24. He concluded that the proposed development would materially detract from the consistency and balance of the lower level development within the wider terrace, which is positioned around the three storey blocks of flats to the side and rear. Because these blocks were purpose-built and of a considerably different appearance, their presence could not be relied upon to justify granting prior approval (DL13). Once again, those planning judgments were for the Inspector, not the Court.

2 Lemsford Close, London N15

25. The challenge brought by Ms Rotenberg relates to the decision letter dated 10 November 2021 dismissing an appeal against the refusal of prior approval for the addition of a flat-roofed single storey to the existing two-storey, flat-roofed dwelling.

26. The Inspector decided that the proposal would be acceptable in terms of its impact on the amenity of adjoining premises, which included the maintenance of a relatively open outlook from within adjoining gardens (paragraph AA.2(3)(a)(i) of Part 1 of Schedule to the GPDO 2015 and DL9-11).

27. As regards paragraph AA.2(3)(a)(ii), the Inspector decided that, disregarding any effect on adjoining properties, the proposed second floor extension closely reflected the architectural style of the existing property and accorded "with the design of the host property" (DL3).

28. The appeal property is one of eight terraced houses. The Inspector found that they all share the same two storey design; the streetscene in this part of Lemsford Close displays a high degree of architectural consistency; and nearby taller buildings are of a different design and visually distinct from the terrace in which the appeal building is situated. (DL4).

29. The Inspector concluded that the additional storey on the appeal building would clearly protrude above the adjoining flat roofs, giving the terrace an uneven profile. The appeal

property would appear inconsistent with its neighbours. This disruptive effect would be particularly noticeable because of the open aspect of the streetscene directly facing parkland. The side elevations would be clearly visible above the adjoining flat roofs (DL5). The proposed extension would be out of keeping with the external appearance of the appeal property in the context of the adjoining terrace (DL6 and DL12).

The statutory framework

30. The statutory framework has been set out in some detail by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing and Local Government* [2021] PTSR 553 at [19] to [43] and [46] to [61]. There is no need for that analysis to be repeated in this judgment. Neither party raised any issue concerning those passages. But they need to be read together with the further elucidation provided by the Court of Appeal in the same case ([2021] EWCA Civ 1954 (see below).

31. The grant of the permitted development right in Class AA of Part 1 comes about through article 3(1) of the GPDO 2015 and the description of that right in Class AA read together with the exclusions in paragraph AA.1 (*Keenan v Woking Borough Council* [2018] PTSR 697 at [33] et seq. and *R (Rights: Community: Action)* [2021] EWCA Civ 1954 at [27]). Prior approval is not a free-standing development consent. It is one element of the consent for the development. The grant of planning permission by the GPDO 2015 and the grant of prior approval together comprise that development consent. The prior approval procedure is embedded in the consent granted by the Order; it forms an inextricable part, or a "necessary component" of the permitted development right. A developer's ability to implement that permission remains latent until prior approval is granted for a specific proposal on a specific site [64] and ([68]). Accordingly, in a prior approval case, planning permission accrues or crystallises upon the grant of that approval, not before [28]).

32. Class AA of Part 1 to Schedule 2 to the GPDO 2015 is set out in the Annex to this judgment.

33. The permitted development defined by Class AA is for the enlargement of a dwelling-house by constructing up to two additional storeys where the existing property consists of two or more storeys, or one additional storey where the existing property has only one storey, immediately above the current uppermost storey. The right also includes any engineering operations reasonably necessary for that construction.

34. But paragraph AA.1 excludes certain forms of development from the right, notably:

    (i) Land falling within Article 2(3) and Schedule 1 to the GPDO 2015 (e.g. National Parks, areas of outstanding natural beauty, conservation areas, etc.) and any site of special scientific interest;

    (ii) A dwelling-house built before 1 July 1998 or after 28 October 2018;

    (iii) A dwelling-house which has already been enlarged upwards by one or more storeys since it was originally built (Article 2(1));

    (iv) Development where the height of the highest part of the roof would exceed 18m above ground level (Article 2(2)), or would exceed the highest part of the roof

of the existing dwelling by more than 3.5m for a single storey dwelling or 7m for a dwelling with two or more storeys;

(v) Development where the highest part of the roof would, in the case of a semi-detached house, exceed by more than 3.5m the highest part of the roof of the building having a shared party wall or an adjoining main wall or, in the case of a terraced house, the highest part of the roof of every other building in the terrace;

(vi) Any storey constructed other than on the "principal part" of the dwelling (see para.AA.4(i));

Paragraph AA.1 also excludes an upwards extension where "visible support structures" would be provided on the exterior of the dwelling when the works are completed.

35. The right in Class AA is subject to the conditions in paragraph AA.2. So, for example, the external materials must be similar in appearance to those used in the exterior of the existing dwelling, side elevations must not include any window, and the roof pitch of the principal part of the dwelling as enlarged must be the same as that of the existing dwelling (paragraph AA.2(2)). Paragraph AA.2(3)(a) sets out the matters for which prior approval must be obtained (see [5] above).

36. Paragraph AA.3 deals with applications for prior approval. Sub-paragraph (11) prohibits the carrying out of any development before prior approval is obtained. Sub-paragraph (12) requires the development authorised by Class AA to be carried out in accordance with "the details approved" by the LPA, referring back to the application described in paragraph AA.3(1) and (2).

37. Under paragraph AA.3(2) the application must describe the details of the proposed works and provide plans showing "the proposed development", and "the existing and proposed elevations of the dwelling-house" and the position and size of windows.

38. The LPA may refuse an application if they consider that the proposal does not comply with paragraph AA.1 and AA.2, or if they consider that the developer has provided insufficient information to enable them to determine that question (paragraph AA.3(3)). If the authority does not refuse the application on that basis, then it must notify "each adjoining owner or occupier" about the proposed development (para. AA.3(5)) and must take any representations they make into account (para. AA.3(12)). Where the application relates to prior approval of impact on air traffic or defence assets or impact on "protected views" (see AA.2(3)(a)(iii) and (iv)), the LPA must consult with certain specified consultees, such as the Secretary of State for Defence and Historic England (para AA.3(6) to (10)).

39. By paragraph AA.3(11), the LPA may require the developer to submit information to enable it to determine the application, including assessments of impacts and risks and statements as to how they are to be mitigated, having regard to the National Planning Policy Framework ("NPPF").

40. When determining the application, the LPA is obliged to have regard to the NPPF so far as relevant "to the subject matter of the prior approval" (para.AA.3(12)(b)).

41. The issues in this case regarding the true construction of the prior approval controls on external appearance and impact on amenity need to be seen in the context of similar permitted development rights in Part 20 of Schedule 2 to GPDO 2015. In summary, those rights are:

> Class ZA
>
> Permission is granted for the demolition of a purpose-built block of flats or a detached building within the B1 Use Class (use for offices, light industry or research and development) and its replacement by a single purpose-built block of flats or a detached dwelling-house.
>
> Class A
>
> Permission is granted for the construction of up to two additional storeys of new dwellings immediately above the highest storey of a detached, purpose-built block of flats.
>
> Class AA
>
> Permission is granted for the construction of up to two additional storeys of new dwellings immediately above the highest storey of a detached building in commercial or mixed use (i.e. Use Classes A1, A2 or A3 or offices, or a mixture of those uses with or without dwellings).
>
> Class AB
>
> Permission is granted for the construction of new dwellings as a single additional storey above an existing single-storey building, or up to two additional storeys above a building with two or more storeys, where that existing building is terraced and in commercial or mixed use (as defined in Class AA of Part 20).
>
> Class AC
>
> Permission is granted for the same new development as in Class AB, but above a terraced building in use as a single dwelling.
>
> Class AD
>
> Permission is granted for the same new development as in Class AB, but above a single detached dwelling.

42. These seven Classes of permitted development rights were introduced within a short period of time. First, Class A of Part 20 was introduced by SI 2020 No. 632 which was made on 23 June 2020 and came into force on 1 August 2020. Second, Class AA of Part 1 and Classes AA, AB, AC and AD of Part 20 were introduced by SI 2020 No. 755, which was made on 20 July 2020 and came into force at 9am on 31 August 2020. Third, Class ZA was introduced by SI 2020 No. 756, which was made on 20 July 2020 and come into force at 10am on 31 August 2020.

43. The structure of these permitted development rights is similar to Class AA of Part 1 of Schedule 2 to the GPDO 2015. They each describe the permitted development right as a Class which is subject to exclusions. The following paragraph sets out conditions subject to which the permission is granted. Those conditions include a requirement to apply for and obtain prior approval for specified matters before development may lawfully be commenced and a further requirement that the development be carried out in accordance with those details approved by the LPA (para. B(16) and (17)). The procedural provisions governing prior approval in paragraph B of Part 20 serve very similar functions to paragraph AA.3 of Part 1.

44. The prior approval controls for the six Classes summarised in [41] include additional matters appropriate for the more substantial forms of development involved. For example, prior approval is required in relation to transport and highways impacts, flooding risks, and the provision of adequate natural light in all habitable room of the new dwellings to be created. But the four matters needing prior approval in the case of Class AA of Part 1 (see paragraph AA.2(3)(a)) also have to be approved under each of those six Classes.

45. The control of impact on amenity is essentially the same as that applied in Class AA of Part 1. As I explain below, the use of the phrase "neighbouring premises" in those six Classes does not have a different meaning to "adjoining premises" in Class AA of Part 1.

46. There are, however, two different drafting styles when it comes to the control of external appearance. Like Class AA of Part 1, the control in Classes AA, AB, AC and AD of Part 20 relates to the external appearance of the building "including (i) the design and architectural features of – (aa) the principal elevation; and (bb) any side elevation that fronts a highway". The fact that these controls refer to the external appearance of a "building" rather than a "dwelling-house" (as in Class AA of Part 1) is of no significance for the issues in this case. These terms simply refer to the structure which is being enlarged by the addition of one or two storeys.

47. But in the case of two Classes of permitted development, Classes ZA and A of Part 20, the control simply refers to the "external appearance" of the new building or the building, without any further text which includes the design and architectural features of the principal elevation and any side elevation fronting a highway. The question is whether the ambit of these two formulations, read properly in context, should be construed differently, one covering external appearance in general and the other limited to those matters which are expressly stated to be "included".

48. There is one difference between the drafting of the external appearance controls for Class AA of Part 1 compared to Classes AA to AD of Part 20. The latter (along with Class A of Part 20) allow the creation of multiple additional dwelling houses and so the permitted development rights include works for the construction of (a) access to those units, including fire escapes via external staircases and (b) storage, waste or other ancillary facilities to support the new dwelling-houses. In Classes AA to AD of Part 20 the requirement to obtain prior approval of external appearance includes the "impacts" of those works. Plainly in some cases such works may not be located on a principal elevation, or on a side elevation fronting a highway or public streetscene.

A summary of the submissions

49. Mr. Streeten for the claimants refers to Government announcements and a public consultation exercise in order to identify the objectives of these additional permitted development rights introduced in 2020.

50. In October 2018 the Ministry published a consultation paper "Planning Reform: Supporting the high street and increasing the delivery of new homes". Paragraph 1.1 referred to the use of permitted development rights to contribute to the supply of new homes. Paragraph 1.2 relied on such rights as providing "a more streamlined planning process with greater planning certainty while at the same time allowing for local consideration of key planning matters". Paragraph 1.5 stated that views were sought on a new permitted development right for making use of airspace above existing buildings to create new homes "which fit within the existing streetscape".

51. The proposals were described in further detail in paragraph 1.13 to 1.29 of the document. This section made it clear that the aim was not only to increase the size of the housing stock, but also to increase the supply of larger homes, the latter being relevant to Class AA of Part 1.

52. Both Counsel relied upon paragraph 1.26 of the consultation document which states:

> "Prior approval would consider the design, siting and appearance of the upward extension and its impact on the amenity and character of the area, taking account of the form of neighbouring properties. This may include considering whether the proposed development is of good design, adds to the overall quality of the area over its lifetime, is visually attractive as a result of good architecture, responds to the local character and history of the area and maintains a strong sense of place, as set out in paragraph 127 of the National Planning Policy Framework. We expect prior approval on design to be granted where the design is in keeping with the existing design of the building"

53. Mr. Streeten emphasised the last sentence in support of his contention that the effect of the external appearance of a proposal should be confined under paragraph AA.2(3)(a)(ii) to the building itself. However, Ms. Osmund-Smith for the defendant said that the paragraph, read as a whole, is concerned with broader considerations. Prior approval could involve considering whether a proposed development is of good design, adds to the overall quality of the area, is visually attractive, responds to the local character of the area and maintains a strong sense of place, relying upon paragraph 127 of the version of the NPPF then current.

54. The corresponding policy in paragraph 130 of the current NPPF states:

> "Planning policies and decisions should ensure that development:
>
> (a) will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development;

(b) are visually attractive as a result of good architecture, layout and appropriate and effective landscaping;

(c) are sympathetic to local character and history, including the surrounding built environment and landscape setting, while not preventing or discouraging appropriate innovation or change (such as increased densities);

(d) establish or maintain a strong sense of place, using the arrangement of streets, spaces, building types and materials to create attractive, welcoming and distinctive places to live, work and visit;

(e) optimise the potential of the site to accommodate and sustain an appropriate amount and mix of development (including green and other public space) and support local facilities and transport networks; and

(f) create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users; and where crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion and resilience ”

55. Ms. Osmund-Smith also drew attention to paragraph 120(e) of the NPPF:

> “Planning policies and decisions should:
>
> …….
>
> (e) support opportunities to use the airspace above existing residential and commercial premises for new homes. In particular, they should allow upward extensions where the development would be consistent with the prevailing height and form of neighbouring properties and the overall street scene, is well-designed (including complying with any local design policies and standards), and can maintain safe access and egress for occupiers”.

56. The Government’s response on the consultation exercise was published in May 2019. Paragraph 35 stated (inter alia):

> “…… As set out in the Planning Update Written Statement we intend to take forward a permitted development right to extend upwards certain existing buildings in commercial and residential use to deliver additional homes. We want a right to respect the design of the existing streetscape, while ensuring the amenity of existing neighbours is considered. The review of permitted development rights for change of use of buildings to residential use in respect of the quality standard of homes delivered announced in the Written Statement will inform this work. We

> recognise the complexity of designing a permitted development right to build upwards and will continue to engage with interest parties on the technical details"

Ms. Osmund-Smith emphasises the references in that passage to respect for the design of the existing streetscape and the "amenity of existing neighbours".

57. Of course, the intention of the legislature in creating Class AA of Part 1 is to be ascertained from the language used in the legislation itself, read properly in context and as a whole. Mr. Streeten submits that the height, width and mass of an extension under Class AA of Part 1 are prescribed by the Order and "cannot in and of themselves result in the refusal of prior approval", when considering either external appearance or impact on amenity. He submits that there can be no rowing back on that matter of principle which, he suggests, is analogous to the consideration of reserved matters relating to an outline planning permission (citing on the latter point *Paul Newman New Homes Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1054 at [17]).

58. In this respect, Mr. Streeten submits that Class AA of Part 1 establishes as a matter of principle "scale", which is to be distinguished from "appearance". He says that in Class AA these two concepts are treated as mutually exclusive. But he seeks to advance this argument, not by an analysis of the language used in the GPDO 2015, but by relying upon the definitions of "scale" and "appearance" forming part of the code in the Town and Country Planning (Development Management Procedure) (England) Order 2015 – SI 2015 No 595 ("DMPO 2015") for outline planning permissions and reserved matters. In that context he also prays in aid the decision of Simon J (as he then was) in *MMF (UK) Limited v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin) at [11]:

> "Scale and Appearance (as defined) are concerned with two different aspects of a building. As Mr. Cannock submitted, at the most simple analysis, if one considers a building as a simple three-dimensional shape, a box, the size of the box and importantly its relationship with other buildings, is a question of Scale. How the box is designed within that overall shape is its Appearance. That too may involve a consideration of its relationship with other buildings, but if so, it is applying a different criterion to one of Scale".

In *Crystal Property (London) Limited v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1265 the Court of Appeal approved the part of that passage which deals with the meaning of "scale" as a reserved matter.

59. Mr. Streeten relies upon certain canons of construction, to which it is convenient to refer by their Latin labels. First, he relies primarily upon the principle that to express one thing is exclude another – *expressio unius est exclusio alterius* (see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition) at Section 23.12). He submits that because the draftsman has expressly referred to certain specific matters, namely overlooking, privacy and loss of light in the case of impact on amenity and the specified elevations in the case of external appearance, any other aspects which would otherwise fall within amenity or external appearance are excluded. He cites *Dilworth v The*

Commissioner of Stamps [1894] AC 94 at 105-6 for the proposition that a definition may "include" certain terms in order to confine that definition to those terms rather than to enlarge it.

60. Mr. Streeten submits that the express references to specified matters in paragraph AA.2(3)(a)(i) and (ii) do not serve to extend the natural meaning of "external appearance" and "impact on amenity". Their natural meaning is sufficiently broad to cover those matters without needing to "include" them within those terms. He then says that it follows that if those matters are not treated as exhaustive of the meanings of "external appearance" and "impact on amenity", the express references to them are superfluous.

61. Mr. Streeten seeks to reinforce his submission by referring to Classes ZA and A of Part 20 which impose controls in relation to amenity and external appearance without any additional wording. He suggests that the difference in drafting is deliberate, so that the ambit of "external appearance" and "impact on amenity" in Class AA of Part 1 is limited to the specific matters said to be "included" in those controls. But Mr. Streeten accepts that the construction for which he extends would also have to be appropriate for Classes AA to AD of Part 20.

62. Mr. Streeten also relies on the *ejusdem generis* principle ("of the same kind"). He submits that "amenity" in paragraph AA.2(3)(a)(i) is limited to a genus solely concerned with the living conditions of private individuals and that paragraph AA.2(3)(a)(ii) is limited to a genus solely concerned with the appearance of public, as opposed to private, facing elevations.

Principles of statutory interpretation

63. In *R (Mawbey) v Lewisham London Borough Council* [2020] PTSR 164 Lindblom LJ held at [20] that common words used in a permitted development right are to be given their common meaning, unless there is something in the legislative context to displace that meaning; the ordinary meaning of the language used is to be ascertained in a broad, common sense manner. The language which has to be construed in the present case uses common words.

64. Mr. Streeten rightly accepted that the ordinary meaning of the phrase "A includes B" is that B forms part of, rather than exhaustively defines, A. He is relying upon canons of construction in order to arrive at a different understanding; one which amounts to saying that "including" has been used in paragraph AA.2(3)(a) of Part 1 in the sense of "meaning". So, for example, as Ms Osmund-Smith pointed out, sub-paragraph (i) would be read as if it had said "impact on the amenity of any adjoining premises through overlooking, privacy and the loss of light".

65. *Bennion* points out at Section 20.1 that canons of construction are not to be rigidly applied but provide useful tools for analysing the language used. In *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022 Lord Neuberger PSC said that canons of construction have a valuable part to play, but "as guidelines rather than railway lines". Although those canons embody logic or common sense, they exist to illuminate and help, but not to constrain or inhibit ([57] to [60]).

66. Legislation is to be read as a whole, so that a provision within an enactment is not to be read as if it stood alone, but in its context as part of that instrument (*Bennion* Section 21.1).

67. There are presumptions that every word in an enactment is to be given meaning; that where the same word is used more than once it has the same meaning, and that different words have different meanings unless the context indicates otherwise (*Bennion* at Sections 21.2 to 21.3). But it has also been said that redundancy seldom carries great weight in statutory interpretation. It is not unusual for Parliament to say expressly what the courts would have inferred anyway (Lord Hoffmann in *Walter v Centaur Clothes Group Limited* [2000] 1WLR 744, 805D). Sometimes language which is strictly unnecessary is included out of an abundance of caution, or for the avoidance of doubt (*Re section 14(5)(d) of the Land Compensation Act 1961* [2018] 2 P & CR 6 at [79] and *Bennion* at p.643).

68. The Explanatory Memorandum to a statutory instrument may be used to explain its context, or the mischief at which it is aimed, or to assist in resolving an ambiguity in the legislation (*Bennion* at Section 24.24 and *Coventry and Solihull Waste Disposal Company Limited v Russell (Valuation Officer)* [1999] 1 WLR 2093, 2103).

69. Mr. Streeten cited *R (Smolas) v Herefordshire Council* [2021] PTSR 1896 at [33] for the proposition that the prior approval procedure is intended to be a "light touch" process. In fact that passage only summarised submissions made by the claimant in that case. The judge did not endorse that notion as an interpretative tool (see [82]). No doubt the *procedural* steps in applying for prior approval are to involve the "minimum of formalities" and are intended to be simple to operate (*Murrell v Secretary of State for Communities and Local Government* [2011] 1 P & CR 6 at [29]). But there the Court was not dealing with the interpretation of the subjects which a LPA may consider and control when making substantive decisions on whether to grant or refuse prior approval. That must depend upon the language used, read in context and as part of the legislation as a whole.

70. The Court may consider a consultation paper as part of the contextual setting for legislation, or to help identify the mischief at which it is aimed. But plainly a consultation paper which seeks views on a subject without at the same time putting forward a draft of the legislation to be enacted will carry little weight and, indeed is likely to be irrelevant to the meaning of the words used in the statute or statutory instrument subsequently drafted and enacted (see e.g. *Bennion* Section 24.9 at pp.731-2).

Discussion

To what extent does Class AA of Part 1 establish a principle of development?

71. In *Murrell* the Court of Appeal accepted that the grant of permitted development rights in the GPDO 2015 involves a decision on an issue of principle which is not for consideration in the prior approval procedure, "if the GPDO requirements [i.e. the prior approval requirements] are met" (see [45]). Likewise, in [46] the Court stated that a permitted development right which is subject to prior approval does not crystallise until that procedure is completed. Rights of this kind do not accrue in relation to any land unless and until a particular proposal complies with the prior approval procedure and,

at that point, the right may only be exercised in accordance with that proposal as approved (or, in some cases, deemed to be approved). As Lindblom LJ stated in the *Rights: Community: Action* case, the prior approval procedure is embedded in the permitted development right and the approval is an essential component of the consent granted ([64] and [68]).

72. It is therefore unhelpful simply to state the bald proposition that the permitted development right *establishes* the principle of that development without more. The right, and the principle it recognises, is contingent upon the grant of prior approval for a specific proposal. *Murrell* illustrates this point and how it is necessary to be careful, both in defining the principle and how it intersects with the prior approval procedure.

73. That case was concerned with the erection of an agricultural building in the open countryside under Class A of Part 6 of the Order. The Inspector had refused to grant prior approval, relying upon (inter alia) settlement and general countryside policies (see [19] – [20]). The Court of Appeal accepted that it would have been permissible for the Inspector to rely upon those policies in order to reject the proposal on the grounds of impact on visual amenity. But it was impermissible for her to rely on those policies in order to reject it as conflicting with their objectives (see [47] – [49]). That reasoning did not involve a site-specific assessment of a proposal falling within the parameters of the permitted development right. Instead, it involved a policy objection to the principle of such development taking place in the countryside in general.

74. If the Inspector in that case had confined herself to rejecting the proposal because of its harmful visual impact on that particular rural location, that would have fallen within the control of "external appearance" under the prior approval provisions and would not have involved any improper challenge to what is authorised by Class A of Part 6. The reasoning in *Murrell* shows that it is not helpful to make the generalised statement that a permitted development right of that kind *establishes* a principle of development. That ignores the prior approval controls to which the right is subject. There is no justification for putting any such gloss on the text of the GPDO 2015, instead of just applying the language actually used in the Order.

75. The same approach applies to the interpretation and application of Class AA of Part 1. Class AA defines the *maximum* number of storeys which may be erected above a dwelling, and paragraph AA.1 sets out a number of parameters for defining the *maximum* height to which a proposal may be built, subject in each case to obtaining prior approval for a particular proposal. Paragraph AA.1(i) also confines the footprint of an extension to the principal part (as defined in paragraph AA.4) of the existing dwelling. By implication the right may be exercisable laterally *up to* the extent of that footprint. The form of the new roof is further constrained by the condition in paragraph AA.2(c), which requires its pitch to be the same as that of the roof of the existing dwelling.

Can scale be controlled by the prior approval code for Class AA of Part 1?

76. In paragraph 51(1) of his Skeleton Mr. Streeten accepted that the height, bulk and mass of the extension could form a reason for refusal of prior approval under, for example, paragraph AA.2(3)(a)(i), if they would "result in unacceptable overlooking, loss of privacy or loss of light". In other words, the prior approval process may be used to restrict the height or the bulk of a proposed extension within the ambit of the relevant

control in paragraph AA.2(3)(a). A LPA might, for example, require a new storey to be set back so as to avoid an objectionable loss of light to a neighbouring property. This straightforward line of reasoning does not involve any impermissible questioning of the development right granted by Class AA of Part 1 or the "principle" of that right.

77. The same analysis also applies to the other limbs of paragraph AA.2(3). Mr. Streeten accepted that this is so in relation to sub-paragraphs (iii) and (iv). Plainly, impacts upon air traffic and defence assets and upon protected vistas may be affected unacceptably by both the height and bulk or scale of a proposed extension. Mr. Streeten also accepts that the height and bulk of a proposal may also be controlled under sub-paragraph (ii) (external appearance) but, he says, only in relation to its impact on the subject building itself. I return to that issue below.

78. Given that height and bulk may be controlled within the ambit of paragraph AA.2(3)(a), and that that may be done without any unlawful conflict with the grant of the permitted development right, Mr. Streeten's reliance upon the decisions in *MMF* and *Crystal Property* falls away. In *MMF* outline planning permission had been granted approving the "scale" of the proposal, but leaving "appearance" to be dealt with as a reserved matter. Because of the way in which that express grant of planning permission had separated "scale" from "appearance", it was necessary for the Court to explain how those two aspects should be distinguished. It was relevant to do so in the context of the predecessor of the DMPO 2015 then in force and its definitions of those two terms. "Scale" was defined so as to refer to the height, width and length of a building in relation to its surroundings. "Appearance" concerned the visual impression made by a building, including its external built form. Because Simon J was forced to draw a line between the two, he concluded that "appearance" excluded height in so far as it was concerned with a building's relationship with its surroundings (see [8]). He did not decide as a general principle that the "appearance" of a building only concerns the effects of that appearance on the building itself and not on its surroundings. Indeed, the judge explicitly came to the opposite conclusion in [11] (see [58] above). The context for the decision in *Crystal Property* was very similar.

79. Neither *MMF* nor *Crystal* were concerned with a prior approval scheme for a permitted development right such as Class AA of Part 1. They do not assist in the interpretation of paragraph AA.2(3)(a)(ii). As explained above, it is clear that Class AA does not grant a permission for any particular "scale" of development and scale can be controlled under the prior approval provisions. The dichotomy between "scale" and "appearance" in the outline planning permission granted in *MMF*, whereby scale was already approved by that permission and could *not* be controlled as a reserved matter, does not exist in Class AA of Part 1, nor indeed in any of the related Classes of permitted development.

80. The grant of the permitted development right in Class AA and paragraph AA.1 sets the outer limits, or parameters, of what may lawfully be put forward in an application for approval of a development on a specific site, applying paragraphs AA.2 and AA.3. Accordingly, not all development approved under Class AA may reach one or more of those maximum limits, because a developer may choose to seek approval for a lesser scheme, or the decision-maker may decide that the scale of the proposal (or some aspect of that scale) is too great, acting within the ambit of the prior approval controls in paragraph AA.2(3)(a).

"Adjoining premises"

81. Counsel helpfully made submissions on the meaning of the phrase "adjoining premises" in paragraph AA.2(3)(a)(i), although none of the challenges to the decision letters turn on this specific point. But its meaning does nevertheless form part of the context for the issues which do need to be determined.

82. I cannot accept the narrower construction advanced by Mr. Streeten that the amenity control only concerns those properties which abut, or are contiguous with, the subject property. The normal meaning of the word "adjoining" includes "adjacent" or "neighbouring". I do not regard the express use of the word "neighbouring" in the comparable controls in Class ZA, A and AA to AD of Part 20 as indicating that a different meaning should be given to "adjoining" in Class AA of Part 1 (see below). Of more significance is the fact that where in the GPDO 2015 the draftsman meant to say "immediately adjoining", he has used that express language (see e.g. Paragraph D3 of Part 9, paragraph N2 of Part 17).

83. Paragraph 7.12 of the Explanatory Memorandum to SI 2020 No.755 states:

> "The right is subject to obtaining prior approval from the local planning authority, which will consider certain matters relating to the proposed construction of additional storeys. These are consideration of the impact on the amenity of neighbouring premises, including overlooking, privacy and overshadowing; the design, including the architectural features of the principal elevation of the house, and of any side elevation which fronts a highway; and the impacts a taller building may have on air traffic and defence assets and on protected vistas in London"

Thus, it is plainly stated that one of the matters to which the permitted development right is subject is prior approval in respect of a proposal's impact on "the amenity of neighbouring premises".

84. The claimants' submission also has implications for the operation of the prior approval procedure. Paragraph AA.3 requires the LPA to notify each "adjoining owner or occupier" of the proposal and to take into account their representations when determining the application. That expression is defined by article 2(1) to mean "any owner or occupier of any premises or land adjoining the site". The same obligation is imposed on LPAs in relation to the prior approval procedure under Classes ZA, A and AA to AD of Part 20 (see paragraph B(12)). It would make no sense for the legislation to require the authority to assess the impact of a proposal on the amenity of "neighbouring" premises, but to consult only a narrower class of neighbours, namely those living in dwellings contiguous with the subject property. It is plain that in the statutory instrument the draftsman uses the words "neighbouring" and "adjoining" interchangeably and with the same meaning. It would also make no sense in Class AA of Part 1 to confine the obligation to consult, or the control of impact on amenity, to occupiers of dwellings contiguous with the subject premises. Issues concerning, for example, overlooking and privacy may well affect other neighbouring properties as well.

85. Lastly on this topic, Mr. Streeten referred to s.60(2B) and (2C), which authorises a development order to include a provision that where the owner or occupier of adjoining premises objects to a development on land which is a dwelling house or within its curtilage, the LPA must be satisfied that it will not have an unacceptable impact on the amenity of "adjoining premises" (defined so as to refer to the dwelling concerned or the boundary of its curtilage). The control which applies to development falling with paragraph A.4 of Part 1 in Schedule 2 to the GPDO 2015 is authorised by this provision. The prior approval controls for Class AA of Part 1 and related Classes are not authorised by s.60(2B) and (2C). In any event, where those provisions are engaged, I do not accept that the reference to "boundary" should be taken to imply that "adjoining" requires contiguity. Adjoining premises could be neighbouring premises in relation to that curtilage.

Is control of external appearance or impact on amenity limited to the matters included?

86. I do not consider that the word "including" in either sub-paragraph (i) or (ii) of paragraph AA.2(3)(a) is to be read as limiting the matters which can be taken into account under "amenity" or "external appearance" to those which are expressly specified as being included. The word "including", read in the context of this legislation, does not have an exhaustive effect. Indeed, as Ms Osmund-Smith said, if the intention had been to limit prior approval controls to the matters specified, the obvious course would have been to say so directly. There would have been no need to refer to "amenity" or "external appearance", or to introduce the specified matters by the word "including".

87. *Dilworth* was a case dealing with the construction of an interpretation section (see also *Bennion* at Sections 18.2 and 18.3). Here we are dealing with the construction of a power to control details of a proposed development. The *obiter* passage in *Dilworth* at p.106 relied upon by Mr. Streeten puts forward two possible explanations for the use of the word "including" in an interpretation section. First, it may enlarge the natural meaning of the word being defined. Second, where that is not the *sole* purpose, the word "including" *may* be equivalent to *"mean and include,* so as to introduce an exhaustive explanation of the word being defined. So it is plainly implicit in that passage in *Dilworth* that there may be other explanations for the use of the word "including".

88. *Bennion* at Section 17.4 refers to the drafting technique of including examples in a statutory provision such as a power. In my judgment, there is no reason to think that the specific terms in paragraph AA.2(3)(a)(i) and (ii) were intended to delimit the scope of that part of the power, rendering the broader language "amenity of any adjoining premises" and "external appearance of the dwelling house" effectively otiose. Instead, they are examples of the matters which are to be controlled by the decision-maker. The rejection of the claimants' submission that the matters "included" are exhaustive as to the scope of the LPA's power does not render the language describing those matters superfluous. That language makes it plain that the matters "included" are to be taken into account by the LPA. *Bennion* provides illustrations of this drafting technique (see, for example, *Inland Revenue Commissioners v Parker* [1966] AC 141, 160 E – 161 F).

89. I am reinforced in this approach to the use of the word "including" by comparing Class A of Part 20 with Class AA of Part 1 and Classes AA to AD of Part 20. The latter group all refer to the same matters as being "included" in external appearance. The former simply refers to "external appearance"[1]. If the claimants' construction in relation to Class AA of Part 1 is correct than it must also apply to Classes AA to AD of Part 20. But Classes AA to AD of Part 20, like Class A of the same Part, are all dealing with the creation of multiple new dwellinghouses on top of existing buildings. Certainly, in the case of Classes A, AA and AB these buildings may be substantial. It would make no sense for the Order to allow LPAs to control all aspects of external appearance where an upwards extension is to be constructed on a block of flats, but to confine that consideration to the principal elevation and any side elevation fronting a highway where the existing building is a detached (or terraced) commercial or mixed use building.

90. Mr. Streeten sought to address this difficulty in his argument by suggesting that the control of external appearance is different for upwards extensions to a purpose-built block of flats because that development would be more likely to be viewed from all sides. That suggestion is untenable. Commercial (or mixed use) buildings are no different in principle. They may or may not be freestanding. Both types of building may be visible on all sides. Indeed, both Class A and Class AA of Part 20 can only apply to detached buildings. There is no sensible reason why the external appearance of a commercial building should only be assessed in relation to its principal elevation and any side elevation fronting a highway, and a broader approach taken to a purpose-built block of flats, given that they both deal for this purpose with additional development of essentially the same nature.

91. It should also be recalled that an application for prior approval under Class AA of Part 1 (or indeed under Classes AA to AD of Part 20) is required to include drawings showing all elevations of the building as proposed to be extended. An approval, if granted, must relate to those drawings and the development must be carried out in accordance with them. It would be inconsistent with the nature of that approval that an LPA should grant it without considering all the submitted elevations and applying the controls in paragraph AA.2(3)(a) to the proposal as a whole.

92. A proposal for an upwards extension of a building, whether under Class AA of Part 1 or Classes ZA, A and AA to AD of Part 20, is capable of having a significant impact on the amenity of neighbouring premises, which is not confined to overlooking, privacy or loss of light. Such impacts may include, for example, impact on outlook, noise and activity. There is no reason to think that the language used in the GPDO 2015 was meant to exclude such considerations from control by prior approval.

93. Accordingly, I reject the claimants' primary submission based upon *Dilworth* and the *expressio unius est exclusio alterius* canon of construction.

Is the control of external appearance or impact on amenity restricted to a genus?

94. The claimants' case is not assisted by the *ejusdem generis* principle. First, where it applies, the specific language of the legislation is not treated as being exhaustive. Instead, it operates so that the broader language used, here "impact on amenity" and

[1] Class ZA is different in that it deals with the erection of an entirely new building following the demolition of an existing building.

"external appearance", is read down by reference to the "genus" identified from the specific language used (see *Bennion* at Section 23.2). So, for example, impact on amenity would not be limited to overlooking, privacy and loss of light, as in the claimants' primary submission, but, according to Mr. Streeten, would deal with the living conditions of private individuals. That interpretation would allow impact on outlook for such individuals to be considered under paragraph AA.2(3)(a)(i), as in the appeal decision on 31 Gaywood Avenue.

95. Second, and in any event, the *ejusdem generis* principle generally only applies where specific terms are followed by wider terms and not where, as in this case, general language is followed by specific language (*Bennion* at Section 23.5 and 23.7).

96. Third, for the *ejusdem generis* principle to apply there must be a sufficient indication in the legislation of a category properly described as a *genus.* The classes upon which Mr. Streeten based his argument are not justified. In the control of "external appearance" paragraph AA.2(3)(a)(ii) does not insist that the principal elevation should be one facing a highway, although it may often do so. There is no basis for restricting the general expression "external appearance" to public facing elevations. The same applies to the prior approval controls of the external appearance of development within Classes AA to AD of Part 20 (see [48] above). There is also no basis for restricting "impact on amenity" to the "living conditions of private individuals". "Adjoining premises", the amenity of which may be impacted, is not confined to residential premises, or to premises used for living or occupied by private individuals. The control relates to adjoining premises generally.

97. Fourth, the *ejusdem generis* principle is subject to context. For the reasons already given, there is no justification for reading down the words "impact on amenity" and "external appearance" in the way the claimants seek to do. The principle invoked by the claimants does not help in the interpretation of the prior approval code in Class AA of Part 1 or the related Classes.

Whether control of external appearance is limited to its effects on the subject property

98. I also reject the claimants' submissions that the "external appearance" control is confined to an assessment of the impact of that appearance on the subject property itself, as opposed to its surroundings. There is nothing in the language of the GPDO 2015 to justify this construction. Paragraph AA.2(3)(a)(ii) simply requires a developer to obtain prior approval of the "external appearance of the dwelling house…". The Order does not contain any language to the effect that the decision-maker may only assess the impact of that external appearance *on* the dwellinghouse itself. That interpretation involves reading additional words into the legislation when there is no legal justification for doing so. The LPA is therefore empowered to assess and control all relevant aspects of that external appearance, and not simply those which impact on the subject building.

Consultation documents and the NPPF

99. The conclusions on interpretation to which I have come are consistent with the overall tenor of the consultation material the Court was shown. They are also consistent with the relevant provisions in the NPPF.

Conclusions

100. Because I have rejected the claimants' construction of Class AA of Part 1 in Schedule 2 to the GPDO 2015, it follows that all three claims for statutory review must be dismissed.

101. The decision of each Inspector was entirely lawful. That is as far as the Court's function permits this judgment to go. Individual decision-makers will make their own planning judgments applying the prior approval controls, correctly interpreted, to the materials before them. This judgment does not mean that individual decision-makers would be bound to determine the appeals on the three properties the subject of these proceedings in the way that in fact occurred. That is always a matter of judgment for the person or authority taking the decision. I would also add that there is no evidence before the Court to show that the correct interpretation of Class AA of Part 1, along with the related Classes in Part 20, will in practice make it impossible or difficult for developers to rely upon these permitted development rights, as Mr. Streeten began to suggest at one point in his oral submissions.

102. I summarise the court's main conclusions on the interpretation of Class AA of Part 1 of Schedule 2 to the GPDO 2015:

(i) Where an application is made for prior approval under Class AA of Part 1 of Schedule 2 to the GPDO 2015, the scale of the development proposed can be controlled within the ambit of paragraph AA.2(3)(a);

(ii) In paragraph AA.2(3)(a)(i) of Part 1, "impact on amenity" is not limited to overlooking, privacy or loss of light. It means what it says;

(iii) The phrase "adjoining premises" in that paragraph includes neighbouring premises and is not limited to premises contiguous with the subject property;

(iv) In paragraph AA.2(3)(a)(ii) of Part 1, the "external appearance" of the dwelling house is not limited to its principal elevation and any side elevation fronting a highway, or to the design and architectural features of those elevations;

(v) Instead, the prior approval controls for Class AA of Part 1 include the "external appearance" of the dwelling house;

(vi) The control of the external appearance of the dwelling house is not limited to impact on the subject property itself, but also includes impact on neighbouring premises and the locality.

Annex – Class AA of Part I of Schedule 2 to the GPDO 2015

Class AA - enlargement of a dwellinghouse by construction of additional storeys

Permitted development

AA. The enlargement of a dwellinghouse consisting of the construction of—

(a) up to two additional storeys, where the existing dwellinghouse consists of two or more storeys; or

(b) one additional storey, where the existing dwellinghouse consists of one storey, immediately above the topmost storey of the dwellinghouse, together with any engineering operations reasonably necessary for the purpose of that construction.

Development not permitted

AA.1. Development is not permitted by Class AA if—

(a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of Class G, M, MA, N, O, P, PA or Q of Part 3 of this Schedule (changes of use); (b) the dwellinghouse is located on—

(i) article 2(3) land; or

(ii) a site of special scientific interest;

(c) the dwellinghouse was constructed before 1st July 1948 or after 28th October 2018;

(d) the existing dwellinghouse has been enlarged by the addition of one or more storeys above the original dwellinghouse, whether in reliance on the permission granted by Class AA or otherwise;

(e) following the development the height of the highest part of the roof of the dwellinghouse would exceed 18 metres;

(f) following the development the height of the highest part of the roof of the dwellinghouse would exceed the height of the highest part of the roof of the existing dwellinghouse by more than—

(i) 3.5 metres, where the existing dwellinghouse consists of one storey; or

(ii) 7 metres, where the existing dwellinghouse consists of more than one storey;

(g) the dwellinghouse is not detached and following the development the height of the highest part of its roof would exceed by more than 3.5 metres—

(i) in the case of a semi-detached house, the height of the highest part of the roof of the building with which it shares a party wall (or, as the case may be, which has a main wall adjoining its main wall); or

(ii) in the case of a terrace house, the height of the highest part of the roof of every other building in the row in which it is situated;

(h) the floor to ceiling height of any additional storey, measured internally, would exceed the lower of—

(i) 3 metres; or

(ii) the floor to ceiling height, measured internally, of any storey of the principal part of the existing dwellinghouse;

(i) any additional storey is constructed other than on the principal part of the dwellinghouse;

(j) the development would include the provision of visible support structures on or attached to the exterior of the dwellinghouse upon completion of the development; or

(k) the development would include any engineering operations other than works within the curtilage of the dwellinghouse to strengthen its existing walls or existing foundations.

Conditions

AA.2.—(1) Development is permitted by Class AA subject to the conditions set out in subparagraphs (2) and (3).

(2) The conditions in this sub-paragraph are as follows—

(a) the materials used in any exterior work must be of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse;

(b) the development must not include a window in any wall or roof slope forming a side elevation of the dwelling house;

(c) the roof pitch of the principal part of the dwellinghouse following the development must be the same as the roof pitch of the existing dwellinghouse; and

(d) following the development, the dwellinghouse must be used as a dwellinghouse within the meaning of Class C3 of the Schedule to the Use Classes Order and for no other purpose, except to the extent that the other purpose is ancillary to the primary use as a dwellinghouse.

(3) The conditions in this sub-paragraph are as follows—

(a) before beginning the development, the developer must apply to the local planning authority for prior approval as to—

(i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;

(ii) the external appearance of the dwellinghouse, including the design and architectural features of—

(aa) the principal elevation of the dwellinghouse, and

(bb) any side elevation of the dwellinghouse that fronts a highway;

(iii) air traffic and defence asset impacts of the development; and

(iv) whether, as a result of the siting of the dwellinghouse, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State;

(b) before beginning the development, the developer must provide the local planning authority with a report for the management of the construction of the development, which sets out the proposed development hours of operation and how any adverse impact of noise, dust, vibration and traffic on adjoining owners or occupiers will be mitigated;

(c) the development must be completed within a period of 3 years starting with the date prior approval is granted;

(d) the developer must notify the local planning authority of the completion of the development as soon as reasonably practicable after completion; and (e) that notification must be in writing and include—

(i) the name of the developer;

(ii) the address of the dwellinghouse; and (iii) the date of completion.

Procedure for applications for prior approval

AA.3.—(1) The following sub-paragraphs apply where an application to the local planning authority for prior approval is required by paragraph AA.2(3)(a)

(2) The application must be accompanied by—

(a) a written description of the proposed development, including details of any works proposed;

(b) a plan which is drawn to an identified scale and shows the direction of North, indicating the site and showing the proposed development; and

(c) a plan which is drawn to an identified scale and shows—

(i) the existing and proposed elevations of the dwellinghouse, and (ii) the position and dimensions of the proposed windows.

together with any fee required to be paid.

(3) The local planning authority may refuse an application where, in its opinion—

(a) the proposed development does not comply with, or

(b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,

any conditions, limitations or restrictions specified in paragraphs AA.1 and AA.2.

(4) Sub-paragraphs (5) to (8) do not apply where a local planning authority refuses an application under sub-paragraph (3); and for the purposes of section 78 (appeals) of the Act, such a refusal is to be treated as a refusal of an application for approval.

(5) The local planning authority must notify each adjoining owner or occupier about the proposed development by serving on them a notice which—

(a) describes the proposed development, including the maximum height of the proposed additional storeys;

(b) provides the address of the proposed development; and

(c) specifies the date, which must not be less than 21 days from the date the notice is given, by which representations are to be received by the local planning authority.

(6) Where the application relates to prior approval as to the impact on air traffic or defence assets, the local planning authority must consult any relevant operators of aerodromes, technical sites or defence assets and where appropriate the Civil Aviation Authority and the Secretary of State for Defence.

(7) Where an aerodrome, technical site or defence asset is identified on a safeguarding map provided to the local planning authority, the local planning authority must not grant prior approval contrary to the advice of the operator of the aerodrome, technical site or defence asset, the Civil Aviation Authority or the Secretary of State for Defence.

(8) Where the application relates to prior approval as to the impact on protected views, the local planning authority must consult Historic England, the Mayor of London and any local planning authorities identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State.

(9) The local planning authority must notify the consultees referred to in sub-paragraphs (6) and (8) specifying the date by which they must respond, being not less than 21 days from the date the notice is given.

(10) When computing the number of days in sub-paragraphs (5)(c) and (9), any day which is a public holiday must be disregarded.

(11) The local planning authority may require the developer to submit such information as the authority may reasonably require in order to determine the application, which may include— (a) assessments of impacts or risks;

(b) statements setting out how impacts or risks are to be mitigated, having regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in July 2021; and

(c) details of proposed building or other operations.

(12) The local planning authority must, when determining an application—

(a) take into account any representations made to them as a result of any notice given under sub-paragraph (5) and any consultation under sub-paragraph (6) or (8); and

(b) have regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in July 2021, so far as relevant to the subject matter of the prior approval, as if the application were a planning application.

(13) The development must not begin before the receipt by the applicant from the local planning authority of a written notice giving their prior approval.

(14) The development must be carried out in accordance with the details approved by the local planning authority.

(15) The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.

Interpretation of Class AA

AA4.—(1) For the purposes of Class AA—

"defence asset" means a site identified on a safeguarding map provided to the local planning authority for the purposes of a direction made by the Secretary of State in exercise of the powers conferred by article 31(1) of the Procedure Order or any previous powers to the like effect;

"detached", in relation to a dwellinghouse, means that the dwellinghouse does not—

(a) share a party wall with another building; or

(b) have a main wall adjoining the main wall of another building;

"principal part", in relation to a dwellinghouse, means the main part of the dwellinghouse excluding any front, side or rear extension of a lower height, whether this forms part of the original dwellinghouse or is a subsequent addition;

"semi-detached", in relation to a dwellinghouse, means that the dwellinghouse is neither detached nor a terrace house;

"technical sites" has the same meaning as in the Town and Country Planning (Safeguarded Aerodromes, Technical Sites and Military Explosives Storage Areas) Direction 2002;

"terrace house" means a dwellinghouse situated in a row of three or more buildings, where—

(a) it shares a party wall with, or has a main wall adjoining the main wall of, the building on either side; or

(b) if it is at the end of a row, it shares a party wall with, or has a main wall adjoining the main wall of, a building which fulfils the requirements of paragraph a.

(2) In Class AA references to a "storey" do not include—

(a) any storey below ground level; or

(b) any accommodation within the roof of a dwellinghouse, whether comprising part of the original dwellinghouse or created by a subsequent addition or alteration,

and accordingly, references to an "additional storey" include a storey constructed in reliance on the permission granted by Class AA which replaces accommodation within the roof of the existing dwellinghouse.

Neutral Citation Number: [2021] EWCA Civ 1920

Case No: C1/2021/0926

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
Mr Justice Julian Knowles
CO/2314/2020, CO/2315/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

MANCHESTER CITY COUNCIL	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant/ Appellant**
SAIF CHAUDRY	**(1) Interested Party**
PREM PATHAK	**(2) Interested Party**

- -
- -

Freddie Humphreys (instructed by the **Treasury Solicitor**) for the **Appellant**
Horatio Waller (instructed by **Council Legal Services**) for the **Respondent**
The Interested Parties did not appear and were not represented

Hearing date : 7 December 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be at 10am on Wednesday 15 December 2021.

Lord Justice Lewison:

1. The issue on this appeal is whether a planning inspector was wrong to refuse to impose conditions on the grant of planning permission on the ground that they were unnecessary. Julian Knowles J held that he was. His judgment is at [2021] EWHC 858 (Admin).

2. 3 Grandale Road was originally built as a dwelling house. It has two storeys with two principal rooms at each floor level. On 23 October 2019 Manchester City Council served an enforcement notice alleging a breach of planning control in the following terms:

> "Without planning permission the material change of use of a dwellinghouse (Class C3) to form 4 commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical room (Class D1)."

3. Two of the recipients of the enforcement notice appealed to the Secretary of State under section 174 of the Town and Country Planning Act 1990. Section 174 sets out a number of possible grounds of appeal. That which is relevant for present purposes is:

> "(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged"

4. Where a person appeals on this ground, he is deemed to have made an application for planning permission "in respect of the matters stated in the enforcement notice as constituting a breach of planning control": Section 177 (5). On the appeal, the Secretary of State may grant such planning permission: section 177 (1) (a). Any planning permission thus granted is treated as having been granted on the deemed application: section 177 (6).

5. The council opposed the appeal, contending that planning permission ought not to be granted; and that the property ought to be returned to its former use as a single dwelling house. But as a fall back, the council argued that if planning permission were to be granted it should be granted permission subject to conditions. The suggested conditions included two conditions in the following terms:

> "The uses hereby permitted are limited to 1 x Class A1, 2 x Class B1 and 1 x Class D1, as set out in the Town and Country Planning (Use Classes) Order 1987…
>
> Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 … the only uses permitted within Class A1 are "Travel and Ticket Agencies", within Class B1 "Offices" and within D1 are "Therapy/Medical Treatment Room" and shall not be used for any other purpose within those respective Classes …"

6. Having considered the merits of the appeal, the inspector decided to grant planning permission. Paragraph 1 of the decision letter stated:

> "… permission is granted … for the development already carried out, namely the material change of use of a dwellinghouse (Class C3) to form four commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical treatment room (Class D1)…"

7. In relation to the conditions quoted above the inspector said in paragraph 12:

> "Two conditions that specify and limit the commercial uses of the property are … unnecessary because the planning permission that has been granted specifies these uses."

8. Section 289 (1) of the Act enables the local planning authority to appeal against a decision of the Secretary of State "on a point of law".

9. The principles applicable to the interpretation of a planning permission are now well-settled. The process of interpretation is an objective one. The question is what a reasonable reader would understand by the document in which the grant of planning permission is contained. The legal context is relevant to that question. The starting point, and usually the end point, is to find the natural and ordinary meaning of the words used, viewed in their particular context: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] PTSR 1388 at [19].

10. The legal context for the interpretation of a planning permission is planning law. The reasonable reader must be notionally equipped with some knowledge of planning law and practice: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2018] EWCA Civ 844, [2019] PTSR 143 at [52], (not criticised on appeal) [2019] PTSR 1388 at [23].

11. In planning law development includes the making of a material change in the use of any buildings or other land: Town and Country Planning Act 1990 s 55 (1). But where a building is used for a purpose of any class specified in an order made by the Secretary of State, the use of the building for another purpose within the same class is not development: section 55 (2) (f). In addition, where a use falls within a use class, certain changes from one use class to another are permitted under the Town and Country Planning (General Permitted Development) Order 2015 without the need for planning permission.

12. At the time of the events with which we are concerned, the relevant classes of use were those specified in the Town and Country Planning (Use Classes) Order 1987. The Order has since been amended. Some of those classes as they then stood are mentioned both in the enforcement notice and in the inspector's decision. But although the Use Classes Order encompasses a wide range of uses, it is not all-embracing. The Use Classes Order itself specifies a number of uses which are not allocated to a class (e.g. a taxi business, a scrapyard, and a casino). There are, in addition, other uses which do not fall within a use class. In *Tessier v Secretary of State for the Environment* (1976) 31 P & CR 161, for example, a sculptor's workshop was held not to fall within any use class. A use like that is traditionally described as a *sui generis* use (a use of its own kind). Another

example which does not fall within a use class is that of a mixed use. In *Belmont Riding Centre Ltd v First Secretary of State* [2003] EWHC 1895 (Admin), [2004] 2 PLR 8 the Secretary of State argued that:

> "A mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f): in particular, the specific mixed use does not fall within Class D2 and Class D2 does not bite on the question whether a change in the activities comprised in the mixed use causes a material change of use."

13. Richards J accepted that submission at [31]. He said:

> "That there was a mixed use … was common ground before the present inspector. I accept Mr. Strachan's submission that such a mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f)…. In examining use classes the focus must be on the relevant use for the purposes of s.55, which in this case is the mixed use as a whole, rather than on individual components of a mixed use. A change in components will involve a change in the mixed use itself and, subject to the question of materiality, will amount to development."

14. Richards J returned to the point in *Fidler v First Secretary of State* [2003] EWHC 2003 (Admin), [2004] 1 PLR 1. He said at [80]:

> "… the Use Classes Order has no application to a mixed use: the mixed use does not itself fall within any class and a finding of material change of use is not avoided simply by showing that a component falling within a particular class has been substituted for another component falling with the same class."

15. That observation was approved by this court on appeal: [2004] EWCA Civ 1295, [2005] 1 P & CR 12 at [28] (iv) (Carnwath LJ).

16. Whether a change of use of land is "material" is a question of fact and degree and is decided by reference to the planning unit. The identification of the appropriate planning unit is itself a planning judgment, although there are well settled principles applicable to the identification of the appropriate planning unit: see, for example *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207. The court has no power to intervene unless the decision maker has made an error of law.

17. There is another feature of planning law which would be known to the reasonable reader. That is the distinction between a limited description of a use permitted by the grant of planning permission and a condition prohibiting further change. That principle is exemplified by *I'm Your Man Ltd v Secretary of State for the Environment* (1998) 77 P & CR 251. In *Cotswold Country Grange Park llp v Secretary of State for Communities and Local Government*]2014] EWHC 1138 (Admin), [2014] JPL 981 Hickinbottom J neatly encapsulated the difference at [15]:

> "… the grant identifies what can be done – what is permitted – so far as use of land is concerned; whereas conditions identify what cannot be done – what is forbidden. Simply because something is expressly permitted in the grant does not mean that everything else is prohibited. Unless what is proposed is a material change of use – for which planning permission is required, because such a change is caught in the definition of development – generally, the only things which are effectively prohibited by a grant of planning permission are those things that are the subject of a condition, a breach of condition being an enforceable breach of planning control."

18. The Secretary of State seeks to uphold the inspector's decision on the basis that he granted planning permission for a mixed use of the property as a whole. That mixed use did not benefit from the changes in use permitted by section 55 (2) (f) because, as a mixed use, it did not fall within any class specified in the Use Classes Order. Since the mixed use did not benefit from section 55 (2) (f), the inspector was correct in concluding that the suggested conditions were unnecessary. The judge impermissibly exercised his own planning judgment to decide whether there was one planning unit or multiple planning units.

19. It is, I think, common ground, that if the result of the change of use from residential to commercial resulted in the creation of four planning units, then it could not be said that the conditions proposed by the council were unnecessary to prevent further change. If, on the other hand, there was a mixed use of a single planning unit which did not fall within any use class, then the inspector was entitled to conclude that the proposed conditions were indeed unnecessary.

20. What the inspector decided is, in the first place, a question of interpretation of the decision letter. The inspector did not give any explicit consideration in the decision letter to the identification of the appropriate planning unit. Nor did he mention the phrase "mixed use" anywhere in the decision letter. If he meant to say that there was a single planning unit with a mixed use, that is a surprising omission. What he decided must, therefore, be a process of objective interpretation of what he did say.

21. He began by setting out (in the bullet points at the start of the decision) the breach of planning control alleged. That breach was a change of use of a dwelling house "to form 4 commercial units". It clear from that description that the council's case was there were four units in place of one. As well as granting the planning permission in the terms I have quoted, the inspector attached a condition to the grant. That condition was that the "commercial units" (plural) should only operate between certain hours. In considering the amenities of neighbours in paragraph 11 of the decision letter, the inspector began by saying that "each commercial unit" was of limited size. He continued by consistently referring to "commercial uses" (plural). Similarly in his rejection of the proposed conditions in paragraph 12 of the decision letter, he referred to the "commercial uses" (plural) and asserted that the grant of the permission specified "these uses" (plural). This consistent description of uses in the plural militates strongly against the suggestion that what the inspector was describing was a single composite use. Similarly his reference to "each" commercial unit shows that he treated each separately, rather than as part of a single unit.

22. But the key point, to my mind, is the inconsistency between:

    i) The proposition that a mixed use of a single planning unit does not fall within any use class, and

    ii) Both the inspector's reference to "four commercial units" and also his description of the uses of each unit by reference to a use class.

23. These statements cannot, in my judgment, sensibly co-exist. In the first place a planning unit with a mixed use is, as *Belmont* and *Fidler* show, a single planning unit. Second, the use of that single unit does not fall within any use class. The description of the development as "four" units, each with its own use class, necessarily entails the proposition that each unit is a separate planning unit. If there were only one planning unit, then there would only have been one "commercial unit" with a mixed use that did not fall within any use class. This is reinforced by the description of the alleged breach of planning control in the enforcement notice, which also refers to four units each with its own use class; and the breach of planning control as the *formation* of those units; a description which the inspector repeated in the final paragraph of the decision letter as well as in the bullet points at its beginning. In that paragraph he acknowledged that planning permission was being granted for the formation of four commercial units.

24. Mr Humphreys, for the Secretary of State, argued that the inclusion of the classes of use by reference to their description in the Use Classes Order did no more than identify the components that made up the single overall mixed use. I do not agree. None of the individual uses to which the property was in fact put spanned the whole of any particular use class. For example the planning permission referred to one of the units operating as a travel agent. If the planning permission had granted permission for a single mixed use made up of various components, description of that component as "travel agent" would itself have been a sufficient description of that particular component without the additional reference to Class A1 (which embraces retail units of all kinds, apart from those selling hot foods, as well as many other uses). Use as a travel agent is merely a sub-class of that use class.

25. He also pointed out that the planning permission granted did not identify the individual rooms to which each description of use attached. That is true, but in my judgment it is a minor point, and does not detract from what is otherwise the clear import of the grant.

26. I do not consider that the decision letter is ambiguous in this respect. Its meaning is, to my mind, clear. The argument for the Secretary of State, if I may respectfully say so, seeks to create an ambiguity where none exists in the decision letter itself; and uses extraneous materials for that purpose. As Lord Hope explained in *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 2 EGLR 128:

> "Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the

> document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

27. It follows, in my judgment, that as a matter of interpretation of the decision letter the inspector did grant planning permission for a change of use which resulted in four separate planning units, each with its own use class. The consequence is that changes of use of a particular unit within the applicable use class (as well as changes between use classes permitted by the General Permitted Development Order) would not amount to development requiring planning permission; and would therefore be permitted in the absence of any conditions limiting such changes. The limited verbal description of those uses within the grant would not be enough. In those circumstances, I consider that the inspector failed to apply the principle in *I'm Your Man Ltd*, and wrongly concluded that conditions limiting further changes of use were unnecessary.

28. The judge approached the question in a slightly different way. He first set out his understanding of the law relating to planning units, and the criteria used to define them. There is no criticism of his summary of the relevant criteria. The complaint is that he embarked upon the exercise at all. He then said that the inspector's decision was ambiguous and did not directly state whether the four business rooms were individual planning units. But he held that, having regard to permissible extraneous material, "the only rational conclusion" was that each of the four rooms amounted to an individual planning unit.

29. It is perfectly true, as the Secretary of State submits, that matters of planning judgment are for the decision maker and not for the court. But the decision maker must exercise that planning judgment on a correct legal basis. In *Burdle* the court was clearly of the view that it could intervene if, on the materials available, one conclusion was "inevitable".

30. As I have said, an appeal from a decision of the Secretary of State to the court lies only on a point of law. In *Edwards v Bairstow* [1956] AC 14 Lord Radcliffe, in a well-known passage, said:

> "But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, *or as one in which the true and only reasonable conclusion contradicts the determination*." (Emphasis added)

31. In this case the judge found at [57] that "the only rational conclusion" was that there were four planning units. That finding amounted to a finding that the inspector had made an error of law, either on the basis of what Lord Radcliffe said, or on the basis of irrationality in public law. The consequence of that error of law was that the inspector made a further error of law; namely to decide that because the description of what was permitted was expressed in limited terms, there was no need for any conditions precluding further changes of use. That was not in my judgment an exercise of planning judgment by the judge: it was the identification of an error of law made by the inspector.

32. I would dismiss the appeal.

Lord Justice Dingemans:

33. I agree.

Lord Justice William Davis:

34. I also agree.

Neutral Citation Number: [2022] EWHC 36 (Admin)

Case No: CO/2369/2021

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

Cardiff Family and Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 14/01/2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

WILTSHIRE COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
- and -	
(2) GREYSTOKE LAND LIMITED	

Mr Jonathan Easton (instructed by and) for the **claimant**
Mr Andrew Parkinson (instructed by **Government Legal Department**) for the **first defendant**
The second defendant did not appear

Hearing dates: 4 January 2022
- -

Approved Judgment

Handed down remotely at 11am Friday 14 January 2022

HH JARMAN QC:

Introduction

1. By notice dated 20 December 2019 the claimant, as local planning authority (the Council), refused an application by the second defendant (Greystoke) for up to 10 entry-level affordable dwellings with associated access road and car parking and a publicly accessible village green on a pastoral field (the site) in a small village in its area called Broad Town. Greystoke appealed the refusal under section 78 of the Town and Country Planning Act 1990 (the 1990 Act), which appeal was heard by an inspector appointed by the defendant (the Secretary of State). By a decision letter dated 27 May 2021, the inspector allowed the appeal and granted permission for the development, subject to conditions. The Council, with the permission of Lang J, now applies to this court under section 288 of the 1990 Act, questioning the validity of that decision.

2. It does so on three grounds. The first is that the inspector misinterpreted national policy which supports entry-level affordable housing, and in particular paragraph 71 of the National Planning Policy Framework 2019 (NPPF). That has since been updated, but with no material differences. The second is that he also misinterpreted local policy, and in particular Core Policy (CP) 58 of the Wiltshire Core Strategy (WCS), which amongst other matters seeks to ensure conservation of the landscape. This is particularly important in the present case, because as the inspector acknowledged, the development would involve built form in a field presently part of a countryside gap between the built forms of the village. The third is that the inspector erred in his assessment of the harm that the development would have on the setting of a Grade II listed church, known as Christ Church, which lies just to the east of the site.

Legal principles

3. There was no dispute before me about the legal principles to be applied by a court when a decision of a specialist decision maker such as a planning inspector is challenged on the basis of misinterpretation of policy. Accordingly they can for present purposes be set out briefly so far as particularly relevant here, with reference to a helpful summary by Dove J in *Canterbury City Council v Secretary of State for Communities and Local Government and another* [2018] EWHC 1611 (Admin) at paragraph 23.

4. The essential distinction to bear in mind is that the interpretation of planning policy is a question of law for the court, whereas the value or weight to be attached to the policy is a matter of weight for the decision maker (see, for example, Lord Carnwath giving the lead judgment in *Suffolk Coastal District Council* v *Hopkins Homes Ltd* [2017] UKSC 37 at paragraph 26).

5. Second, the interpretation of such policies has to recognise that they contain broad statements of policy which may be mutually irreconcilable so that in a particular case one must give way to another (per Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13). They are designed to shape practical decision making and are primarily addressed to planning professionals and the public for whose benefit they exist.

6. Third, polices must be read in context to arrive at their proper interpretation, and context includes their subject matter and the objectives sought to be achieved. It also includes the wider policy framework and the overarching strategy (see *Tesco Stores,* paragraphs 18 and 21).

7. Fourth, courts should respect the expertise of specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local (per Lord Carnwath in *Hopkins Homes* at paragraph 25).

8. Particular reference to the interpretation of NPPF was made by Lindblom LJ recently in *Asda Stores Limited v (1) Leeds City Council and (2) Commercial Development Projects Limited* [2021] EWCA Civ 32. At paragraph 35 he said:

> "When called upon – as often it is nowadays – to interpret a policy of the NPPF, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve "reasonably predictable decision-making, consistent with the aims of the policy-maker", it will look for an interpretation that is "straightforward, without undue or elaborate exposition" (see *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). Often it will be entitled to say that the policy simply means what it says, and that it is the job of the decision-maker to apply it with realism and good sense in the circumstances as they arise – which is what local planning authorities are well used to doing when making the decisions entrusted to them (see *R. (on the application of Corbett) v The Cornwall Council* [2020] EWCA Civ 508, at paragraphs 65 and 66)."

National policies

9. The relevant national policies in this case are as set out in the NPPF. NPPF 11, which comes within Chapter 2 headed "Achieving sustainable development", provides that "Plans and decision should apply a presumption is favour of sustainable development". Sub-paragraph d) provides that for decision making this means:

> "d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date□, granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed□; or

> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

10. Footnote 7 provides that this includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites. It is not in dispute that the Council cannot do so in the present case, and the inspector's finding to that effect is not challenged.

11. Footnote 6 provides that the policies referred to are those in the NPPF, rather than those in development plans, relating to a number of specified matters such as SSSIs and Local Green Space, and includes designated heritage assets

12. Chapter 5 deals with delivering a sufficient supply of homes. NPPF 59 provides that it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay. NPPF 61 provides that the size and tenure of housing needed for different groups should be assessed and reflected in policies, including not just those who require affordable housing but other groups such as older people, students, people with disabilities and travellers.

13. Homes for first time buyers are dealt with in NPPF 71, as follows:

> "Local planning authorities should support the development of entry-level exception sites, suitable for first time buyers (or those looking to rent their first home), unless the need for such homes is already being met within the authority's area. These sites should be on land which is not already allocated for housing and should:
>
> a) comprise of entry-level homes that offer one or more types of affordable housing as defined in Annex 2 of this Framework; and
>
> b) be adjacent to existing settlements, proportionate in size to them, not compromise the protection given to areas or assets of particular importance in this Framework, and comply with any local design policies and standards."

14. It is not in dispute that the site is adjacent to and proportionate in size to Broad Town. The areas or assets of particular importance referred are set out in footnote 34 are the areas referred to in footnote 6, including the church as a designated heritage asset. Footnote 34 continues that entry level exception sites should not be permitted in National Parks, AONBs or the Green Belt.

15. The conservation and enhancement of such assets are dealt with in Chapter 15, paragraph 196 of which provides:

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits

> of the proposal including, where appropriate, securing its optimum viable use."

Local policies

16. As for the development plan, this consists of the WCS, adopted in 2015, some three years after the NPPF was first published.

17. CP 57 is entitled "Ensuring high quality design and place shaping" and requires a high standard of design in all new developments, which are expected to create a strong sense of place through drawing on the local context and being complimentary to the locality. It provides that applications for such development must demonstrate how the proposal will make a positive contribution to the character of Wiltshire through specified objectives. Some of these relate to place shaping, such as enhancing local distinctiveness by responding to the value of the natural and historic environment, relating positively to its landscape setting. Others relate to more detailed matters of design, such as building layouts, built form, height, mass, scale, building line, plot size, elevational design, materials, streetscape and rooflines to effectively integrate the building into its setting.

18. CP 58 deals with ensuring the conservation of the historic environment and provides that development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance.

The decision letter

19. I now turn to the inspector's decision letter in this case. In paragraph 7, he identified five main issues before him, of which three are relevant to the Council's challenge, namely whether the proposal is in an appropriate location for entry level housing, the effect of the proposal on the character and appearance of the area, and the effect of the proposal on a designated heritage asset, namely the church.

20. He dealt with the issues in turn. Location is dealt with in paragraphs 8 to 23. Character and appearance is dealt with in paragraphs 24 to 37. The designated heritage asset is dealt with in paragraphs 45 to 60. He then deals with planning balance at paragraphs 67 to 75.

21. In carrying out the balance, he found that the proposal would conflict with the development plan in three main ways. First, its lack of exception site status and general lack of conformity with the spatial strategy. He assessed the harm from the conflict as moderate, given the shortage of affordable homes and of housing land supply more generally (67). Second, its effects on the countryside gap and on the character and appearance of the area. He assessed the harm from that conflict, which he acknowledged would normally carry great weight, as moderate, due to the flexibility inherent in an outline proposal (68). Third, its effects on the church. Again, he acknowledged that any harm derived from conflict with WCS policies to protect designated heritage assets would normally carry great weight, but again he reduced that to moderate because the WCS did not provide for the consideration of public benefits in this regard unlike NPPF 196 (69). He assessed the cumulative effect of these harms as significant (71).

22. He then assessed the benefits. He assessed the provision of entry level affordable housing, where the need for such was not being met and there was a lack of affordable housing and a shortage in housing land supply generally, as of significant weight as a public benefit (73).

23. He assessed the balance of harm and benefit as roughly equal, so that the former would not significantly and demonstrably outweigh the later. Accordingly it was the presumption in favour of sustainable benefit in the NPPF that, in his judgment, tipped the overall planning balance in favour of the proposal (75).

24. His conclusion at paragraph 93 reads as follows:

> "There is conflict with the development plan, but Paragraph 11d of the Framework is a material consideration that has been decisive in this case, indicating that a decision should be taken otherwise than in accordance with the development plan. Consequently, the appeal is allowed and planning permission is granted subject to conditions attached in the schedule."

25. In so concluding, in my judgement the inspector was clearly dealing with the statutory presumption in favour of the development plan. Section 70(2) of the 1990 Act requires that, in dealing with an application for planning permission, a local planning authority must have regard to the provisions of the development plan, so far as is material to the application, and to any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Ground 1

26. I deal now with each of the grounds in turn. A number of points are, in my judgment, immediately obvious from a reading of NPPF 71. The first is that local planning authorities should support the development of sites suitable for first time buyers or tenants. The second is that such sites are exceptional and should be adjacent (so not in) existing settlements . The third is that such sites should be on land which is not already allocated for housing. In my judgment, this means that such development will almost always, if not always, not be in accordance with the development plan, one of the functions of which is to identify and allocate sites suitable for housing.

27. The passages of the decision letter dealing with this part of the NPPF are paragraphs 15-17, which provide as follows:

> "15. It is clear that the very nature of proposals advanced pursuant to Paragraph 71 of the Framework would deliver an implicit level of landscape change at the edge of a settlement, with a certain degree of tolerance for harm built into its provisions. Accordingly, in my mind, the starting point for considering compliance with local design policies and

> standards in the context of Paragraph 71 of the Framework can only logically involve detailed matters about the design of housing, not matters of principal landscape change.
>
> 16. For me to consider compliance with local design policies and standards in the context of principle landscape change would be a contradiction of the provisions within Paragraph 71 of the Framework, which allow small numbers of entry level homes to emerge at the edge of a settlement on the basis that the benefits would outweigh any limited changes and potential landscape harm.
>
> 17. With this in mind, and as will be reasoned later in my decision, the existence of fundamental landscape harm would not render the proposal incompatible with Paragraph 71 of the Framework and compliance with local design policies and standards can be achieved through the flexibility inherent in an outline proposal, including the Council's and other interested parties' continued agency in relation to future reserved matters applications."

28. Mr Easton, for the Council makes four criticisms of this interpretation. First, it removes from consideration of NPPF 71, fundamental landscape harm on the basis that the paragraph presupposes that such harm will be tolerated.

29. Second, it fails to read the paragraph in the context of other polices of the NPPF and particularly those in Chapter 12 which emphasises the importance of adding to the overall quality of the area and ensuring development is sympathetic to local character (NPPF 127), and Chapter 15 which requires planning decisions to contribute to and enhance the natural environment and recognising the intrinsic character and beauty of the countryside (NPPF 170).

30. Third, it limits consideration of local design policies to what can be achieved by decisions of the Council on reserved matters applications, whereas matters of design encompass broader issues such as local character and landscape setting. Fourth, and a related point, this led the inspector to reduce the great weight normally giving to such policies to moderate weight.

31. Mr Parkinson, for the Secretary of State, submits that the role of NPPF 71 is to support entry level housing subject to meeting the specified criteria. It cannot have been intended that if these criteria are met, then other material considerations should not be considered. While he accepts that the critical paragraphs of the decision letter could have been better expressed, he submits that NPPF 71 recognises that entry level housing sites are inherently likely to involve some landscape harm, and that is clear by providing they should not be permitted in National Parks, AONB or Green Belt.

32. He further submits that reading the decision letter as a whole the inspector clearly dealt with location, character and appearance as material considerations. He did not take the view that the harm referred to in paragraph would always be trumped if the criteria in NPPF 71 were met. In referring to fundamental landscape harm in paragraph 17 of the decision letter, the inspector specifically refers to the reasoning

later in the letter. In paragraph 27, he refers to the site as contributing to the countryside gap which helps to prevent coalescence between Broad Town's distinct pattern of development.

33. In paragraph 30, he says:

> "In principle, the proposal would deliver built form where currently there is none, and within a countryside gap that has and integral function in preventing coalescence between the north and south of Broad Town. Clearly, therefore, the proposal would erode some of the countryside gap and cause a degree of harm to the rural character and appearance of the area."

34. In paragraph 35, he says this:

> "Consequently, my overarching his assessment of the principle harm to the rural character and appearance of the area is the fact that the proposal is put forward in outline wherein lies a significant degree of flexibly to deliver a development which accords with local design requirements, and otherwise mitigates the most serious and harmful effects. For example, layout of the units could be evolved at reserved matters and the community car parking area could be the subject of robust soft landscaping measures to control the effects of the built form on the countryside gap."

35. Mr Parkinson also accepts that matters of design can encompass landscape and enhancing the character of the countryside, as is obvious from CP 57 and the notes thereto. To the extent that the countryside gap is built upon, then detailed design could not mitigate the loss of that part of the gap. However, as recognised by the inspector, the effect of the built form on the remainder of the gap could be mitigated by detailed design. Accordingly, the inspector was entitled reduce the harm caused by the conflict with CP 57, for example, to moderate weight.

36. In my judgment, NPPF 71 clearly envisages that by supporting entry level exception sites, harm to the landscape would be likely, at the least. That is shown by providing that sites should be adjacent to existing settlements and on land not already allocated for housing. It is also shown by the need to emphasise that sites should not be permitted in National Parks, AONB or Green Belt. That is so even when other NPPF policies protecting the countryside are considered. That does not mean that landscape harm should not be weighed in the balance. Reading the decision letter fairly as a whole, and the inspector in paragraph 17 expressly refers to his reasoning later in the letter, in my judgment it is clear that that is precisely what he did. He did not regard compliance with NPPF 71 as trumping, or even impacting upon, such consideration.

37. Moreover, again on a fair reading of the decision letter as a whole, and in particular paragraphs 30 and 35, the inspector had well in mind the distinction between impacts which could not be mitigated by design, namely the loss of the part of the countryside gap to be built upon, and those which could, namely the effects of the built form on the countryside. It was a matter of planning judgment for the inspector to decide what weight to attach to the conflict with polices requiring development to protect conserve

and where possible enhance the landscape character, particularly as the proposal involves both built form such as the dwellings themselves, and non-built form, such as the village green.

38. Accordingly in my judgment ground 1 is not made out.

Ground 2

39. Ground 2 relates to the weight which the inspector attached to the harm derived from the conflict with CP 58. At paragraph 56 of the decision letter he said this:

> "Overall, the proposal would conflict with Core Policy 58 of the WCS, which among other things seeks to ensure conservation of the historic environment. The harm derived from this conflict with the development plan would normally carry great weight, however given that the policy does not include provision for balancing potential benefits and is therefore plainly inconsistent with Paragraph 196 of the Framework, any harm should be reduced to carrying moderate weight in this context."

40. Whilst accepting that CP 58 does not expressly provide for a balance with potential benefits, Mr Easton nevertheless submits that the inspector was wrong to downgrade the weight to be attached to the harm derived from the conflict with CP 58, because as a matter of law a balancing exercising is permissible when applying CP 58.

41. He relies upon a decision of the Court of Appeal in *City & Country Bramshill Limited v Secretary of State for Housing Communities and Local Government and another* [2021] EWCA Civ 320. In that case a planning inspector attached significant weight to development plan policies aimed at conserving the historic environment, even though it was common ground before him that such policies were inconsistent with NPPF policy on heritage assets because they did not provide for public benefits to be balanced against harm. The Court of Appeal rejected the submission that the inspector had misapplied the local policies.

42. Mr Easton referred me to paragraph 87 of the lead judgment of Sir Keith Lindblom SPT, in that case:

> "The absence of an explicit reference to striking a balance between "harm" and "public benefits" in the local plan policies does not put them into conflict with the NPPF, or with the duty in section 66(1). Both local and national policies are congruent with the statutory duty. The local plan policies are not in the same form as those for "designated heritage assets" in the NPPF. They do not provide for a balancing exercise of the kind described in paragraphs 193 to 196 of the NPPF, in which "public benefits" are set against "harm". But they do not preclude a balancing exercise as part of the decision-making process, whenever such an exercise is appropriate. They do not override the NPPF policies or prevent the decision-maker from

> adopting the approach indicated in them. They are directed to the same basic objective of preservation."

43. However, as Mr Parkinson points out, Sir Keith went on at paragraph 88 to observe that the inspector was free, and indeed obliged, in performing the duty under section 66(1) of the Planning (Listed Buildings and Conservation Area) Act 1990, to give such wight to local plan polices as she reasonably judged appropriate. That duty is as follows:

> "In considering whether to grant planning permission or permission in principle for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

44. In paragraph 89, Sir Keith continued:

> "The inspector's conclusion on weight, though it was not urged on her by either side at the enquiry, was nonetheless a lawful conclusion. That was a matter of planning judgment for her. Her conclusion was rational, and adequately reasoned…She acknowledged that those policies lacked the "balancing requirement" of the NPPF, but added that "they contain the statutory requirement." By this she clearly meant that they embodied the objective of preserving listed buildings and their settings, in accordance with the duty in section 66(1). She was not saying she interpreted them as shutting the balancing exercise under paragraphs 196 and 196 of the NPPF. She went on to apply that balancing exercise in the assessment that followed, and she did so meticulously."

45. Mr Easton accepts that the inspector in the present case carried out such a balancing exercise, but submits that he did so by applying NPPF 196 which expressly permits such an exercise, rather than by applying CP58 as required by section 38(6) of the 2004 Act. Had he done so, he should and would have applied great weight to the conflict of the proposal with that policy. That is of significance given that the inspector found that the harm and the public benefit of the proposal was finely balanced.

46. In my judgment, the inspector in this case carried out a similar exercise to that carried out in *Bramshill*, and also referred to the statutory duty in paragraph 58 of the decision letter, saying that he had "given considerable weight to the statutory duty to preserve" the church. There is an element of circularity in Mr Easton's argument. If, as he submits, the inspector should have carried out the exercise under CP58, and if, as he submits, it is permissible to have regard to benefits under that policy, then the matter of what weight to give to the conflict with the policy having regard to the fact that on its terms it does not provide for balance exercising, would remain a matter for the planning judgment for the inspector. It is clear from paragraph 89 of the judgment in *Bramshill* that the inspector was entitled to acknowledge that lack.

47. Accordingly, ground 2 fails also.

Ground 3

48. In respect of ground 3, Mr Easton submits that it is illogical for the inspector to find that the harm to the church would be mitigated by the potential siting of the village green as part of the proposal, but then to hold that the village green and community car park could not be regard as real benefits given the uncertainty as to their delivery. In oral submissions, he put this in essence as a reasons challenge.

49. In my judgment, on a fair reading of the decision letter as a whole that is not what the inspector did. In terms of mitigation of harm, what he said in paragraph 50 of the decision letter is that the outward view would be preserved due to the potential siting of the village green. On the indicative layout of the proposal, the village green is shown to the south of the built form and to the west of the church. In dealing with benefits, at paragraphs 52 and 53 he indicated that notwithstanding the merits of the village green and the community car parking area, there was no mechanism for those to come forward at the same time as the residential component which could exist for several years before details of these other components were brought forward.

50. However, as Mr Parkinson submits, even if there is uncertainty about the delivery of the car park and village green, the inspector was entitled to take into account that the proposal does not involve built form on the site of the proposed village green, which would remain open land over which the outward views from the grounds of the church directly westward would remain as at present. Mr Parkinson accepts that there is no condition preventing the proposal to change in this respect, but as control of reserved matters remains with the Council it has the power to refuse any change which would impact adversely on the outward views referred to by the inspector.

51. To the extent that this reasoning is not explicit in the decision letter, in my judgment, it is implicit from the reference in paragraph 50 to outward views being preserved because of the potential siting of the village green and from a fair reading of the decision letter as a whole. Accordingly ground 3 fails.

The same outcome

52. That is sufficient to dispose of the claim, and it is unnecessary for me to deal with alternative arguments of Mr Parkinson that even if the legal errors alleged under grounds 2 and 3 are made out, it is highly likely that the outcome would have been the same within the meaning of section 31 (2A) of the Senior Courts Act 1981. For the sake of completeness I will deal with these arguments but will do so briefly.

53. Mr Easton submits that to reach such a conclusion would be a result of post decision speculation which is impermissible (see *R(Logan) v London Borough of Havering* [2015] EWHC 3193).

54. In respect of ground 2, Mr Parkinson submits that even if the inspector had accorded great weight to the harm of the conflict of the proposal with CP58, for the purpose of NPPF 11d(ii), which the inspector found tipped the balance, this would not augment a finely balanced finding into one where the adverse impacts would significantly and demonstrably outweigh the benefits, as would be required to justify not granting

permission. Similarly, under ground 3, even if the inspector did assume that the village green would be delivered when assessing harm, there is still no basis for asserting that heritage harm would have been assessed at a higher level, given the control which the Council has over reserved matters.

55. I accept those submissions. This is not to engage in post decision speculation, but to assess the effect of these matters on the detailed assessments which the inspector carried out.

Conclusion

56. Each counsel presented his case with focussed persuasiveness and I am grateful to each for the assistance given to the court. Notwithstanding that of Mr Easton, the claim fails. Counsel helpfully indicated that any consequential matters which cannot be agreed can be dealt with on the basis of written submissions. A draft order, agreed if possible, should be filed within 14 days of hand down of this judgment, together with any such submissions if necessary.

Neutral Citation Number: [2022] EWCA Civ 187

Case No: C1/2021/0261

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(PLANNING COURT)
MR JUSTICE HOLGATE
[2020] EWHC 3566 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2022

Before:

LORD JUSTICE LEWISON
SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
and
LORD JUSTICE MOYLAN

- -

Between:

R. (on the application of SARAH FINCH on behalf of the WEALD ACTION GROUP)	**Appellant**
– and –	
(1) SURREY COUNTY COUNCIL **(2) HORSE HILL DEVELOPMENTS LTD.** **(3) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES**	**Respondents**
– and –	
FRIENDS OF THE EARTH LTD.	**Intervener**

- -
- -

Marc Willers Q.C. and **Estelle Dehon** (instructed by **Leigh Day**) for the **Appellant**
Harriet Townsend and **Alex Williams** (instructed by **Surrey County Council Legal Department**) for the **First Respondent**
David Elvin Q.C. and **Matthew Fraser** (instructed by **Hill Dickinson LLP**) for the **Second Respondent**

Richard Moules (instructed by the **Treasury Solicitor**) for the **Third Respondent**
Paul Brown Q.C. and Nina Pindham (instructed by **Friends of the Earth Ltd.**) for the **Intervener** by written submissions only

Hearing dates: 16 and 17 November 2021

- -

Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down was deemed not before 4pm on 17 February 2022

The Senior President of Tribunals:

Introduction

1. The basic question in this case is whether, under Directive 2011/92 EU of the European Parliament and of the Council ("the EIA Directive") and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA regulations"), it was unlawful for a county council, as mineral planning authority, not to require the environmental impact assessment for a project of crude oil extraction for commercial purposes to include an assessment of the impacts of greenhouse gas emissions resulting from the eventual use of the refined products of that oil as fuel. In my view, applying legal principles that are already fully established, it is clear that the county council did not err in law.

2. With permission granted by Lewison L.J., the appellant, Sarah Finch, appeals against the order of Holgate J. dated 23 December 2020, dismissing her claim for judicial review of the planning permission granted by the first respondent, Surrey County Council, for the retention and extension of the Horse Hill Well Site, near Horley. Ms Finch brought the challenge on behalf of the Weald Action Group. The planning permission was granted on 27 September 2019. The applicant for planning permission was the second respondent, Horse Hill Developments Ltd. The third respondent, the Secretary of State for Levelling Up, Housing and Communities, opposes the appeal. The intervener, Friends of the Earth Ltd., has made written submissions in support of Ms Finch; it had the same opportunity in the court below.

3. The task of the court in a claim such as this is only to decide the issues of law. Those issues cannot extend into the realm of political judgment – which is the responsibility of the executive, not the courts – or into the domain of policy-making, or into the substantive merits of the decision under challenge. They can embrace matters of law. But they cannot call into question the decision-maker's exercise of evaluative judgment, except where the principles of public law allow. All this is well-established. And as this court has made clear several times, it applies no less to cases whose subject matter concerns greenhouse gas emissions and climate change than it does to all others (see, for example, *R. (on the application of Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954, at paragraph 52; *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, at paragraph 2; and *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004; [2021] Env. L.R. 10, in particular at paragraphs 48 and 87).

The issues in the appeal

4. The single ground of appeal raises four issues. First, was the judge wrong to hold that the "true legal test" of whether an impact constitutes an indirect likely significant effect of the development on the environment is whether it is "an effect of the development for which planning permission is sought"? Secondly, was he wrong to hold that the EIA regulations are not directed at environmental impacts which result

merely from the consumption, or use, of an "end product" – for example, a manufactured article or a commodity such as oil, gas or electricity? Thirdly, was he wrong to hold that the EIA Directive and the EIA regulations did not require the assessment of "scope 3" or "downstream" greenhouse gas emissions arising from the combustion of the refined products of the oil which would be extracted by the development? And fourthly, was he wrong to hold that the county council's reasons for not requiring an assessment of those greenhouse gas emissions were lawful?

The legislative regime under the EIA Directive and the EIA regulations

5. In April 2014, amendments to the EIA Directive were made by Directive 2014/52/EU. Recital (13) of Directive 2014/52/EU stated that "it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) …". The EIA Directive was amended accordingly.

6. Recital (2) of the EIA Directive refers to the "precautionary principle". Recital (7) says that "[development] consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out".

7. Article 1(1) states that the EIA Directive "shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment". Article 1(2)(a) defines a "project" as meaning "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources". Article 2(1) requires member states to "adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment … are made subject to … an assessment with regard to their effects on the environment".

8. Article 3(1) states:

> "1. The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect significant effects of a project on the following factors:
> …".

Five factors are identified, including "(c) land, soil, water, air and climate".

9. Article 4(1) requires, subject to article 2(4), that projects listed in Annex I be made the subject of assessment in accordance with articles 5 to 10. Paragraph 14 of Annex I defines, as one of those types of project, the "extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500,000 cubic metres/day in the case of gas".

10. Article 5(1) states:

> "1. Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:
> …
>
> (b) a description of the likely significant effects of the project on the environment;
>
> (c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
> …".

Under article 5(1)(f) the developer is also required to provide the information specified in Annex IV, which includes an estimate of emissions which will be produced during the construction and operation phases (paragraph 1(d)) and a "description of the likely significant effects of the project on the environment" resulting from "the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)" (paragraph 5(f)). Paragraph 5 requires the description to cover, among other things, the direct effects and any indirect effects "of the project".

11. The EIA Directive was lawfully transposed into domestic law by the EIA regulations. Regulation 3 prohibits the granting of planning permission for "EIA development" unless an environmental impact assessment has been carried out for it. Under the EIA regulations, the process for environmental impact assessment includes the preparation of an "environmental statement" by the applicant for planning permission and the "reasoned conclusion [of the relevant planning authority] on the significant effects of the proposed development on the environment …". The authority must "integrate" that conclusion into its decision whether to grant planning permission (regulations 4 and 26). Paragraph 14 of Schedule 1 replicates paragraph 14 of Annex I to the EIA Directive in identifying the "[extraction] of petroleum and natural gas for commercial purposes" above specified amounts as EIA development.

12. Regulation 4(2) provides:

> "(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors –
> … ;
>
> (c) land, soil, water, air and climate;
> …".

13. By regulation 18(3), the environmental statement must contain, among other things, "(b) a description of the likely significant effects of the proposed development on the environment", "(c) a description of the likely significant effects of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment", and "(f)

additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected".

14. Paragraph 1 of Schedule 4 requires the environmental statement to provide "(d) an estimate, by type and quantity, of expected residues and emissions …" of the development. Under paragraph 4(1) it must describe "the factors specified in regulation 4(2) likely to be significantly affected by the development", which include "(c) climate (for example greenhouse gas emissions)". Paragraph 5 requires "[a] description of the likely significant effects of the development on the environment resulting from", among other things, "(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change". It also states that "[the] description of the likely significant effects on the factors specified in regulation 4(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development …".

15. Both in decisions of the Court of Justice of the European Union ("the CJEU") and in those of the domestic courts there is ample authority on the legislation governing environmental impact assessment. The relevant principles are familiar and not controversial. I shall mention only those bearing on the issues we have to decide. There are seven:

    (1) While a broad and purposive approach to the interpretation of the European Union legislation is appropriate, it must always respect the words actually used (see, for example, the judgment of the CJEU in *Brussels Hoofdstedelijk Gewest v Vlaams Gewest (The Brussels Airport Co. NV intervening)* (Case C-275/09) [2011] Env. L.R. 26, at paragraph 29; the judgment of Lord Sumption in *R. (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324, at paragraph 120; and the judgment of Moore-Bick L.J. in *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, at paragraph 19).

    (2) The legislation for environmental impact assessment is directed at a project of development. The concept of a "project" is one to which a broad interpretation should be applied (see the judgment of the CJEU in *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] E.C.R. I-5403, at paragraphs 31 and 39, and the first instance judgment in *R. (on the application of Catt) v Brighton & Hove City Council* [2013] EWHC 977 (Admin), at paragraphs 66 to 72).

    (3) An assessment of the "likely significant effects of the project on the environment" under the EIA Directive extends to the effects of the use of the works as well as their construction (see, for example, the judgments of the CJEU in *Commission v Spain* (Case C-227/01) [2005] Env. L.R. 20, at paragraphs 48 to 50, holding that a project to expand a railway by constructing additional track must be subject to environmental impact assessment, because the use of the expanded railway was likely to cause significant noise; in *Abraham v Wallonia* (Case C-2/07) [2008] Env. L.R. 32, at paragraphs 42 to

44, holding that the assessment for the expansion of an airport by works to improve its existing infrastructure, including the widening of the runways, which would enable it to be used more intensely, had to assess not only the impacts of the expansion itself – the works to be carried out – but also of the increased activity resulting from it; and in *Ecologistas en Accion - CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458, holding that the impacts of the use of an urban ring road, once improved, must be assessed, and not merely the impacts of the construction works; and the first instance judgment in *R. (on the application of Preston) v Cumbria County Council* [2019] EWHC 1362 (Admin); [2020] Env. L.R. 3, at paragraphs 46 to 49, holding that the assessment for a proposed temporary discharge pipe for a wastewater treatment plant must include not only the effects of the installation of the pipe but also those of its discharge into a river).

(4) Crucially, an environmental impact assessment must address the particular development under consideration, not some further or different project (see, for example, the Court of Appeal's decision in *Preston New Road Action Group and Frackman v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9; [2018] Env. L.R. 18, in particular the leading judgment at paragraphs 60 to 73, holding that the environmental impact assessment for the proposed exploration for shale gas was not legally required to include the effects of the potential later commercial extraction by fracking, for which a further planning permission would be required; and the first instance judgment in *R. (on the application of Khan) v Sutton London Borough Council* [2014] EWHC 3663 (Admin), at paragraphs 121 to 134, holding that the assessment for an energy recovery facility was not legally required to extend to the impact of combined heat and power pipelines running from the application site, which would have to be the subject of another application for planning permission; and cf. *Brown v Carlisle City Council* [2010] EWCA Civ 523; [2011] Env. L.R. 5, where the environmental statement for the development of a freight distribution centre at an airport did not include, as it should have done, an assessment of the effects of the associated improvements to the airport itself, which were part of the same project but the subject of a separate application for planning permission).

(5) The existence and nature of "indirect", "secondary" or "cumulative" effects will always depend on the particular facts and circumstances of the development under consideration (see the judgment of Sullivan L.J. in *Brown*, at paragraph 21; and the judgment of Laws L.J. in *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321; [2012] Env. L.R. 22, at paragraph 28).

(6) Where an environmental impact assessment has to address the "indirect" effects of a proposed development, it must include a sufficient assessment of such effects (see, for example, the decision of the Court of Appeal in *R. (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env. L.R. 36, at paragraphs 39 and 69 of the leading judgment, holding that the environmental impact assessment for an intensive poultry rearing development was defective because it failed properly to consider the impact of odour and dust produced by poultry manure spread on surrounding farmland).

(7) Establishing what information should be included in an environmental statement, and whether that information is adequate, is for the relevant planning authority, subject to the court's jurisdiction on conventional public law grounds (see the judgment of Sullivan J. in *R. (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29, at paragraphs 32, 33 and 41). The applicable standard of review has consistently been held to be the "Wednesbury" standard (see the judgment of the Supreme Court in *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52; [2021] PTSR 190, at paragraphs 142 to 145; the judgment of the Court of Appeal in *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, at paragraphs 136 to 144; the judgment of Coulson L.J. in *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179; [2021] PTSR 359, at paragraphs 53 to 55; the judgment of Laws L.J. in *Bowen-West*, at paragraphs 27 to 46; and the judgment of Lang J. in *R. (on the application of Friends of the Earth) v North Yorkshire County Council* [2016] EWHC 3303 (Admin); [2017] Env. L.R. 22 – otherwise known as *Frack Free Ryedale* – at paragraphs 21 to 23). The "Wednesbury" standard of review in its modern application has been elucidated by the Divisional Court (Leggatt L.J. as he then was, and Carr J. as she then was) in *R. (on the application of the Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 W.L.R. 1649 (at paragraph 98).

The development

16. As described in the county council's decision notice, the development for which planning permission was granted was this:

> "Retention and extension of an existing well site, HH1 and HH2 wells, and vehicular access to allow: the drilling of four new hydrocarbon wells and one water reinjection well; the construction of a process and storage area and tanker loading facility; new boundary fencing; well maintenance workovers and sidetrack drilling; and ancillary development enabling the production of hydrocarbons from six wells, for a period of 25 years".

17. This project for the commercial extraction of crude oil was to proceed in five defined phases, culminating in the site's restoration, and with a production period of about 20 years. The total amount of crude oil extracted in that period might be about 3.3 million tonnes. When the crude oil was brought to the surface, a quantity of natural gas would be produced, and this would be used to provide power for the site during the production phase. Provision would also be made for gas flaring in the event of an emergency and for maintenance. The crude oil would be taken by tankers to refineries for processing. Only once it had been refined would it become useable as fuel. Where the oil would be refined, and where the products of its refinement might be used, whether in the United Kingdom or elsewhere, it was not possible to say.

The environmental impact assessment

18. In October 2018, at the request of Horse Hill Developments, the county council adopted a scoping opinion for the environmental impact assessment. The scoping opinion stated (in paragraph 3.12) that "[direct] emissions associated with the construction and operation of the well site, and the consumption of fuel by vehicles, plant and equipment associated with the well site, would likely be small in scale, and whilst contributing to increased concentrations of greenhouse gases in the atmosphere could not be classed as significant in their own right"; and (in paragraph 3.13) "[the] direct emissions associated with the combustion of natural gas (methane) arising from the hydrocarbon extraction process, and the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant", and "[it] is acknowledged that the contribution of the proposed development would be modest when considered in a national or regional context". The "recommendation" (in paragraph 3.14) was that "[given] the nature of the proposed development, which is concerned with the production of fossil fuels, the use of which will result in the introduction of additional greenhouse gases into the atmosphere, … the submitted EIA include an assessment of the effect of the scheme on the climate", which "should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site".

19. In the environmental statement, which accompanied the application for planning permission when it was submitted in December 2018, the "scope of the assessment" of greenhouse gas emissions was "confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development" (paragraph 107). Paragraph 119 acknowledged that "in order to meet the UK's energy security needs, the Carbon Plan indicates that gas and oil will continue to play a valuable role as we make the transition to a low carbon economy", and that "[gas] will be needed over the coming decades both for heating and for electricity generation". The approach to assessing greenhouse gas emissions was explained in paragraphs 121 and 122:

> "121. The assessment considers direct releases of greenhouse gases consistent with all phases of the proposed development as described in detail within ES Chapter 4. The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by the facilities and process beyond the planning application boundary and outwith the control of the Site operators.
>
> 122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-makers should *'focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes'*. These non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes

> will operate effectively to avoid or mitigate the scope for material environmental harm."

The "Assessment Methodology" (in paragraph 123) identified the sources of greenhouse gas emissions in the proposed development: the combustion of diesel fuel in construction plant, in HGVs servicing the development, and in on-site engines and generation plant, and the combustion of natural gas. The conclusion (in paragraph 144) was that the direct greenhouse gas emission impacts of the development would be of "negligible" significance.

20. In June 2019, a review of the environmental statement was undertaken for the county council by its Principal Environmental Assessment Officer, Dr Jessica Salder, who had also been responsible for the scoping opinion. In her report of that review, she said (in paragraph 4.12) that the environmental statement had responded "in an appropriate and proportionate manner to the requirements of Regulation 4(2) and to the relevant parts of Schedule 4 of the EIA Regulations". Having referred (in paragraph 5.14) to the recommendation in paragraph 3.14 of the scoping opinion, she said (in paragraph 5.15):

> "5.15 The assessment presented in the submitted ES focusses on the direct greenhouse gas emissions of the development and operation of the proposed wellsite. The potential contribution of the hydrocarbons that would be produced over the lifetime of the wellsite is not covered in the submitted ES, the reasons for excluding those emissions are set out in paragraphs 121 and 122 … of the submitted ES. The [county council] accepts the argument set out in paragraphs 121 and 122 … of the submitted ES and the justification provided for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process."

21. In her witness statement dated 30 September 2020, Dr Salder refers (at paragraph 21) to greenhouse gas emissions "that could arise from the use of the products manufactured from the crude oil extracted from [the] proposed well site", which, she says, "would not be caused by the proposed well site development, but would arise in any event due to ongoing demand for and consumption of fossil fuels by a range of actors across the private, public, transport and domestic sectors …". She says (at paragraph 28) that "[the] main reason for agreeing that the distant downstream indirect GHG emissions associated with the processing and ultimate use of the crude oil produced from the well site could be reasonably excluded from the scope of the detailed assessment was that such processing and use lay beyond the control of the project to which the assessment related, as set out in paragraph 121 (p.35) of the submitted ES".

The officers' report to committee

22. When the application for planning permission was considered by the county council's Planning and Regulatory Committee on 11 September 2019, the committee had before it a lengthy report from its officers, recommending that planning permission be

granted. The report described the environmental impact assessment, but did not refer to Dr Salder's review. On greenhouse gas emissions, it said (in paragraph 97):

> "97. Greenhouse gas emissions and the climate – the question of the direct impacts of the proposed development on emissions of greenhouse gases and associated climate change is addressed in chapter 6 of the submitted ES. The question of the development's impact on climate change and global atmospheric composition is discussed in greater detail in paragraphs 102 to 162 of this report. On balance, and having taken account of the information and evidence submitted by all parties with an interest in the determination of the current planning application, the CPA has concluded that the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of greenhouse gases directly attributable to the implementation and operation of the scheme."

23. There followed a lengthy, general discussion of the need for hydrocarbons, domestic energy supply, and climate change, in their respective policy contexts. The officers considered these matters in some detail, though at a broad, strategic level. They referred to European Union climate change objectives, to the Climate Change Act 2008 and its later amendment, and to government policy on climate change (paragraphs 126 to 135). Under the heading "Need for Hydrocarbon Development", the officers acknowledged (in paragraph 159) that the Government had made it "clear that oil and gas remains an important part of the UK's energy mix", and that "[based] on the UK Government's current policy, it is … recognised that the proposed development would not be in conflict with the Government's climate change agenda". They referred (in paragraph 160) to government policies for planning and for energy, including the National Planning Policy Statement ("NPPF"), recognising the "need to maximise indigenous oil and gas resources both onshore and offshore", to which they were "required to give significant weight". They concluded (in paragraph 161) that it was "appropriate that identified reserves of on shore hydrocarbons are properly husbanded to make a valuable contribution by maximising energy recovery of indigenous supplies and contribute to the UK's energy sector and energy security", and (in paragraph 162) that "on the basis of Government guidance there is a national need for the development subject to the proposal satisfying other national policies and the policies of the Development Plan".

The judgment of Holgate J.

24. Holgate J. rejected the submission that anything "attributable" to a proposed development, including environmental impacts liable to result from the use and exploitation of a so-called "end product", should be assessed (paragraph 99 of the judgment). He recorded, and accepted, the "common ground" between the parties that "it is inevitable that oil produced from the site will be refined and, as an end product, will eventually undergo combustion, and that that combustion will produce [greenhouse gas] emissions" (paragraph 100). He identified the "true legal test" in this way (in paragraph 101):

> "101. … [The] fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development" on the site where the raw material will be produced for the purposes of exercising planning or land use control over that development. The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable. Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought. An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project"."

25. Under the regime for environmental impact assessment, the judge said, "[indirect] effects cover … consequences which are less immediate, but … must, nevertheless, be effects which *the development itself* has on the environment" (paragraph 110). He saw no support for Ms Finch's argument in decisions of the CJEU, in particular *Abraham* and *Ecologistas*, or in those of the domestic courts, including *Squire* and *Frackman* (paragraphs 114 to 125). In *Abraham* the "overall effects", including the use of the improved airport, could properly be regarded as effects of the development. And "the phrase "end product" was simply used by [the CJEU] to describe the *outcome* of the project". *Abraham*, he said, "cannot be taken as laying down any principle that an EIA should assess the environmental effects of the use by consumers of an "end product", that is an article or item sold or distributed from a processing facility using a raw material produced on the development site" (paragraph 115). The same applied to *Ecologistas* (paragraph 117).

26. He concluded (in paragraph 126):

> "126. The upshot is that the case law confirms that EIA must address the environmental effects, both direct and indirect, of the development for which planning permission is sought (and also any larger project of which that development forms a part), but there is no requirement to assess matters which are not environmental effects of the development or project. In my judgment the scope of that obligation does not include the environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed. I therefore conclude that, in the circumstances of this case, the assessment of [greenhouse gas] emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application."

27. In the alternative, on the assumption that his conclusion in paragraph 126 was wrong and that it was "legally possible under [the EIA regulations] for the assessment of [greenhouse gas] emissions from the use of refined oil products to fall within the scope of [environmental impact assessment] for the extraction development proposed at Horse Hill", the judge went on to consider whether the county council's decision was nevertheless a lawfully taken decision. It was, he said, "well established that the decision on whether such an assessment should be carried out as part of an EIA is a matter of judgment for the planning authority, subject to judicial review applying the *Wednesbury* standard, in particular irrationality", citing *Friends of the Earth Ltd.*, at paragraphs 142 to 145, and *Gathercole*, at paragraphs 53 to 55; and he observed that the "threshold for establishing irrationality in such circumstances is high …", citing *Newsmith Stainless Ltd. v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin); [2017] PTSR 1126 (paragraph 127). Paragraph 122 of the environmental statement had "explained why no assessment was being made of emissions from, for example, oil refineries". Neither that paragraph nor paragraph 121 had relied on "lack of control or the existence of other regulatory regimes to justify the non-assessment of [greenhouse gases] from the combustion of refined oil products" (paragraph 129). The county council's "real reason" for not assessing greenhouse gas emissions from the use of refined oil products – stated in paragraph 121 of the environmental statement and paragraph 5.15 of the review – was that "the essential character of the proposed development is the extraction and production of crude oil, and not the subsequent process of refining the crude oil at separate locations remote from Horse Hill, followed by the use of infrastructure and/or transport for the distribution of the end products, whether in the UK or elsewhere in the world". This explanation was "sufficient to deal with any suggestion of irrationality" (paragraph 131).

28. Holgate J.'s ultimately decisive conclusion, therefore, was this (in paragraph 132):

> "132. … [No] legal criticism can be made of [the county council's] focus on the land use and development proposed because that was the "project" which was the subject of the planning application and the related EIA. Viewed in that way it is impossible to say that [the county council's] judgement that [greenhouse gas] emissions from the combustion of refined fuels were not an environmental effect of the proposed development was, as a matter of law, irrational. [The county council's] judgment was not beyond the range of conclusions which rational decision-makers could lawfully reach."

The first issue – the "true legal test"

29. Mr Marc Willers Q.C., who appeared with Ms Estelle Dehon for Ms Finch, submitted that Holgate J. was wrong to conclude that under the EIA regulations the "true legal test" for an indirect likely significant effect of a development on the environment "is whether [it] is an effect of the development for which planning permission is sought". He had understood the concept of "the proposed development" too narrowly, and had not recognised the breadth of the concept of a "project" under the legislation. He had put a gloss on the EIA regulations, unduly restricting the meaning of "indirect" effects

to the effects of the operations for which planning permission was sought. Mr Willers referred to the Government's relevant guidance, revised in May 2020, which says that "the aim" of environmental impact assessment "is to protect the environment by ensuring that a local planning authority when deciding whether to grant planning permission for a project, which is likely to have significant effects on the environment, does so in the full knowledge of the likely significant effects …". Here, he submitted, the concept of "the proposed development" should be understood to include the extraction of the oil, for profit – its obvious commercial purpose, or "raison d'être". If the court were to adopt a test to determine whether an effect was an "indirect" effect of the proposed development, the right test was whether it was "reasonably foreseeable in light of current knowledge and methods of assessment, given the nature and purpose of the development, whether or not such an effect is within the developer's control".

30. In their written submissions on behalf of Friends of the Earth, Mr Paul Brown Q.C. and Ms Nina Pindham accepted that a simple "but for" test is too broad, and offered this alternative understanding of the concept of "indirect" effects in the legislation: "likely environmental effects more remote than direct effects (whether in time or location), but not so remote that they cannot be attributed to the development at all, having regard to the purpose, nature and any end product of the development, including the environmental impacts liable to result from the use and exploitation of the end product". And it is "then a question for the decision maker whether those are "significant"".

31. Persuasive though these arguments might seem if one imagines a larger role for environmental impact assessment than the legislation actually provides, they are in my view incorrect. They suggest an interpretation of the legislative scheme which would extend environmental impact assessment beyond the direct and indirect environmental effects "of the proposed development" itself to so-called "end products" far removed from that project, and lacking the kind of connection to it that has been seen as a prerequisite in the relevant case law of the CJEU and the domestic courts.

32. In this legislative context, as the case law shows, the concepts of "the proposed development" and the "project" are generally, and certainly in this case, interchangeable. They must be understood broadly, and realistically (see *Frackman*, in particular at paragraphs 63 to 68). Here, as is agreed, they must include the commercial activity of extracting crude oil from the site for export to refineries. This understanding corresponds to the relevant type of "project", identified in paragraph 14 of Annex I to the EIA Directive – the "extraction of petroleum and natural gas for commercial purposes …" and, in parallel terms, in paragraph 14 of Schedule 1 to the EIA regulations. It is consistent with the principle in CJEU and domestic authority that a wide interpretation should be applied to the concept of a "project" (see *Aannemersbedrijf PK Kraaijeveld BV*, at paragraphs 31 and 39, and *Catt*, at paragraphs 66 to 72). Clearly, both the construction of the oil wells and their use for the extraction of crude oil for commercial purposes come within the uniform concepts of "the proposed development" and "the project" in the legislation, just as the use of the additional runway capacity was held to be part of the project in *Abraham*, the use of the urban ring road in *Ecologistas*, and the discharge of treated sewage into the river in *Preston*.

33. This broad approach to the interpretation of the terms "the project" – in its double-limbed definition in article 1(2)(a) of the EIA Directive – and "the proposed development" is not predicated simply on the "purpose" of the project, as opposed to its physical and functional character. Naturally, a project is likely to embody the purpose behind it. But as Ms Harriet Townsend submitted for the county council, the "purpose" of a project does not in itself define what the project actually is, nor does it identify the environmental effects of that project requiring assessment under the legislation. References to the "purpose" of particular developments in the legislation and in the authorities should not be misconstrued in that way. Here, the extraction of crude oil for commercial purposes was the essential content and character of the proposed development. That was the project. The ultimate use of the products generated by the subsequent refinement of the crude oil was not part of that project. Nor, indeed, was the refinement process itself, which would be, in its own right, a separate and substantial industrial activity carried out for profit by the companies concerned. Nor were the distribution and sale of the refined products, which would also be separate commercial activities.

34. In *Frackman*, whatever the operator's commercial purposes may have been, the project itself was confined to exploration for shale gas (see the leading judgment at paragraphs 63 to 67). It did not include any subsequent commercial production, which would only follow, as "a second, distinct and different project – if, but only if, the exploration project proved the existence of a viable resource of gas". And "[that] possible future proposal would have to be considered on its own planning merits when the time came, in the light of the assessment contained in its own environmental statement" (paragraph 63). Anticipating what any future, separate project for extraction might comprise was "a matter of conjecture". In these circumstances it was "not only unnecessary, and inappropriate, for the environmental effects of that unknown development to be included in the EIA for the present project[; it] was also impossible" (paragraph 64). Any future project for extraction was merely "hypothetical" (paragraph 65). This court took the opportunity to reiterate two basic principles: first, that "the existence and nature of "indirect", "secondary" or "cumulative" effects will always depend on the particular facts and circumstances of the project under consideration", and second, "that an environmental statement is not expected to include more information than is reasonably required to assess the likely significant environmental effects of the development proposed, in the light of current knowledge …" (paragraph 67). Thus in a case where there would have to be a further and separate project, which would necessarily be subject to its own environmental impact assessment, and which could properly be said to bring about the environmental impacts in question, those impacts ought to be assessed at that later stage.

35. In the light of the relevant case law, it cannot be said that Holgate J. adopted too narrow an understanding of the concepts of the "proposed development" and the "project" in the legislation for environmental impact assessment. His interpretation was consistent with a true understanding of the definition of a "project" in article 1(2)(a) as "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources", and with the relevant and familiar jurisprudence. There is nothing in his judgment to suggest that he interpreted the term "the proposed development" in the EIA regulations as having a narrower meaning than the case law indicates. Though he did not set out the description of the proposed

development given in the county council's decision notice, there is no reason to think he overlooked the obvious fact that the project included the commercial extraction of crude oil for export to refineries. He did not confine his analysis, artificially, to the effects of executing the proposed works themselves – the operational development for which planning permission was required. He clearly had in mind the development in its entirety: its physical form, its use of the land, and how it would function.

36. Nor did he place an unjustified gloss on the relevant provisions of the EIA Directive and the EIA regulations. On a fair reading of his judgment, he was simply construing the legislation as it is drafted, without resorting to any gloss. This was consistent with the established approach to interpreting the EIA regulations (see *Bateman*, at paragraph 19). It gave prominence, as it should, to the provisions referring to the environmental effects "of the project" and "of the proposed development", which frame the requirements for environmental impact assessment in the EIA Directive and the EIA regulations and limit the scope of the legislative regime. The judge was right to stress the consistent phrasing of the relevant concepts in those terms.

37. One must remember that the process of environmental impact assessment is not an end in itself. It is a process with a specific procedure set out in the EIA Directive and the EIA regulations, and it must be carried out in accordance with that procedure. But it is, ultimately, a means of informing and strengthening a larger process, which is the process of determining an application for planning permission for "development" under the planning legislation (see the speech of Lord Hoffmann in *R. v North Yorkshire County Council, ex parte Brown* [2000] 1 A.C. 397, at p. 404). The regime is not intended to regulate the environmental effects of economic or commercial activity, or of the use of land, in general. It is only engaged when a grant of "development consent" for a particular project of development is necessary.

38. It is therefore unsurprising, indeed essential, that the legislation for environmental impact assessment explicitly and consistently requires only the assessment of effects "of the proposed development" or "of the project". That assessment is expected to assist the overarching process for "development consent" which it serves, and into which it is integrated – as is conspicuous, for example, in article 5(1)(c) of the EIA Directive and regulation 18(3) of the EIA regulations. To do this, it must be commensurate with the project itself. It is, as Ms Townsend submitted, "project-centric". Logically, this must apply not merely to the "direct … significant effects" of the development but also to significant effects which are "indirect". Therefore, as Mr Richard Moules submitted for the Secretary of State, to determine whether something is an "indirect" effect under the legislation for environmental impact assessment, the decision-making authority must ascertain whether it is truly an effect "of the proposed development". To come within the reach of the legislation, it must be identifiably an effect of the project in hand (see, for example, *Frackman*, at paragraph 68).

39. The "direct and indirect significant effects of a project" in article 3(1) of the EIA Directive, the "likely significant effects of the project" in paragraph 5 of Annex IV, the "direct and indirect significant effects of the proposed development" in regulation 4(2) of the EIA regulations and the "likely significant effects of the proposed development" in regulation 18(3)(b) do not need any paraphrase or gloss. In the absence of definitions in the legislation, they must be understood as they are expressed. Substituting terms such as "reasonably foreseeable [effects]" or "attributable [effects]" for the wording actually used is inapt. The concept of

"reasonable foreseeability" finds no place in the EIA Directive and the EIA regulations. Nor do the concepts of something being "likely to arise as a result of", or "attributable to", or "an inevitable result of", the proposed development. Nor does the concept of "but for" causation, which would connect a development to events very far along the chain of consequences away from it. Neither the words of the legislation nor the relevant authorities support any of these alternative concepts.

40. To conclude on this issue: if the "relevant planning authority" acts on a correct understanding of the legislation, the question of whether a particular impact on the environment is truly a "likely significant [effect]" of the proposed development – be it a "direct" or "indirect" effect – is ultimately a matter of fact and evaluative judgment for the authority.

41. The real question at issue here, therefore, is not the meaning of the concepts of "the project" and "the proposed development" as such, but the meaning of the concept of "effects", and in particular "indirect" effects, of that development. As the judge rightly emphasised (in paragraph 101 of his judgment), what needs to be considered by the decision-making authority is whether a particular environmental impact is "an effect of the development for which planning permission is sought". But this, I think, is not in itself a statement of the "true legal test". To say that the impact, to qualify for assessment, must be an effect of the development is only to pose the question in different terms. What needs to be considered is the necessary degree of connection that is required between the development and its putative effects.

42. In this case, though the project itself was confined to the construction and use of a working well site for the commercial extraction of crude oil for onward transport to refineries, the judge proceeded on the agreed basis that the eventual combustion of the refined products of the oil extracted at the site was "inevitable" – not merely "reasonably foreseeable" or "likely" or "possible", or the potential result of a future project that was itself only "a matter of conjecture" or merely "hypothetical". This being so, the county council had to establish whether, bearing in mind the intermediate stages which would necessarily have to occur before combustion could take place, the greenhouse gas emissions which would be generated in that way were properly to be regarded as "indirect" effects of the proposed development, or not. In the light of the relevant case law, I do not think this was simply a matter of law for the court. It was, I consider, a question for the county council to determine, subject to the scrutiny of the court on public law grounds. And as the relevant case law also makes plain, it is not the court's role in a claim for judicial review to substitute its own view for the planning authority's on a question of this kind (see *Plan B Earth*, at paragraphs 136 to 144).

43. Unlike the judge, while I agree with his interpretation of the relevant provisions of the legislation, I would not say – as he did (in paragraph 126 of his judgment) – that "in the circumstances of this case, the assessment of [greenhouse gas] emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the [environmental impact assessment] required by [the EIA regulations] for the planning application". I do not think it is possible to say that such an impact is legally incapable of being an environmental effect requiring assessment under the legislation. It follows that the outcome of the appeal, in my view, turns not on the legal possibility of a conclusion to that effect, but on the lawfulness of the decision the county council ultimately reached

that "scope 3" or "downstream" greenhouse gas emissions were not "indirect significant effects of the proposed development" – a decision which, in his alternative conclusion (at paragraph 132), the judge accepted was lawfully taken in any event.

The second issue – the environmental effects of the consumption or use of an "end product"

44. Mr Willers submitted, again with Mr Brown's support, that the judge was wrong to regard the EIA Directive and the EIA regulations as not extending to environmental effects resulting from the consumption or use of an "end product" – a manufactured article or a commodity such as oil, gas or electricity, or steel – ultimately resulting from a series of processes, of which the proposed development was the first. In *Abraham* the CJEU stated (at paragraph 43) that an environmental impact assessment must include "the environmental impact liable to result from the use and exploitation of the end product of [the proposed] works". In principle, it was submitted, "indirect" effects include the impacts of an "end product", and references to an "end product" in the case law do not mean only the development itself in its finished state. Here, according to Mr Willers, the corresponding "end product" was "oil".

45. I think this argument fails to confront the real question to which I have referred. The expression "end product" is not a term of art. It does not appear in the legislation. And when it occurs in the authorities it is not used to enlarge the concept of the likely significant environmental effects "of the proposed development" to include anything which might follow as a consequence of planning permission being granted and implemented for that development.

46. As the judge held (in paragraphs 115 and 117), in *Abraham* the phrase "end product" was used to describe the outcome of the project, which in that case included the use and operation of the airport as improved by the works of construction undertaken – in the French language version, "l'utilisation et l'exploitation des ouvrages issus de ces travaux". The CJEU's decision does not lay down a principle that an environmental impact assessment must assess the environmental effects of the use, by consumers, of a so-called "end product" in the form of something which is subsequently created, sold or distributed from a processing facility using a raw material produced on the application site. In fact, it consolidates the fundamental principle that only the likely significant effects of the project of development in question require to be assessed. The same may be said of the CJEU's judgments in *Ecologistas* and *Commission v Spain*. Not merely the construction work, but in *Ecologistas* the use of the whole urban ring road as improved (in the Spanish language version, "la utilización y la explotación de las construcciones resultantes de dichas obras"), and in *Commission v Spain* the use of the railway line as expanded, had to be assessed. In either case, this was the outcome of the proposed development itself, as completed and used.

47. In this case, if one regards the concept of an "end product" as it has been explicitly applied in the decisions of the CJEU, it extends to the operational well site as constructed, the use of the well site for the commercial extraction of crude oil, and its eventual restoration, which will be the ultimate outcome of the project under consideration. Conceptually, this clearly corresponds to the works of improvement to the airport and, in addition, the use of the airport as thus improved in *Abraham.*

48. No difference of approach is to be seen in the domestic authorities. Though the facts were quite different, the reasoning in *Squire* is consistent with that in *Abraham*, *Ecologistas* and *Commission v Spain* – as it is with other decisions of the domestic courts. The Court of Appeal held that an environmental impact assessment was defective because it failed to assess the environmental effects of a product incidental to the proposed development itself – the manure produced by chickens in the proposed poultry sheds, some of which would be sold to local farmers for storage and spreading on agricultural land. It was common ground in that case that such effects lay squarely within the "indirect" effects of that project of development. The production of manure and its storage and spreading, with the concomitant impacts of odour and dust, was clearly an outcome of the proposed development itself and its use. The claim for judicial review of the authority's decision to grant planning permission for the poultry buildings succeeded on appeal because in the view of this court the authority had failed, before proceeding to its decision, to secure an environmental impact assessment in which these obvious effects of the development proposed were fully and properly assessed (see paragraphs 62 to 69 of the leading judgment). The Court of Appeal did not take itself to be explicating the general meaning of the term "indirect significant effects". The question was only whether those effects had been lawfully assessed as effects of the proposed development.

49. Implicitly, therefore, the decision of this court in *Squire* acknowledges that environmental effects caused by the use of a by-product of the development under consideration – in that case a biological by-product – can be "indirect" effects of that development under the EIA regulations (paragraph 65 of the judgment). However, that decision does not establish that the EIA Directive and the EIA regulations necessarily compel the assessment of environmental effects resulting from the ultimate consumption or use of an "end product" in the sense contended for by Mr Willers, be it a manufactured article or a commodity, where those environmental effects are not actually effects "of the proposed development" itself.

50. Mr Willers submitted that in *Catt* the court did not treat the "end product" of the development as synonymous with its "outcome". I disagree. It was held in that case, following the CJEU's approach in *Abraham* (at paragraphs 42 to 44), that the process of screening must consider "not merely the likely effects of the works themselves but also the impacts liable to result from the use and exploitation of the development once constructed" (paragraph 72 of the judgment). The court recognised that off-site activities, carried out by third parties, may be "cumulative" indirect effects of the project (paragraph 73). However, the court's reasoning in that case is fully consistent with the reasoning in *Abraham*. It reinforces the point that the "end product" as referred to in *Abraham* meant the "outcome" of the project of development being undertaken.

51. Nor does Mr Willers' argument gain any force from the decision in *Preston*. In that case it was held to be necessary to assess the environmental effects of the use of the discharge pipe once installed. This also matches the approach indicated by the CJEU in *Abraham, Ecologistas* and *Commission v Spain*: that the effects of the use and operation of a completed development should be assessed, as well as the works to construct it. No other principle can be drawn from the reasoning there.

The third issue – the assessment of "scope 3" or "downstream" greenhouse gas emissions

52. Ms Dehon submitted that it was wrong to conclude, as the judge had done, that the EIA Directive and the EIA regulations did not require the assessment of "scope 3" or "downstream" greenhouse gas emissions arising from the use of the crude oil extracted from the site – because, as the judge put it, those effects arose from "consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed" (paragraph 126 of the judgment). Ms Dehon submitted, as did Mr Brown, that the county council was legally obliged to require an assessment of "scope 3" greenhouse gas emissions, and that its failure to do so was irrational.

53. There were four strands to this argument. First, in *Catt* it was acknowledged that however a "project itself is defined, the analysis required … may have to embrace a wider consideration of environmental effects" (paragraph 72). In this case there was a closer connection between the proposed development and the effects in issue than in other cases where assessment was held to be necessary, in particular *Squire*.

54. Secondly, Holgate J. was unduly concerned with the wide ramifications of imposing a duty on local planning authorities to require an assessment of "scope 3" greenhouse gas emissions. The "floodgates" would not be opened. The duty would only arise where the commercial extraction of hydrocarbons with a view to their refinement, sale and combustion as fuel was the "purpose" of the development, where the generation of such emissions would follow inevitably from the development, and where the likely effects on the environment would be "significant". As cases in several other jurisdictions show, this is not an outlandish approach, but orthodox.

55. Thirdly, impacts both beneficial and harmful, in unknown locations, depending on the acts of unknown third parties and partly attributable to the development proposed, are often assessed in environmental impact assessments. For example, the effects of new housing development on traffic, the economic impacts of commercial or industrial development and the effect of an out-of-town shopping development on a town centre or on employment in the locality were all routinely the subject of such assessment. Assessing the impact of "scope 3" greenhouse gas emissions is not impossible or difficult to do; there are methods for doing it.

56. And fourthly, this might be the only opportunity for the effects of such emissions to be assessed in an environmental impact assessment – unless it were done for the proposed development of a new oil refinery. Applying the "precautionary principle", and adopting a suitably broad and purposive approach to the interpretation of the legislation, the court should conclude that the effects of the greenhouse gas emissions which would be generated by the combustion of the refined products of the crude oil extracted at the application site must be assessed at this stage.

57. This is not an argument I can accept. It cannot be reconciled with the analysis I believe to be right on the previous two issues. The first difficulty it meets is that the decision to require or not to require an assessment of the impacts of "scope 3" greenhouse gas emissions potentially attributable to the ultimate use of the refined products of the crude oil extracted by the proposed development was one of fact and evaluative judgment for the county council as the "relevant planning authority",

challengeable only on "Wednesbury" grounds (see paragraph 15(7) above). To suggest, as an immutable general principle, that such emissions must always be regarded as "indirect" effects of a development for the production of "fossil fuels" – or that they can never be – is incorrect.

58. The relevant law is clear, familiar and well established. In *Friends of the Earth*, Lord Hodge and Lord Sales, with whom the other members of the Supreme Court agreed, approved the relevant parts of the respective judgments of the Court of Appeal (paragraphs 126 to 144) and the Divisional Court (paragraphs 401 to 435) in the preceding stages of the Heathrow third runway case. The Court of Appeal and the Divisional Court had approved the approach of Sullivan J. in *Blewett* (at paragraphs 32, 33 and 41). Lord Hodge and Lord Sales noted (in paragraph 142 of their judgment) that "*Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level". They went on to say (in paragraph 143) that "[as] Sullivan J. held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal ["Wednesbury"] principles". The Court of Appeal had observed in *Plan B Earth* (at paragraph 136) that "[the] authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind"; and the Divisional Court in *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin); [2020] PTSR 240 (at paragraph 434), that "decisions on the inclusion or non-inclusion in the environmental report of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan-making authority".

59. Both the Court of Appeal (at paragraph 127) and the Divisional Court (at paragraph 420) had also referred to this court's decision in *Bowen-West* – as did this court in *Frackman* (at paragraphs 67 and 73). In *Bowen-West* the central question for the court was whether the Secretary of State had been bound to treat certain proposals as involving or constituting "indirect, secondary or cumulative effects" of the existing proposal, under the EIA regulations (paragraph 7 of the judgment of Laws L.J.). Laws L.J. described the issue which the Secretary of State had to determine as "[first] and foremost, … an issue of fact" (paragraph 28). The views of the inspector and the Secretary of State "as the primary judges of fact" were, he said, "entitled to very considerable weight" (paragraph 29). He cited the observation of Sullivan L.J. in *Brown* (at paragraph 21) that "[the] answer to the question – what are the cumulative effects of a particular development – will be a question of fact in each case". He rejected an argument that the question of whether the effects of the larger scheme were cumulative effects of the smaller was one of law, and emphasised that "the texts are all consistent with the proposition that what are and what are not indirect, secondary or cumulative effects is a matter of degree and judgment" (paragraph 30), which he distinguished from "the obvious proposition that the meaning of a text is for the court to ascertain …" (paragraph 31). The question here, he said, was "quintessentially a matter of judgment" (paragraph 33). Relevant authority indicated

that "the conventional ["Wednesbury"] approach" applied (paragraph 39). The "merits issues" were "for the factual judgment of the Secretary of State", and his conclusions upon them were "not impeachable on any legal ground" (paragraph 45).

60. The essential question for the "relevant planning authority" in a case such as this, therefore, is whether there is, in fact, a sufficient causal connection between the project under consideration and a particular impact on the environment for that impact to constitute one of the "indirect significant effects of the proposed development". The fact that certain environmental impacts are inevitable may be relevant to the question of whether they are "effects of the proposed development". In some cases, the inevitability of those impacts might make it more likely that they are effects of the development. But it does not compel the conclusion that they are, in fact, such effects (see paragraphs 39 to 42 above). The notion that it does is misconceived. As Holgate J. said (in paragraph 101 of his judgment), "the fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development" on the site where the raw material will be produced …"; and "[an] inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project"".

61. In the particular circumstances of this case, at least, I do not think the impacts of "scope 3" greenhouse gas emissions from the subsequent combustion of the refined products of the crude oil extracted at the application site could only reasonably be regarded as "indirect significant effects of the proposed development" so that the county council's decision not to require their assessment under the EIA Directive and the EIA regulations was "Wednesbury" unreasonable. In my view that decision cannot be said to exceed the bounds of reasonable evaluative judgment on the facts here.

62. The judge went further. In the circumstances of this case he considered that the lack of connection between the proposed development and any "scope 3" greenhouse gas emissions made it impossible "as a matter of law" to regard those emissions as capable of falling within the assessment required by the EIA regulations for Horse Hill Developments' application for planning permission. That is the thrust of his conclusion in paragraph 126 of his judgment.

63. As I have said, I would not hold that this was impossible strictly "as a matter of law". But in my opinion the county council was clearly entitled to decide as it did in this case, as a matter of lawful evaluative judgment. Whether there was a sufficient causal connection between the proposed development and the impacts of "scope 3" greenhouse gas emissions was a classic question of fact and judgment for the decision-making authority. It was for the county council – not now to be second-guessed by the court – to decide whether, in addition to the assessment of greenhouse gas emissions generated on the application site, a further assessment should be required covering the impacts of the ultimate consumption of refined products of the crude oil extracted by the proposed development. The county council's decision not to require that additional assessment was, in my view, reasonable and lawful. This is the thrust of the judge's alternative conclusion in paragraph 132 of his judgment, with which I agree.

64. That conclusion, as I see it, is a true reflection of the guiding principles in the European Union and domestic case law. One of those principles is central. To require assessment under the legislation for environmental impact assessment, impacts on the environment must be effects "of the proposed development". They must have, in the decision-maker's judgment, a sufficiently close connection with that particular development to be at least indirect effects of it.

65. In this case I cannot agree with the submission that "scope 3" or "downstream" greenhouse gas emissions were sufficiently connected to the proposed development to create for the county council an effective obligation in law to require their assessment as indirect effects under the EIA Directive and the EIA regulations. They were not connected to the development in the same way as the impacts of the storage and spreading of the manure in *Squire*. In that case the manure was a product of the development itself in its operation as a poultry enterprise: a waste product with a commercial value. The connection between the development and the impacts in question was clear as a matter of fact, and not dependent on a series of intermediate processes. Here, by contrast, the crude oil extracted at the application site could only find its way to the various uses that might be responsible for the impacts in question once it had passed through several other distinct processes and activities, including, initially, its refinement, followed by the onward transportation and distribution of the refined products, and their eventual sale for use as fuel, which would only then, in various places at various times, produce emissions of greenhouse gases. The refinement of the extracted oil to render it useable as fuel was not part of the project. Neither was the future combustion of the refined products, or any infrastructure in which that might occur. As Ms Townsend submitted, decisions yet to be made "downstream" would determine how much of the oil would end up being combusted, and whether the economic demand for it would rise or fall. Moreover, there has been no suggestion that any of the environmental impacts resulting from the intermediate process of refinement ought to have been taken into account in the environmental impact assessment for the proposed development of crude oil extraction as if they were effects of that development. That is not part of the argument advanced for Ms Finch, or for Friends of the Earth. What is submitted, in effect, is that the county council could only reasonably conclude that environmental impacts several steps further away than refinement ought to have been assessed. That proposition is, in my view, untenable.

66. In the circumstances of this case, the county council's decision not to enlarge the assessment of greenhouse gas emissions to cover "scope 3" or "downstream" emissions as well as those caused by the development itself was legitimate. It had a reasonable and lawful basis for deciding not to insist on such an assessment here – which was that "scope 3" emissions were not, in truth, effects "of the proposed development" it was dealing with. In this case the environmental effects of such emissions could reasonably be seen as far removed from the proposed development itself, and not causally linked to it, because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions – remote enough, therefore, for the council lawfully to conclude that it did not qualify as one of the "likely significant effects of the proposed development" on the environment.

67. Whether in other cases, in different circumstances involving development for the extraction of hydrocarbons, "downstream" impacts might properly be regarded as

"indirect" effects on the environment, so that it would be reasonable and lawful for a local planning authority in those circumstances to require their assessment, is not a question we have to decide. The specifics of such projects will vary greatly from one kind of "fossil fuel" to another. The need for a wider assessment of greenhouse gas emissions may sometimes be appropriate, and possibly not contentious. One can imagine possible scenarios. But I do not think it would be helpful for us to set about inventing examples on hypothetical facts unrelated to the case before us.

68. It can make no difference to this understanding of the legislative regime for environmental impact assessment that the impacts of "downstream" greenhouse gas emissions might not come to be assessed under that regime at some later stage. This might be the only or last opportunity for the impacts of such emissions to be assessed. Or it might not. But as Holgate J. recognised, the legislation is concerned with the development of land and the environmental effects of that development and its operation. It was not conceived as a means of ensuring that every kind of impact on the environment, even an inevitable impact, is sooner or later assessed in an environmental statement regardless of any causal connection with a "proposed development" for which planning permission is sought and an environmental impact assessment required. Where there will or may be some further project which could properly be said to bring about the environmental impacts in question, those effects ought to be assessed at that later stage – as was held by this court in *Frackman*. But it does not follow that the converse is also true. The fact that a particular impact on the environment will not necessarily be assessed in the course of a decision-making process for another development in the future does not mean it must therefore be made the subject of environmental impact assessment now.

69. Holgate J.'s decision in this case has recently been referred to with approval, albeit obiter, by the Inner House of the Court of Session (the Lord President, Lord Menzies and Lord Pentland) in *Greenpeace Ltd. v Advocate General* [2021] CSIH 53; 2021 S.L.T. 1303 – a case concerning equivalent legislative provisions. There the court had to consider whether an environmental impact assessment for a project to exploit the Vorlich oil field in the North Sea by drilling and operating two wells ought to have included an assessment of the impacts of the later consumption of the extracted and refined oil. As it said (at paragraph 64), the ultimate consumption of oil and gas – once they had been extracted from the wells, transported, refined, and sold to and used by consumers – did not give rise to "direct or indirect significant effects of the relevant project". In the court's view, the "ultimate use of a finished product" was "not a direct or indirect effect of the project", and it was "that effect alone which, in terms of the Regulations, must be assessed". In agreement with the reasoning of Holgate J. in paragraph 101 of his judgment, the court went on to say that "[however] broad and purposive an interpretation of the Regulations or the Directive might be attempted, the clearly expressed wording of the legislation cannot be disregarded" (paragraph 65). It is "the effect of the project, and its operation, that is to be considered and not that of the consumption of any retailed product ultimately emerging as a result of a refinement of the raw material". The "parameters of what is to be assessed are defined by reference to the effects of the project" – which is "in contrast to cases in which the decision maker is formulating planning policy and is consulting on what is relevant ([*R. (on the application of Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin); [2019] PTSR 2209]) or where the relevance of ultimate use is not disputed ([*H.J.*

Banks & Co. Ltd. v Secretary of State for Housing, Communities and Local Government [2018] EWHC 3141 (Admin); [2019] Env. L.R. 20])". Holgate J.'s approach was not dissimilar to Lang J.'s in *Frack Free Ryedale* and was consistent with the Court of Appeal's in *Frackman* (paragraph 66). As the court also observed, however, the argument was in that case "academic"; it had not been maintained that the exploitation of the Vorlich field would increase, or even maintain, the current level of consumption of oil and gas (paragraph 68).

70. The remaining arguments on this issue can be dealt with shortly. Mr Elvin submitted that the regime for environmental impact assessment requires attention to be given to matters within the control of the developer. Thus, for example, the EIA regulations – in paragraph 8 of Schedule 4 – contemplate the possibility of a developer mitigating the environmental impacts of his development. This brings into play the general rule that planning conditions should not be imposed to require a result which the landowner is powerless to achieve (see, for example, *Davenport v Hammersmith and Fulham London Borough Council* (1999) 78 P. & C.R. 421, at p. 425), and the analogous principle that a section 106 obligation can only be required where there is a substantial connection with the proposed development itself (see *Aberdeen City and Shire Strategic Planning Authority v Elsick Development Company Ltd.* [2017] UKSC 60; [2017] PTSR 1413, at paragraphs 29, 30, 47, 48 and 61 to 63). I can see the force of that point. In principle, however, I do not accept that the level of "control" or lack of "control" which the developer would have over future occurrences off-site and the possibility or impossibility of his taking steps to avoid or mitigate harm to the environment, though it can be a relevant factor, will of itself determine whether those events are "indirect significant effects of the proposed development". The crucial question here, as Mr Elvin acknowledged, is whether the impact – be it harmful or beneficial – is sufficiently causally connected to the development to be an indirect effect of it under the legislation.

71. Ms Townsend submitted that it was uncertain whether the extraction of the crude oil at Horse Hill Well Site would in fact lead to a net increase in "scope 3" greenhouse gas emissions. Once sold, it would form an indistinguishable part of the oil market. The EIA regulations do not require the impossible (see *Frackman*, at paragraphs 72 and 73; and *Frack Free Ryedale*, at paragraphs 37 to 39). That is true. But again it is not, in itself, the crucial point. We can accept that it is scientifically possible to calculate a theoretical level of greenhouse gas emissions from the combustion of a given quantity of hydrocarbons (see, for example, *H.J. Banks*, at paragraphs 73 to 88). General estimates of the greenhouse gas emissions from the combustion of the refined products of the crude oil extracted by a particular development can be made, using the methodology in the Institute of Environmental Management and Assessment guidance. This was common ground before us. Whether the oil extracted from the development, once refined, distributed, sold and used, will be responsible for a net increase in global greenhouse gas emissions is a different question. Again, a reliable estimate is not impossible – as one sees, for example, in the decision of the Hague District Court in *Vereniging Milieudefensie and others v Royal Dutch Shell Plc* C/09/571932 (English version: HA ZA 19-379), which accepted the finding of UNEP's 2019 Production Gap Report that "studies using elasticities from the economics literature have shown that for oil, each barrel left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term" (paragraph 4.4.50). But none of this disturbs the reasoning that resolves the basic

question in this case – which is not whether an assessment of the impacts of "scope 3" greenhouse gas emissions was technically possible, but whether it was unlawful for the county council not to require such an assessment here.

72. We were shown several cases in other jurisdictions, European and non-European, which related, in one way or another, to projects of hydrocarbon extraction, in which courts have considered the legal implications, in various contexts, of the impacts of "downstream" greenhouse gas emissions. I shall touch on them only lightly – because, as was submitted by Ms Townsend, Mr Elvin and Mr Moules, none of them has any direct bearing on the legal issues in the case before us.

73. The proceedings in *Royal Dutch Shell* concerned the scope of the company's private law duty of care and its interaction with the European Union Emission Trading Scheme, the court holding that the company was obliged to reduce its CO_2 emissions in accordance with the "unwritten standard of care" laid down by the Dutch Civil Code. Important as the case undoubtedly is in the broader dynamic of environmental law, it did not require the court to grapple with the legislative requirements for environmental impact assessment.

74. The decision of the Norwegian Supreme Court in *Nature and Youth Norway and others v The Ministry of Petroleum and Energy*, 22 December 2020, HR-2020-2472-P (Case No. 20-051052SIV-HRET) concerned the validity of a royal decree granting petroleum licences in Norwegian marine areas in the Barents Sea. One of the issues was whether the prior opening decision for the award of petroleum production licences in Norwegian marine areas was in breach of the legislation for strategic environmental assessment. The opinion of the majority was that, at the stage in the licensing process at which a "plan for development and operation" would have to be approved, "it would have been up to the Ministry and the Government to decide whether it was appropriate to refer to and discuss the question of climate effects on a superior level – i.e. as part of the Norwegian climate policy – rather than addressing them in the individual environmental assessment" (paragraph 234). No issue arose on the proper ambit of environmental impact assessment.

75. In *Gray v Minister for Planning and others* [2006] NSWLEC 720, in a materially different legislative and factual context from the case before us, Pain J., sitting in the New South Wales Land and Environment Court, held, on the facts, that there was "a sufficiently proximate link" between the mining of a large reserve of thermal coal and the effects of burning that coal in coal-fired power stations, to require assessment of the effects of greenhouse gas emissions in the environmental assessment for the coal mine (see the judgment, at paragraphs 83 to 100, citing the decision of the Federal Court of Australia in *Minister for the Environment and Heritage v Queensland Conservation Council Inc.* [2004] FCAFC 190 that the Minister was under a duty to consider the impacts of the proposed construction of a new dam on the Dawson River upon downstream pollution by irrigators).

76. In *Gloucester Resources Ltd. v Minister of Planning and Another* [2019] NSWLEC 7, another decision of the New South Wales Land and Environment Court, Preston J. accepted (in paragraphs 486 to 513 of his judgment) that the impacts of "scope 3" greenhouse gas emissions should be assessed for the project of open cut coal mining which the court was considering in an appeal on the planning merits against the Minster of Planning's refusal of permission. The judge observed (in paragraph 503)

that such emissions are commonly understood to relate to "sold goods and services and thus caused by end users' use of the product (e.g. coal) produced by a project". It should be noted that he was considering that project in the light of a policy which required the assessment of downstream greenhouse gas emissions for hydrocarbon development.

77. We were also taken to the decision of the District Court of Columbia in *WildEarth Guardians v Zinke* 368 F. Supp. 3d 41, 73 (DDC 2019) holding that the United States Bureau of Land Management did not sufficiently consider climate change when making decisions under the Mineral Leasing Act, in a statutory context, under the National Environmental Policy Act, where the definition of "indirect" environmental effects refers to their being "reasonable foreseeable".

78. One can see how in each of those cases, in the specific legal context that arose, the court was able to reach the conclusions it did on the issues it had to decide. In my view, however, we can gain no assistance from them in resolving the issues in this appeal, which arise on different facts under the legislative regime for environmental impact assessment in this jurisdiction, construed in the light of the relevant case law of the CJEU and the domestic courts.

The fourth issue – "reasons"

79. Ms Dehon submitted that even if an authority's failure to require an assessment of the impacts of "scope 3" greenhouse gas emissions was not necessarily always unlawful in circumstances such as these, the county council's decision not to require such an assessment in this case was still bad in law. She argued that the reasons given for the decision betray its legal flaws. First, she submitted, the county council took into account immaterial considerations. Its decision not to require an assessment of the effects of greenhouse gas emissions was based, at least in part, on the fact that the use of the oil after extraction was "outwith the control of the Site operators", and on the existence of "non-planning" regimes to "regulate hydrocarbon development and other downstream industrial processes", which would "operate effectively to avoid or mitigate the scope for material environmental harm". Secondly, the county council had taken into account as a positive consideration, weighing in favour of the proposal, the need for the oil which was to be extracted and the contribution it would make to meeting the United Kingdom's energy needs, but not the negative impact that burning its refined products would have on global climate change. This, Ms Dehon submitted, was inconsistent to the point of unlawfulness.

80. I disagree with both submissions. The county council did not, in my view, rely on immaterial considerations in judging how far the environmental impact assessment for this project should go in assessing greenhouse gas emissions, nor was its decision otherwise unlawful.

81. The county council's reasons for deciding not to require assessment of "scope 3" emissions are to be seen in paragraph 5.15 of the review report and the relevant passages of the environmental statement to which reference was made. Paragraph 5.15 of the review report confirmed that "the argument set out in paragraphs 121 and 122 … of the [environmental statement] and the justification provided for excluding

consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process" was accepted. Paragraph 121 of the environmental statement says that the assessment covers the "direct releases of greenhouse gases consistent with all phases of the proposed development". It justifies this approach by stating that "[the] essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by the facilities and process beyond the planning application boundary and outwith the control of the Site operators". Paragraph 122 goes on to refer to the assessment methodology adopted, stating that this does not focus on the "control of processes or emissions where these are subject to approval under pollution control regimes", and that "[these] non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm".

82. No legal error can be discerned in the relevant conclusions of the review report and the passages in the environmental statement to which they refer. Those conclusions should be read in the spirit of realism with which the court reviews the decision-making of planning authorities (see *R. (on the application of Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at paragraphs 41 and 42; and *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893; [2018] PTSR 88, at paragraph 50). On a fair reading, they explain why the county council decided as it did. There is no suggestion in them, or anywhere else in the relevant material, that the county council believed it was bound as a matter of law not to require an assessment of "scope 3" greenhouse gas emissions in this case. They represent a professional officer's evaluative judgment on the question the county council had to decide – not a lawyer's attempt to state a principle or rule obviating the need for evaluative judgment. They engage with the question of whether or not, in the circumstances of this particular case, an assessment of "scope 3" greenhouse gas emissions should be required.

83. The question the county council had to consider was not a complex one. It was a matter of fact and judgment of the kind that planning authorities often have to decide. Did the environmental impact assessment for the proposed development of oil extraction have to extend to an assessment of the impacts of "scope 3" greenhouse gas emissions, or not? The answer was either "Yes" or "No" – "Yes" if, in the county council's judgment, these were likely significant effects of the proposed development, "No" if they were not. The county council had been alert to this question at least from the time when it issued the scoping opinion, indicating its initial stance that "[the] assessment should consider … the global warming potential of the oil and gas that would be produced by the proposed well site" (paragraph 3.14). Officers knew that it had to be resolved before the application for planning permission could be taken to committee.

84. An elaborate explanation for the county council's decision was not required. In the court below, as also before us, it was "common ground that the decision of a planning authority on the adequacy of the [environmental statement] and [environmental impact assessment] is not subject to a duty to give reasons under the [EIA regulations] or the EIA Directive" (paragraph 78 of Holgate J.'s judgment). In these

circumstances, if in reality the county council's decision not to require an assessment of "scope 3" greenhouse emissions was evidently founded on reasons which are legally sound, the decision itself may be presumed lawful. This presumption is not irrebuttable. It might be rebutted if the county council had demonstrably relied on other, illegitimate reasons in reaching its decision (see "De Smith's Judicial Review", eighth edition, at paragraph 5-131).

85. Taking that straightforward approach, one can see the essential and lawful basis for the county council's decision not to require an assessment of the impacts of "scope 3" emissions in this case. It was that in the county council's judgment such impacts were not, in fact, effects of the proposed development. As was stated in paragraph 5.15 of the review report, "[the] assessment presented in the submitted ES focuses on the direct greenhouse gas emissions of the development and operation of the proposed well site". Reading paragraph 5.15 of the review report together with paragraphs 107, 121 and 122 of the environmental statement, which explain why the only greenhouse gas emissions for which an assessment had been undertaken were the "direct releases" from the "the proposed development" itself, and why "scope 3" emissions had not been included, one can see that the county council had in mind, as it should, "[the] essential character of the proposed development". That is how it was put in paragraph 121 of the environmental statement. The "essential character" of the development was correctly described as being "the extraction and production of hydrocarbons". It was recognised explicitly, and again correctly, that this did "not extend to [the hydrocarbons'] subsequent use" by other facilities and processes. Inherent in this is the conclusion, as a matter of fact and judgment, that the necessary causal connection between the proposed development and the impacts of "scope 3" greenhouse gas emissions was absent in this case. And that conclusion provided a cogent and sufficient answer to the basic question which the county council had to decide, and had effectively set for itself when stating its provisional view in the scoping opinion. It was plainly an answer directed to the crucial point, which was whether or not the impacts under consideration were effects of the proposed development. This was all that had to be decided.

86. Did the other matters referred to in paragraphs 121 and 122 of the environmental statement invalidate the county council's decision not to require assessment of the impacts of "scope 3" greenhouse gas emissions? I do not think they did. The observation in paragraph 121, repeated by Dr Salder in her witness statement, that the "essential character of the proposed development … does not extend to [the hydrocarbons'] use by the facilities and process … outwith the control of the Site operators" is true as a matter of fact. Even if one ignores evidence given after the event and looks only at the contemporaneous documents, the meaning is clear. The reference to Horse Hill Developments' lack of "control" was, in context, to reinforce the point that "the proposed development" did not extend beyond extraction, to other facilities and processes, including refinement of the extracted crude oil, and therefore that the impacts of emissions from those facilities and processes were too remote from the proposed development to require assessment in the environmental statement.

87. There is no force in the complaint, directed at paragraph 122 of the environmental statement, that the county council wrongly relied on the existence of "non-planning" regulatory regimes as a reason for not requiring an assessment of the impacts of "scope 3" greenhouse gas emissions, however generated. The criticism is premised on

a misreading of what is actually said. Paragraph 122 does not change the explanation of the assessment given in paragraph 121. It emphasises the distinction referred to, in the passage it quotes from the NPPF, between the role of development control under the planning system and the "control of processes or emissions where these are subject to approval under pollution control regimes" (paragraph 183 of the NPPF). It also points out – as does government policy in the NPPF (ibid.) – that planning decision-makers can assume that those "non-planning regimes", where they apply to "hydrocarbon development and other downstream industrial processes", will work effectively. It does not, however, assert or imply that the existence of those regimes would of itself justify the non-assessment of any effects of the proposed development on the environment, direct or indirect. As Holgate J. held, it does not alter the justification for the non-assessment of "scope 3" greenhouse gas emissions given in paragraph 121.

88. One is left, therefore, with a proper explanation for the county council's decision not to insist on such an assessment. Terse as they were, the reasons are adequate and intelligible. And they do not expose any error of law.

89. I should add that there is no complaint about the conclusion in paragraph 144 of the environmental statement that the greenhouse gas emissions generated by the development itself would be of "negligible" significance. That conclusion is reflected in the officers' report to the county council's committee, which confirmed the county council's view "that the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of greenhouse gases directly attributable to the implementation and operation of the scheme" (paragraph 97). There was no need for the officers to refer in the committee report to the conclusion already reached that the impacts of "scope 3" greenhouse gas emissions were not "indirect" effects of the proposed development requiring assessment in the environmental statement.

90. Finally, I reject the submission, developed by Ms Dehon in reply, that the county council's decision-making was internally inconsistent and unreasonable in the "Wednesbury" sense. To demonstrate such unreasonableness is seldom easy for a claimant challenging a grant of planning permission (see the judgment of Sullivan J., as he then was, in *Newsmith Stainless Ltd.*, at paragraphs 6 to 8). The attempt to do so here fixes on the officers' report to committee, which – it is said – drew attention to the need to maximise indigenous oil and gas resources and the contribution the proposed development would make to meeting that need, but neglected the consequences for climate change. In my view, however, this was not a legal error in the officers' handling of the proposal.

91. In paragraphs 102 to 162 of their report the officers did not attempt a close examination either of the specific need for this particular development or of its possible implications for climate change. The relevant discussion was, throughout, at a broad strategic level. It has not been suggested, and could not be, that the officers ought to have omitted these matters from their consideration of the planning merits. The fact that the development would, in a general sense, help to meet a continuing national need for identified reserves of on-shore hydrocarbons to be husbanded was properly taken into account as a material consideration for the determination of the planning application, as were the relevant policies relating to climate change. However, there was no estimate of the precise contribution which the oil produced at

the site might make to the continuing national need for hydrocarbons, nor an assessment of the particular impacts, negative or positive, of using the refined products of that oil. That was not the level at which the officers discussed these matters.

92. I do not think there was any unlawful inconsistency, or divergence of approach, in the decision-making process as a whole. To take into account the general need for the hydrocarbons which would be produced by the proposed development and, under the policy in paragraph 205 of the NPPF, that "great weight" should be given the economic benefits of mineral extraction, was not logically or legally incompatible with a decision to exclude from the environmental impact assessment the impacts of "scope 3" or "downstream" greenhouse gas emissions from the burning of refined oil products. If, as I have concluded, the county council's decision not to require an assessment of "scope 3" greenhouse gas emissions in the environmental statement was taken in accordance with the legislation for environmental impact assessment and consistently with the relevant case law, that conclusion is not undone by the lawful treatment of need, at a general level, as a material consideration in determining the application for planning permission. In principle, there is nothing inconsistent, let alone "Wednesbury" unreasonable, in a planning authority taking into account a relevant planning need when considering the merits of the application for planning permission before it but not requiring the environmental statement to include an assessment of impacts which it lawfully judges to lie beyond the "direct and indirect significant effects of the proposed development". Contrary to Ms Dehon's submission, there was no unlawful failure here to "balance the scales".

Conclusion

93. For the reasons I have given I would dismiss the appeal.

94. I should add, finally, that I have had the benefit of reading in draft the dissenting judgment of Moylan L.J., and have sought to make plain why I respectfully disagree with the analysis it contains.

Lord Justice Moylan:

95. While I agree with much of what is set out in the judgment of the Senior President of Tribunals, I regret that I do not agree with his conclusion, with which Lewison LJ agrees, as to the lawfulness of Surrey County Council's decision in this case on the issue of greenhouse gas emissions. In my view, the conclusion, that the greenhouse gas emissions which would be caused by the use of the oil extracted from the Horse Hill Well Site were not relevant effects of that project or development and did not, therefore, have to be addressed in the Environmental Impact Assessment ("the EIA"), was legally flawed.

96. Although I appreciate that it is repetitive, in order to make my judgment self-explanatory, I propose to provide my own summary of the legal framework and of the

manner in which the EIA was addressed in this case, focusing on the reasons given by the county council to support their conclusion.

97. As set out in paragraph 1 of the Senior President's judgment:

> "The basic question in this case is whether, under Directive 2011/92 EU of the European Parliament and of the Council ("the EIA Directive") and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA regulations"), it was unlawful for a county council, as mineral planning authority, not to require the environmental impact assessment for a project of crude oil extraction to include an assessment of the impacts of greenhouse gas emissions resulting from the eventual use of the refined products of that oil as fuel."

The key issue is whether the county council's implicit conclusion, that the "inevitable" greenhouse gas emissions which would be produced through the use of the oil extracted at the site were not a relevant effect of the development, was legally flawed. As I seek to explain below, I consider that the county council's reasons for concluding that such emissions were not effects of the extraction of oil for commercial purposes from the Horse Hill Well Site are legally flawed. The EIA does not, therefore, comply with the requirements of the EIA Directive and the EIA regulations and planning permission cannot lawfully be granted.

Legal Framework

98. The EIA Directive and the EIA regulations apply, as set out in article 1(1) of the EIA Directive, "to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment".

99. The EIA Directive applies to a "project"; the EIA regulations apply to a "development". They are clearly synonymous words. There is no definition of "development" in the EIA regulations, but "project" is defined in article 1(2)(a) of the EIA Directive:

> "'project' means:
>
> - the execution of construction works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".

100. Projects/developments are divided, in summary, into those in respect of which an EIA is required and those in respect of which it may be required. The former are set out in Annex I of the EIA Directive and Schedule 1 of the EIA regulations. This is because, as set out in article 2(1) of the EIA Directive, such projects:

> "likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a

> requirement for development consent and an assessment with regard to their effects".

They include a project or development which involves:

> "(14) Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500,000 cubic metres/day in the case of gas."

101. Projects/developments which may require an EIA are set out in Annex II of the EIA Directive. Under article 4(2) of the Directive, Member States are required to determine whether the projects listed in Annex II are to be subject to an EIA either on a "a case-by-case examination" or by reference to "thresholds or criteria set by the Member State". Schedule 2 of the EIA regulations takes the latter approach by setting out the applicable thresholds and criteria for each type of development. In some circumstances, it is "All development" but in most it is by reference to the scale of the development.

102. The Schedule 2 developments include, under the heading of "Extractive Industry":

> "(d) Deep drillings … [when] the area of the works exceeds 1 hectare";

and

> "(e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale (when the) area of the development exceeds 0.5 hectare."

I have referred to the inclusion of the latter in Schedule 2 because, in my view, this emphasises that the essence of the development, with which this case is concerned, which warrants its inclusion in Schedule 1 is *the extraction of petroleum for commercial purposes* (above the stipulated amount) and not the surface installations ancillary to this extraction or that it involves deep drilling.

103. The EIA Directive was amended in 2014. These amendments are, in my view, significant for the present case because, as explained in the recitals, they were in part driven by the need for climate change to become one of the "important elements in assessment and decision-making processes". The recitals in the 2014 Directive included:

> "(7) Over the last decade, environmental issues, such as resource efficiency and sustainability, biodiversity protection, climate change, and risks of accidents and disasters, have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes";

and:

> "(13) Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change";

and:

> "(31) The environmental impact assessment report to be provided by the developer for a project should include a description of reasonable alternatives studied by the developer which are relevant to that project, including, as appropriate, an outline of the likely evolution of the current state of the environment without implementation of the project (baseline scenario), as a means of improving the quality of the environmental impact assessment process and of allowing environmental considerations to be integrated at an early stage in the project's design."

Neither climate change nor greenhouse gas emissions had expressly featured in the EIA Directive as originally formulated.

104. Planning permission cannot lawfully be granted in respect of developments within Schedule 1 or 2 "unless an EIA has been carried out in respect of that development": regulation 3 of the EIA regulations.

105. An EIA, by article 3(1) of the EIA Directive and regulation 4(2) of the EIA regulations, "*must* identify, describe and assess in an appropriate manner … the direct and indirect effects of a project" on "(c) land, soil, water, air and climate" (my emphasis).

106. Article 5, which deals with the information to be provided by the developer, was amended by the 2014 Directive so as to be more prescriptive as to the information required in an EIA. This is reflected in regulation 18(3) and Schedule 4 of the EIA regulations. Regulation 18(3) provides that an ES must include "at least" certain specified information, such as, at (a), "a description of the proposed development comprising information on the site, design, size and other relevant features of the development" and, at (b), "a description of the likely significant effects of the proposed development on the environment". In addition, the ES must include:

> "(f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected."

107. Schedule 4 of the EIA regulations sets out the "Information for Inclusion in Environmental Statements". These include, at paragraph 5:

> "A description of the likely significant effects of the development on the environment resulting from, inter alia:

> (a) the construction and existence of the development, including, where relevant, demolition works;
>
> …
>
> (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;
>
> The description of the likely significant effects on the factors specified in regulation 4(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project, including in particular those established under Council Directive 92/43/EEC and Directive 2009/147/EC."

Paragraph 5(f), which sets out wording added by the 2014 Directive, shows that the "impact of the project on climate" is a specific category of its own which goes beyond the effects from "the construction and existence of the development" and which expressly includes its impact on climate because of "the nature and magnitude of greenhouse gas emissions". The concluding words at the end of paragraph 5 were previously in a footnote and perhaps gain some additional emphasis by being included in the body of this provision: they are *very* broad and, clearly, intentionally very broad.

108. It can be seen, therefore, that the amendments implemented in 2014, for the reasons explained in the recitals, introduced a specific and increased focus on climate change and greenhouse gas emissions and emphasised the breadth of the required "description of the likely significant" direct and indirect effects of a development.

109. An EIA which "is deficient in its lack of a proper assessment of the environmental impacts of … an indirect effect of the proposed development … [is] not compliant with the requirements of the EIA Directive and the EIA regulations": Lindblom LJ, *R. (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env. L.R.835, at [69].

110. It is clear, as referred to by the Senior President at paragraph 15(1), "that a broad and purposive approach to the interpretation of the European Union legislation is appropriate". It is also well-established, as noted by Advocate General Kokott in *Abraham v Wallonia* (Case C-2/07) [2008] Env. L.R. 66, at [58], that the EIA Directive "has a very wide scope and a very broad purpose": see also, the judgment of the court in *Abraham*, at [32] and in *Ecologistas en Accion - CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458, at [28]. This means, as stated by Advocate General Kokott in *Abraham*, at [31], that "the notion of indirect effects is to be construed broadly and in particular includes the effects of the operation of a project".

111. The last point, namely the effects of the operation of a project, was reiterated in the court's judgment in *Abraham*. After repeating, at [42], that "the scope of [the Directive] is wide and its purpose very broad", the court went on to say:

> "[43] It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.
>
> [44] Moreover, the list laid down … of the factors to be taken into account, such as the effect of the project on human beings, fauna and flora, soil, water, air or the cultural heritage, shows, in itself, that the environmental impact whose assessment Directive 85/337 is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out."

This broad analysis reflects the broad approach which must be applied to the application of the EIA Directive. As a result, the effects of a development on the environment extend to the effects of the use of the proposed works, such as the use of a modified airport or the use of a refurbished and improved ring road.

112. Mr Willers and Ms Dehon submitted that the equivalent in the present case is "the use and exploitation" of the extracted oil. This is based on that use being the very essence of the development and also being the "commercial" purpose for which it is extracted. Accordingly, they submitted that its "inevitable" combustion is an "impact of the project to be carried out" and that to exclude that effect would similarly be "simplistic and contrary to" a proper application of the wide scope and purpose of the EIA Directive.

113. I recognise, of course, that there are well-established limits to the nature of the court's review when considering whether an administrative decision is legally flawed. I would quote, just by way of example, what Leggatt LJ and Carr J (as they each then were) said in *R. (Law Society) v Lord Chancellor* [2019] 1 W.L.R. 1649, at [98]:

> "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of

> irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044."

Facts

114. In its scoping opinion, the county council recommended, at paragraph 3.14:

> "Given the nature of the proposed development, which is concerned with the production of fossil fuels, the use of which will result in the introduction of additional greenhouse gases into the atmosphere, it is recommended that the submitted EIA include an assessment of the effect of the scheme on the climate. That assessment should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site"."

115. The environmental statement ("the ES") produced by Horse Hill Developments stated in the section dealing with "Greenhouse Gas Emissions and The Climate", at paragraph 107, that:

> "The scope of the assessment is confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development."

The fact that the ES was only dealing with "direct releases of greenhouse gases from within the well site" was explained as follows:

> "121. The assessment considers direct releases of greenhouse gases consistent with all phases of the proposed development as described in detail within ES Chapter 4. The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by the facilities and process beyond the planning application boundary and outwith the control of the site operators.
>
> 122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-

> makers should 'focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes'. These non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm."

116. It can be seen, first, that greenhouse gas emissions, other than those released "from within the well site boundary", are wholly excluded from the assessment. Secondly, the reasons for this are set out in paragraphs 121 and 122 and comprise two or three elements. The first reason, or the first two reasons, as set out in paragraph 121, are based on the "essential character of the proposed development [being] the extraction and production of hydrocarbons". As a result, the proposed development "does not extend to [the] subsequent use" of those hydrocarbons because that use (a) is by "facilities and process beyond the planning application boundary" and (b) is "outwith the control of the site operators". The second or third reason is set out in paragraph 122. Here the justification for confining the assessment to direct releases is that "decision-makers can assume" that other non-planning, pollution control, regimes "will operate effectively to avoid or mitigate the scope for material environmental harm".

117. The ES was reviewed by the county council, as referred to by the Senior President at paragraph 20. Dr Salder concluded:

> "5.15 The assessment presented in the submitted ES focusses on the direct greenhouse gas emissions of the development and operation of the proposed wellsite. The potential contribution of the hydrocarbons that would be produced over the lifetime of the wellsite is not covered in the submitted ES, the reasons for excluding those emissions are set out in paragraphs 121 and 122 … of the submitted ES. The [county council] accepts the argument set out in paragraphs 121 and 122 … of the submitted ES and the justification provided for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process."

It can be seen that the county council accepted that the reasons given in the ES justified the absence of any assessment of the impact on climate of the greenhouse gas emissions which would be produced through the use of the oil extracted at the site. This must mean that it was accepted, for the reasons given in paragraphs 121 *and* 122, that these emissions did not comprise indirect or secondary effects of the development within the scope of paragraph 5 of Schedule 4 of the EIA regulations.

118. The officers' report stated:

> "97. Greenhouse gas emissions and the climate – the question of the direct impacts of the proposed development on emissions of greenhouse gases and associated climate change is addressed in chapter 6 of the submitted ES. The question of the

> development's impact on climate change and global atmospheric composition is discussed in greater detail in paragraphs 102 to 162 of this report. On balance, and having taken account of the information and evidence submitted by all parties with an interest in the determination of the current planning application, the CPA has concluded that the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of greenhouse gases directly attributable to the implementation and operation of the scheme."

Again, it can be seen that the extent of the assessment is on the "direct impacts of the proposed development on emissions and associated climate change". The paragraphs mentioned, 102 to 162, do not, as suggested, in fact contain any further assessment "of the development's impact on climate change". We are, therefore, taken back to, and left with, the reasons given in chapter 6 "of the submitted ES", namely paragraphs 121 and 122 as set out above.

119. In summary, I repeat, it is clear that the county council's decision was based on the conclusion that the greenhouse gas emissions which would be produced through the use of the oil extracted at the site were not effects of the development.

The judgment of Holgate J

120. At the outset of his judgment, Holgate J set out the nature of the dispute:

> "The ES assessed the GHG that would be produced from the operation of the development itself. However, this challenge concerns the non-assessment by the ES of the GHG that would be emitted when the crude oil produced from the site is used by consumers, typically as a fuel for motor vehicles, after having been refined elsewhere. The issue … arises in a very striking manner in the present case. It is agreed that once the crude oil produced from the development is transported off site it enters, in effect, an international market and the refined end product could be used anywhere in the world, far removed from the Surrey Weald."

121. I also set out, what I regard as being, two key findings made by Holgate J. First, he found:

> "[69] It is not possible to say at this stage where the oil produced would be refined or subsequently used. It could be refined and used in the United Kingdom or exported and then refined and used abroad. It might be refined overseas and then imported back into the UK."

Secondly, he set out, at paragraph 100, that it was:

> "common ground [that] it is *inevitable* that oil produced from the site will be refined and, as an end product, will eventually

> undergo combustion, and that that combustion will produce GHG emissions." (my emphasis)

122. In paragraphs 127 to 133, Holgate J set out his reasons for concluding, that "the reasons accepted in SCC's review of the ES" (namely, paragraphs 121 and 122) "for not requiring an assessment of GHG from the combustion of refined oil products", did not disclose an error of law. I set out his analysis of the reasons adopted by the county council in full:

> "[128] … In summary, HHDL stated and SCC accepted that the essential character of the proposed development of the site is for the extraction and production of hydrocarbons. The character of that land use did not include subsequent processing, distribution, sale and consumption of end products.
>
> [129] The ES went on to refer to national policy stating that the planning system should focus on land use issues rather than the control of process or emissions for which there are other specific regulatory regimes. This part of the reasoning was based upon inter alia paragraph 183 of the NPPF and case law such as *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1994] Env. L.R. 37 and *R (An Taisce, the National Trust for Ireland) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin); [2015] PTSR 189, summarised by Gilbart J in *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin). Paragraph 122 of the ES makes it clear that it was only referring to "hydrocarbon development and other downstream industrial processes" as being regulated by pollution control regimes. In other words, this passage in the ES explained why no assessment was being made of emissions from, for example, oil refineries. Likewise, the reference at the end of paragraph 121 to "facilities and process" beyond the site boundary and outwith HHDL's control should be understood in that same sense. It is plain that the ES did not rely upon lack of control or the existence of other regulatory regimes to justify the non-assessment of GHG from the combustion of refined oil products. The same applies to SCC's acceptance of that reasoning in paragraphs 121 to 122 of the ES.
>
> [130] The claimant's challenge does not relate to the non-assessment of GHG emissions once the crude oil has left the site, except for those arising from the consumption of the end products. There is no challenge to the non-assessment in the ES of GHG from, for example, the process of refining. Accordingly, once paragraphs 121 to 122 of the ES are read properly, the criticism made of the reliance placed upon lack of control and alternative regulatory regimes falls away.

> [131] We are left with the real reason given in paragraph 121 of the ES and paragraph 5.15 of the ES Review for non-assessment of GHG emissions from the use of refined oil products. This was that the essential character of the proposed development is the extraction and production of crude oil, and not the subsequent process of refining the crude oil at separate locations remote from Horse Hill, followed by the use of infrastructure and/or transport for the distribution of the end products, whether in the UK or elsewhere in the world. That explanation is sufficient to deal with any suggestion of irrationality. But it is further supported by the broad thrust of the elucidation of her contemporaneous thinking (as it was described by Mrs Townsend for SCC at the hearing) in paragraphs 15 to 31 of Dr Salder's witness statement."

123. As can be seen, Holgate J considered that, "read properly", the ES "did not rely upon lack of control or the existence of other regulatory regimes to justify the non-assessment of GHG from the combustion of refined oil products". The "real reason" for the non-assessment was "that the essential character of the proposed development is the extraction and production of crude oil".

Conclusion

124. I do not propose to repeat the submissions made on behalf of the parties as these are summarised in the Senior President's judgment.

125. The development in this case is one which requires an EIA because it involves the extraction of petroleum for commercial purposes in an amount which exceeds that stipulated in the EIA Directive and the EIA regulations (paragraph 14 of Schedule 1). The specific features, therefore, of this type of development which warrant its inclusion in Schedule 1 (and Annex I) are the volume of petroleum/oil which will be extracted and that it is extracted for commercial purposes. I appreciate, of course, that the scale of a development may well reflect the volume of oil being extracted but, as referred to above, "Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale", when the "area of the development exceeds 0.5 hectare", are included separately within Schedule 2, as are "Deep drillings" when "the area of the works exceeds 1 hectare".

126. Although this case is, of course, concerned with planning permission for what Holgate J referred to, at [128], as "land use", the critical elements of that use in the present case are, as referred to above, the extraction of oil and its extraction for commercial purposes. As is made clear in *Abraham*, at [45], the EIA is designed to take into account "not only the impact of the works envisaged but also, and *above all*, the impact of the project to be carried out" (my emphasis). The relevant question, in my view, is what is the impact of the extraction of oil for commercial purposes?

127. The key elements of the present development, the "Extraction" of "petroleum" exceeding 500 tonnes per day for "commercial purposes", have to be considered together with the obligation, set out in paragraph 5 of Schedule 4, to describe the development's impact on climate including, expressly, "the nature and magnitude of greenhouse gas emissions". When these elements are viewed collectively, in my

view, applying the requisite broad and purposive approach, they point strongly towards the impact of the development, or an effect of the development, being the greenhouse gas emissions resulting from the "inevitable" commercial use of the oil. Accordingly, I consider that there is significant force in the submission that the use of the extracted oil in the present case is to be equated with the use of a modified airport (*Abraham*) or of an improved urban ring road (*Ecologistas*) or of a discharge pipe (as in *R. (on the application of Preston) v Cumbria County Council* [2019] EWHC 1362 (Admin); [2020] Env. L.R. 3).

128. That is why, in respectful disagreement with what the Senior President says at paragraph 47, I do not consider that the "end product" of the development in this case is confined to, or even focused on, "the operational well site, its use and its eventual restoration". The focus of this development is not "construction works" or "other installations", as referred to in article 1(2)(a) of the EIA Directive, but is an intervention involving the "Extraction of petroleum" for "commercial purposes". The key nature of the development, its essential character, is the extraction of oil for commercial purposes. That *is* the project. In my view, the relevant or applicable "outcome" (as referred to by the Senior President in paragraphs 46 and 47) of the extraction of oil for commercial purposes is the use of that oil.

129. Although I do not go as far as concluding that, as a matter of law, such emissions are necessarily required to be assessed in an EIA. There might be reasons why, in the particular circumstances of a development, they do not have an impact on climate. I, therefore, agree with the Senior President and Lewison LJ that it is a matter to be determined by the county council. However, having regard to what I see as being the context of this case as set out above, it seems to me that cogent reasons would be required to exclude from assessment, the inevitable effects (the greenhouse gas emissions) of the downstream use of the oil.

130. Against that background, I now turn to explain why I have concluded that the reasons given by the county council, for deciding that such emissions were not an effect of this development, were legally flawed.

131. First, I do not agree with Holgate J's analysis of those reasons. Essentially, he decided, as referred to above, that there was only one reason, namely "the essential character of the proposed development". I read paragraphs 121 and 122 differently and, as set out above, in my view they contain two or three reasons.

132. As to paragraph 122, I also respectfully differ from the Senior President's analysis in paragraph 87. In my view, paragraph 122 contains a distinct factor relied on by the county council as supporting the assessment being confined to direct releases of greenhouse gases from the site. Paragraph 5.15 of the Environmental Review Statement refers to both paragraphs as containing "the justification … for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process".

133. The reason advanced in paragraph 122 is factually inaccurate and does not provide the suggested justification. This is because there was no factual basis for the county council, as the decision-maker, to "assume that [non-planning regimes] will operate effectively to avoid or mitigate the scope for material environmental harm". As set out in Holgate J's judgment, I repeat:

> "[69] It is not possible to say at this stage where the oil produced would be refined or subsequently used. It could be refined and used in the United Kingdom or exported and then refined and used abroad. It might be refined overseas and then imported back into the UK."

134. The reasons contained in paragraph 121 comprise (a) the fact that what happens to the oil is "outwith the control of the Site operators" and (b) the fact that the development does not include "the subsequent use" of the oil "beyond the planning application boundary". I also consider that these reasons are legally flawed.

135. First, I do not consider that the question of whether something is or is not an effect of a development, particularly in respect of climate change, depends on whether it is "outwith the control of the Site operators". The issue is not one of control but of the effects of a development which may well be outside the control of the developer.

136. Secondly, I also do not consider that the fact that the oil will be processed and used by others outside the site boundary means that that use is not an effect of the extraction of the oil. Petroleum and natural gas once extracted will always require processing before they can be used and, in my view, it would be surprising if that fact alone meant that no EIA was required in respect of downstream greenhouse gas emissions. To exclude them for that reason would not, in my view, resonate with the CJEU's approach in *Abraham*, at [43]. Adapted to this case, I consider that it would be contrary to the wide scope and broad purpose of the EIA Directive not to assess the environmental impact which will *inevitably* result from the use and exploitation of the extracted oil simply because it will be processed by others at a different location.

137. In my view, as submitted by Mr Brown, Holgate J was wrong when he considered that, at [131], the "essential character of the proposed development" and, at [132], the nature of "the land use" supported the county council's decision not to require an assessment of the greenhouse gas emission which would be caused by the use of the extracted oil. First, even if the essential character is correctly described as "the extraction and production of crude oil", I do not consider that this means that the subsequent use of the oil, once refined, cannot be an effect of the development. Further, as referred to above, I would describe the essential character of the development as being (a) the extraction of oil and (b) its extraction *for* commercial purposes.

138. In my view, for the reasons given above, it would require cogent reasons to exclude from assessment the environmental effects, including "on climate", of the manner in which the oil will be used when that is the commercial purpose of its extraction. The subsequent process of refining and the subsequent combustion do not, as the county council considered and Holgate J determined, provide justification for the non-assessment of greenhouse gas emissions. On the contrary, the oil's refinement and combustion are, in the present case, the commercial purpose of its extraction and provide justification for such an assessment. In other words, I do not consider that the effects of the extraction of the oil for commercial purposes stop at or with its extraction or with its processing at a refinery somewhere in the world. A broad, purposive approach to the interpretation of the provisions applicable in this case points strongly towards their application not being so limited. As Mr Brown submitted, it is not difficult to describe the combustion of material obtained from a

development whose sole purpose is to obtain that material for combustion as being an environmental effect of the development.

139. Accordingly, I have come to a different conclusion to that set out by the Senior President in paragraph 85. In my view, applying the same analysis, the reasons adopted by the county council do not support the conclusion that "scope 3" emissions were not indirect effects of the proposed development. They do not support the conclusion that "the necessary causal connection between the proposed development and the impact of 'scope 3' greenhouse gas emissions was absent in this case". In my view, adopting words from *R. (Law Society) v Lord Chancellor*, the decision to exclude from assessment all but the direct releases of greenhouse gas emissions from within the well site boundary was based on demonstrable flaws in the reasoning such that the decision is legally flawed. Putting it another way, the fact that the EIA failed to identify, describe and assess the "scope 3" or "downstream" greenhouse gas emissions which *will* be produced through the commercial use of the oil extracted from the well site means that the EIA failed to assess the relevant and required effects of the proposed development. As a result, the EIA does not comply with the requirements of the EIA regulations and planning permission cannot lawfully be given.

140. In conclusion, for the reasons set out above, I would allow the appeal.

Lord Justice Lewison:

141. I agree with the Senior President of Tribunals:

i) That the judge did not misinterpret the scope of "the project";

ii) That the "true legal test" proposed by the judge was not a legal test at all, and that the real question is the degree of connection needed to link a "project" and a putative "effect";

iii) That it is not appropriate to introduce a non-statutory gloss (such as "reasonably foreseeable") to express that degree of connection;

iv) That the downstream greenhouse gas emissions were not "legally incapable" of being indirect effects of the project;

v) That whether there is a sufficient degree of connection between the two is a question of fact (or evaluative judgment) for the decision maker; and

vi) The decision-maker's decision can only be impugned on public law grounds (which include, but are not limited to, irrationality).

142. What I have found more difficult is the question whether the decision that Surrey CC in fact took was a lawful one.

143. In Chapter 4 paragraph 107 of the environmental assessment prepared by the developer they said:

> "The scope of the assessment is confined to the direct releases of greenhouse gases from within the wellsite boundary resulting from the Site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development."

144. The statement went on to say:

> "121. This assessment considers direct releases of greenhouse gases consistent with all phases of the proposed development as described within ES Chapter 4. The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and processes beyond the planning application boundary and outwith the control of the Site operators.
>
> 122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-makers should "*focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes*". These non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for environmental harm."

145. In its assessment of that statement Surrey CC said:

> "5.15 The assessment presented in the submitted ES focuses on the direct greenhouse gas emissions of the development and operation of the proposed wellsite. The potential contribution of the hydrocarbons that would be produced over the lifetime of the wellsite is not covered in the submitted ES, the reasons for excluding those emissions are set out in paragraphs 121 and 122 … of the submitted ES. The CPA accepts the argument set out in paragraphs 121 and 122 … of the ES and the justification for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process."

146. On one reading of that assessment it might be said that Surrey CC had considered direct effects only and had ignored any potential indirect effects. But that assessment must be seen in the overall context of the decision-making process.

147. The starting point is Surrey CC's scoping opinion. That scoping opinion expressly considered the question of downstream greenhouse gas emissions; and recommended that the EIA should "consider … the global warming potential of the oil and gas that would be produced by the proposed well site". It is clear, therefore, that Surrey CC had not lost sight of the possibility that downstream greenhouse gas emissions might be an indirect effect of the project. The eventual assessment must be read against that background. Given that the direct effects of the project had been considered in

Chapter 4 of the ES, the first sentence of paragraph 121 must be read as a reference back to that consideration. Accordingly, the second sentence of that paragraph must refer to potential indirect effects. Particular emphasis is placed on subsequent use outwith the control of the developers. That a potential effect is outwith the control of the developers is not, in my judgment, determinative, but it is, I think, relevant. So, too, is the fact that a potential effect takes place outside the site, although once again it is not determinative.

148. In addition, the officers' report presented to the planning committee referred to the Surrey Minerals Plan Core Strategy Development Plan Document 2011. In paragraph 112 of the report officers stated that the policy was that proposals for the commercial production of oil and gas would only be permitted where "there are no significant adverse impacts associated with extraction and processing, *including processing facilities remote from the wellhead* and transport of the product." The report went on to discuss the question of climate change in some detail. Paragraphs 134 and 135 recorded objections to the proposed development based on climate change grounds. Again, it cannot be said that climate change considerations were ignored. Balanced against climate change, however, was the question of need for hydrocarbons. Officers devoted a lengthy section of the report to that question. Their ultimate conclusion (in the updated report presented to the committee) was that:

> "… subject to the imposition of conditions, together with controls through other regulatory regimes, the development would not give rise to unacceptable environmental or amenity impacts and the development is consistent with the NPPF and the development plan…"

149. On balance, I consider that when these various documents are read together, it cannot be said that Surrey CC completely ignored the potential global warming effect of the proposed development. The question was raised by the scoping opinion, objections based on climate change were noted and considered; the development plan document explicitly referred to adverse impacts resulting from processing remote from the wellhead, and officers' overall conclusion was both that the development was consistent with the development plan and also that it would not give rise to unacceptable environmental impacts. Whether the downstream greenhouse gas emissions were or were not to be regarded as indirect effects of the project was a question of judgment for Surrey CC. Although it would have been preferable for more explicit consideration to have been given to that question, I have concluded (not without hesitation) that the reasons just about pass muster.

150. Accordingly, I agree with the Senior President that the appeal should be dismissed.

Neutral Citation Number: [2022] EWHC 2145 (Admin)

Case No: CO/820/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
(Sitting in Birmingham)

Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 12th August 2022

Before :

MR JUSTICE EYRE

- -

Between :

WARWICK DISTRICT COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**First Defendant**
- and –	
MR JULES STORER	**Second Defendants**
MRS ANN LOWE	

- -
- -

Ben Fullbrook (instructed by **Warwickshire Legal Services**) for the **Claimant**
Victoria Hutton (instructed by **Government Legal Department**) for the **First Defendant**
The **Second Defendants** did not appear other than by a noting observer

Hearing date: 19th July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE EYRE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be **10:30am** on **12th August 2022**

Mr Justice Eyre:

Introduction.

1. This case arises out of the Claimant council's refusal of the Second Defendants' application for planning permission for the demolition of an existing outbuilding and its replacement by a garden room/home office. Both the existing structure and the proposed replacement are physically detached from the relevant dwelling house. The Second Defendants' property is in the Green Belt and the Claimant's refusal of permission was on the basis that the proposed structure did not fall within any of the exceptions to the principle that the construction of new buildings in the Green Belt is inappropriate. The Second Defendants appealed that decision and the appeal was allowed by the First Defendant's inspector ("the Inspector") on the basis that the new building was within the exception identified at paragraph [149(c)] of the National Planning Policy Framework namely "the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building".

2. The Claimant applies with the permission of Lang J for planning statutory review of the Inspector's decision pursuant to section 288 of the Town & Country Planning Act 1990. The Claimant had originally sought to proceed by way of judicial review rather than statutory review but Lang J permitted the reconstitution of the claim by way of amendment. The case turns on the proper interpretation of the [149(c)] exception. The Claimant says that the interpretation of that provision is a matter of law and that on its proper interpretation in order for a new building to be an extension of an existing building the former must be physically attached to the latter. As a consequence it is said that the Inspector erred in law in concluding that the exception applied. The First Defendant says that this is not a case where it is appropriate for the court to express a view on the meaning of the term "the extension … of a building". Alternatively he says that the proper interpretation of that term does not require the extension to be physically attached to the building of which it is an extension.

The Factual and Procedural Background and the Applicable Policies.

3. The Second Defendant's property is in Vicarage Road in Stoneleigh. The village of Stoneleigh is "washed over" by the West Midlands Green Belt. The Second Defendant's property consists of a Grade II timber-framed cottage ("the Cottage"), a garden, a garage, and a currently disused timber structure. That structure has a footprint of 10.2m^2 and appears to have been originally used as the garage for the property but that use has been superseded by a more recently-built garage. This timber structure is in the garden of the Cottage but is approximately 20m from the Cottage itself. The Second Defendants sought permission to demolish the timber structure and to replace it with a garden room/home office with a footprint of 16m^2.

4. Policy DS18 of the Claimant's Local Plan addressed the Green Belt and provided that the Claimant would "apply national planning policy to proposals within the green belt".

5. The relevant national planning policy is set out in the NPPF. The current version of the Framework was introduced in July 2021 which was between the date of the Claimant's refusal of permission and the Inspector's determination of the appeal. Although there was a change in the paragraph numbering the text of the relevant passages was unaltered and I will use the current paragraph numbering throughout. The relevant provisions are:

"137. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.

138. Green Belt serves five purposes:

a) to check the unrestricted sprawl of large built-up areas;

b) to prevent neighbouring towns merging into one another;

c) to assist in safeguarding the countryside from encroachment;

d) to preserve the setting and special character of historic towns; and

e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

…

147. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

148. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

149. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:

a) buildings for agriculture and forestry;

b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;

c) the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;

d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;

e) limited infilling in villages;

f) limited affordable housing for local community needs under policies set out in the development plan (including policies for rural exception sites); and

g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:

- not have a greater impact on the openness of the Green Belt than the existing development; or

- not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to

> meeting an identified affordable housing need within the area of the local planning authority."

6. Section 336 of the 1990 Act defines "building" as including "any structure or erection, and any part of a building, as so defined but does not include plant or machinery comprised in a building".

7. On 30th April 2021 the Claimant refused the application for planning permission on the basis that the proposed structure constituted inappropriate development in the Green Belt and that there were no very special circumstances outweighing the harm which inappropriate development would by definition cause. The Officers' Report concluded that none of the exceptions in NPPF [149] applied and the Claimant's decision to refuse permission was on that basis. Neither the report nor the decision addressed [149(c)] directly but instead focused on the possible application of [149(d)] and concluded that it did not apply because the proposed garden room/home office would be materially larger than the existing disused garage which was to be replaced.

8. The Second Defendants appealed the Claimant's refusal of planning permission. They made four points in support of the appeal. First, it was said that the proposed new building was within the exception at [149(d)] because the addition of $6m^2$ did not cause it to be materially larger than the building being replaced. Next, the Second Defendants contended that the proposed garden room/home office was a "normal domestic adjunct" to the Cottage and as such was an extension within the scope of [149(c)]. In that regard they invoked the decision of Malcolm Spence QC sitting as a deputy judge in the case of *Sevenoaks DC v Secretary of State for the Environment & another* [1997] EWHC 1012 (Admin) ("*Sevenoaks")* which I will consider below. Then, the Second Defendants invoked [149(g)] arguing that the proposed structure amounted to limited infilling or the partial redevelopment of a previously developed site. Finally, they pointed to a number of matters which they said combined to constitute very special circumstances such as to warrant the grant of permission even if none of the exceptions applied.

9. By her decision of 20th January 2022 the Inspector allowed the appeal in the light of the assessment contained in the Appeal Planning Officer's report. In doing so she agreed with the Claimant that the exception at [149(d)] did not apply. In that regard she concluded that the additional $6m^2$ would amount to a "significant enlargement" of the existing structure and that the proposed building would also be "visibly larger in scale and bulk than the existing building". However, she did conclude that the proposed building would be an extension within the meaning of [149(c)] setting out the reasoning in that regard as follows:

> "9. Framework paragraph 149 (c) permits the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building. The existing building was the original garage to the house and as such could reasonably be considered to have been a normal domestic adjunct to it. Likewise, the proposed outbuilding would be used for purposes clearly related to the occupation of the dwelling. It would be in the same location on the site, relatively close to the dwelling and within a group of buildings closely associated with it. Therefore, I am satisfied that the proposed out building can be considered as an extension to the dwelling.

> 10. The evidence before me is that there have been various extensions to the original building and a detached garage. Planning permission has recently been granted to replace the rear single storey extension with something similar in scale and the garage is relatively small in relation to the dwelling. The proposed outbuilding would be located behind this building and would be much smaller in scale compared with the host dwelling. Given the modest scale of these existing additions and the limited additional footprint from the proposed outbuilding, I find that the proposal, in combination with previous additions, would not result in disproportionate additions to the host dwelling."

10. In the section 288 review the Claimant raises a single ground of challenge namely that the Inspector's interpretation of [149(c)] was erroneous in that it was not open to her to conclude that a structure which was not physically attached to another building could be an extension of that other building.

The Issues.

11. The Claimant and the First Defendant were agreed that the issue between them was whether in order to be an extension for the purposes of [149(c)] the structure said to be an extension must always be physically attached to the building of which it is purportedly an extension. In the course of counsel's submissions it became apparent that there were really two issues between the parties. The first was whether the court should embark on the exercise of defining "the extension … of a building" for these purposes. The First Defendant said that I should not engage in that exercise but should instead regard the meaning of that provision as a matter for the judgement of planning decision makers to be applied on a case by case basis. The second was as to the meaning of the exception if I did engage in determining that meaning. In that regard the Claimant contended that a purported extension had necessarily to be attached to the building of which it was an extension whereas the First Defendant said that physical attachment was not necessary and that a building could be an extension of another building even though the two were not physically attached to each other.

12. The Second Defendants did not attend the hearing before me (other than by way of an observer taking notes). At the time when the Claimant had applied for judicial review the Second Defendants had responded pointing out the inappropriateness of that procedure; saying that they did not propose filing an Acknowledgement of Service; and contending that the Claimant's challenge to the Inspector's decision was "oppressive and disproportionate". However, their planning consultant had responded in rather more detail to the Claimant's pre-action protocol letter. In that response the *Sevenoaks* decision was invoked again and reference was made to a number of instances in which planning inspectors had given planning permission for freestanding buildings in the Green Belt on the footing that they were extensions to existing buildings. It was said that these illustrated "the well-established principle that detached outbuildings can be treated as extensions to dwellings (for the purposes of Green Belt planning policy) in accordance with the *Sevenoaks* approach".

13. In that response it was also said on behalf of the Second Defendants that although they had made reference to [149(c)] and to the *Sevenoaks* approach in their planning appeal the Claimant had not made any submissions in that regard and that the point was now being raised for the first time. The First Defendant expanded on that point in his Detailed Grounds of Defence. There the First Defendant said that although the Claimant had responded to the Second Defendants' appeal documentation it had not in its response addressed the argument based on *Sevenoaks.* The First Defendant said that the

fact that the Claimant was now advancing an argument which it had not previously advanced was to be seen "as an indication of the `unrealistic and unpersuasive nature'" of the Claimant's legal challenge (adopting the language used by Holgate J in *R (Gosea) v Eastleigh BC* [2022] EWHC 1221 (Admin) at [129]) and referring also to the judgment of Coulson LJ in *R (Gathercole) v Suffolk CC* [2020] EWCA Civ 1179 at [56] – [57]). I do not find this criticism persuasive. Holgate J and Coulson LJ were considering instances where at a late stage environmental assessments had been said to be inadequate as a matter of law in circumstances where the alleged inadequacy had not been raised previously. In such circumstances it is readily understandable that the failure to raise the point at an earlier stage was seen as indicating that the party raising the point did not in truth regard the statement as inadequate. The position is different here where the Claimant's stance throughout has been that none of the [149] exceptions apply and where the issue is one of pure interpretation of the terms of the NPPF. The arguments now advanced are to be considered on their merits and such force as the Claimant's contentions might otherwise have is not reduced by the fact that they were not asserted in the same terms previously.

Is the Meaning of "the Extension … of a Building" a Matter of Definition for the Court or of Judgement for the Decision Maker?

14. The First Defendant contended that there was no one objective meaning which would be applicable in all circumstances to the term "the extension … of a building". Miss Hutton submitted that as a consequence the court should not engage in seeking to define that term but should instead regard it as a matter for the judgement of planning decision makers on a case by case basis. It was, Miss Hutton said, not appropriate for the court to set out one part of a definition of that term but to leave other elements at large.

15. In support of that argument Miss Hutton referred me to *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13, [2012] PTSR 983 where referring to policy statements in development plans and similar documents Lord Reed said at [19]:

> "19 That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: Tesco Stores Ltd v Secretary of State for the Environment [1995] I WLR 759,780, per Lord Hoffmann. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean"

16. Miss Hutton relied on the middle portion of that passage and said that the application of the language of [149(c)] to the facts of any given case was a matter of judgement for the planning decision maker. She sought to contrast the language of [149(c)] with that which Lieven J had considered in *Wiltshire Council v SSHCLG* [2020] EWHC 954 (Admin), [2020] PTSR 1409 where the issue of the meaning of the words in question was "capable of one objective answer regardless of the facts of any particular case" (see at [26]).

17. I do not accept this contention. To adopt the course proposed by the First Defendant would amount to prejudging the core question before me.

18. The approach to be taken to the interpretation of planning policy documents and the distinction between the interpretation of policy and the application of the policy when properly interpreted were explained in *Tesco Stores Ltd v Dundee CC* and in *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37, [2017] 1 WLR 1865. I adopt the summary of the principles to be derived from those authorities which Dove J set out in the following terms in *Canterbury CC v SSCLG & another* [2018] EWHC 1611 (Admin), [2019] PTSR 81 at [23]:

> "In my view in the light of the authorities the following principles emerge as to how questions of interpretation of planning policy of the kind which arise in this case are to be resolved:
>
> i. The question of the interpretation of the planning policy is a question of law for the court, and it is solely a question of interpretation of the terms of the policy. Questions of the value or weight which is to be attached to that policy for instance in resolving the question of whether or not development is in accordance with the Development Plan for the purpose of section 38(6) of the 2004 Act are matters of judgment for the decision-maker.
> ii. The task of interpretation of the meaning of the planning policy should not be undertaken as if the planning policy were a statute or a contract. The approach has to recognise that planning policies will contain broad statements of policy which may, superficially, conflict and require to be balanced in ultimately reaching a decision (see Tesco Stores at paragraph 19 and Hopkins Homes at paragraph 25) Planning policies are designed to shape practical decision-taking, and should be interpreted with that practical purpose clearly in mind. It should also be taken into account in that connection that they have to be applied and understood by planning professionals and the public for whose benefit they exist, and that they are primarily addressed to that audience.
> iii. For the purposes of interpreting the meaning of the policy it is necessary for the policy to be read in context (see Tesco Stores at paragraphs 18 and 21). The context of the policy will include its subject matter and also the planning objectives which it seeks to achieve and serve. The context will also be comprised by the wider policy framework within which the policy sits and to which it relates. This framework will include, for instance, the overarching strategy within which the policy sits.
> iv. As set out above, policies will very often call for the exercise of judgment in considering how they apply in the particular factual circumstances of the decision to be taken (see Tesco Stores at paragraphs 19 and 21). It is of vital importance to distinguish between the interpretation of policy (which requires judicial analysis of the meaning of the words comprised in the policy) and the application of the policy which requires an exercise of judgment within the factual context of the decision by the decision-taker (see Hopkins Homes at paragraph 26)".

19. In *Wiltshire Council v SSHCLG* Lieven J was addressing the meaning of the phrase "subdivision of an existing residential dwelling" for the purposes of the version of the NPPF then in force. The issue before Lieven J was whether for those purposes a dwelling was limited to a single building or could extend to a "wider residential unit that can include secondary buildings within the same plot". It was in that context that the judge concluded that the issue was capable of only one objective answer in all circumstances and that "subdivision of a dwelling implies a single building" (see at [27]). It is of note that Lieven J was not providing a definition which would remove the need for judgement in all circumstances. Similarly she was not purporting to say what would or would not amount to "subdivision of an existing residential dwelling" in all circumstances. Rather she was setting the parameters of the legitimate interpretation of that expression and saying that there were particular circumstances to which it could not extend outside (to apply the language of Lord Reed) "the world of Humpty Dumpty".

20. If the Claimant is right to say that for the purposes of [149(c)] an extension must be attached to the building of which it is an extension the exercise I am being asked to undertake would not amount to setting out one part of a definition and leaving the other elements at large. Instead (as was the case in *Wiltshire Council v SSHCLG*) it would be the entirely legitimate exercise of identifying some situations to which the term could not apply on the basis that in all circumstances the question of whether the extension and the building being extended had to be physically attached was capable of only one objective answer. A conclusion that the Claimant's interpretation was correct would not determine whether a particular attached structure was or was not an extension for these purposes. That would remain a matter of judgement. It would, however, identify structures which were not capable as a matter of law of being extensions.

21. It follows that the exercise is one in which I should engage and where I have to consider whether the meaning of [149(c)] is limited in the way asserted.

The *Sevenoaks* Decision and its Relevance to the Interpretation of NPPF [149(c)].

22. The Second Defendants had relied on the *Sevenoaks* decision in support of their appeal. In their response to the Claimant's pre-action correspondence they again made reference to the decision. They also cited a number of instances where planning inspectors appear to have applied the approach derived from that decision and have permitted the construction of detached outbuildings in the Green Belt on the basis that they were extensions to existing dwellings.

23. The Claimant says that part of the reason why the Inspector fell into error was that she also had regard to the *Sevenoaks* approach. That approach was applicable to the former policy contained in PPG2 which addressed extensions to dwellings. It is not, the Claimant says, applicable to the current policy as set out in the NPPF and which is concerned with the extension of buildings.

24. Although Miss Hutton emphasised that the invocation of the *Sevenoaks* approach formed only one of the First Defendant's arguments she nonetheless contended that the decision was relevant and could not be distinguished from the present case. She submitted that the use of the word "building" in the NPPF rather than "dwelling" as had been used in PPG2 was "neither here nor there" and that focus in *Sevenoaks* as before me was on the proper meaning of "extension".

25. *Sevenoaks* concerned a dwelling house in the Green Belt. Before me there was some question as to whether the proposed new car shelter which was the subject matter of the relevant application there was to be physically attached to an existing structure. It was, however, clear that the deputy judge proceeded on the footing that it was physically detached from the dwelling house in question.

26. The relevant planning policy was set out in PPG2. This provided that "the construction of new buildings inside a Green Belt is inappropriate unless for the following purposes". There then followed a list of five matters the relevant one of which was:

> "limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)
>
> 3.6 provided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts"

27. The local planning authority had refused planning permission but this had been granted on appeal. The inspector had concluded that the proposed car shelter was within the exception and so not inappropriate because it was a "normal domestic adjunct" to the dwelling house even though it was not physically attached to it. The claimant council brought a statutory review contending that the inspector's decision was incorrect. The council's case was, at least in part, based on the fact that the proposed car shelter was physically detached from the dwelling house.

28. The deputy judge rejected that argument. He said, at [26]:

> "In my judgment, the Inspector was fully entitled to hold that the garage was part of the `dwelling', in the sense that it was a normal domestic adjunct, and thus to treat the appeal proposal as an extension of it. The words `extension... of existing dwellings' are certainly capable, in my judgment, of having that meaning, and he was entitled to form his opinion in determining this matter in that way. The garage is an important domestic adjunct, just as the coal shed was in earlier days, and for example, an outside playroom often is. The mere fact that any of these uses is physically separated from the main house does not prevent them from being part of the dwelling. It is a matter of fact and degree in every case and, for example, if the garage had been at the bottom of the garden, the Inspector would doubtless have taken a different view."

29. I can derive only very limited assistance from the *Sevenoaks* decision and it certainly does not bear the weight which the Second Defendants (and to a lesser extent the First Defendant) sought to place on it.

30. As Mr Fullbrook pointed out considerable caution is needed in applying to the NPPF decisions considering the different wording of PPG2: see *Turner v SSCLG* [2016] EWCA Civ 466, [2017] 2 P& C.R. 1 at [17] – [21] per Sales LJ.

31. In addition to that general need for caution it is not safe to assume a simple "read across" from "dwelling" to "building". It cannot be assumed that development which would be an extension of a dwelling could necessarily be regarded as an extension of a building. Thus a dwelling can readily be regarded as including a number of structures physically separated from each other each of which would be a separate building for the purposes

of the 1990 Act (and so for the purposes of the NPPF) but which would nonetheless form part of the same dwelling and be "normal domestic adjuncts" of the relevant dwelling house. A garage would be a prime instance of this as would be a coal shed or an ice house to name some of the somewhat dated examples mentioned in argument before me. That view of a dwelling as capable of including a number of physically separated buildings is not precluded by Lieven J's decision in *Wiltshire Council v SSHCLG*. There the judge was not purporting to define "dwelling" for all purposes nor even for the entirety of the NPPF. Instead she was addressing the meaning of "subdivision of an existing residential dwelling" for the purpose of a particular part of the NPPF.

32. It would, therefore, be possible to conclude that a particular structure was an extension of a dwelling but not an extension of an identified building. [149(c)] of the NPPF is concerned with "the extension … of a building" not with the extension of a dwelling. As noted above the definition of a building is a wide one and covers a range of structures. In her skeleton argument Miss Hutton referred to stadia, warehouses, factories, art installations, and a range of other structures. Many of those would or could have adjuncts or ancillary structures but those could not readily be described as "normal domestic adjuncts".

33. The decision in *Sevenoaks* is, accordingly, distinguishable from the circumstances which I have to consider. In that case the deputy judge was considering different wording from that of [149(c)] in a similar but different context and where there cannot simply be a transposition from "dwelling" to "building". In those circumstances Mr Spence's reasoning provides little assistance with the task I have to undertake.

34. There is, however, force in the First Defendant's argument that the Claimant's interpretation of [149(c)] would mean that the introduction of the NPPF had the effect of restricting the scope for the extension of dwellings in the Green Belt from that which had previously applied. It would mean that the scope for the erection of normal domestic adjuncts to dwelling houses in the Green Belt had been reduced because those would no longer be seen as permissible extensions if physically detached from the relevant dwelling house. That restriction could not, in all cases, be overcome through the use of permitted development rights: for example, those rights do not apply to listed buildings such as the Cottage and so would not come into play here. It follows that if the Claimant's interpretation is correct the structure proposed by the Second Defendants would not have been inappropriate development for the purposes of PPG2 but would be for the purposes of the NPPF. That restrictive effect would, the First Defendant says, be contrary to the apparent purpose of the relevant part of the NPPF. In that regard the First Defendant says that the use of the term "building" in this portion of the NPPF should be seen as widening the scope for development in the Green Belt subject to the protections in the policy and as identifying a wider range of structures that can safely be extended without causing harm to the Green Belt. The First Defendant then says that it would be inconsistent with that change for a narrow reading of extension to be adopted so as to reduce the scope for the extension of dwelling houses. This argument is far from determinative of the proper interpretation of [149(c)] but it is a relevant and weighty consideration.

35. Mr Fullbrook invited me to conclude that decision in *Sevenoaks* was in any event bad law and that the deputy judge had erred in concluding that the proposed structure was an extension of the relevant dwelling. I can deal with that argument very briefly. The

first point is that I am concerned with the proper interpretation of part of the NPPF and it is neither necessary nor appropriate for me to purport to determine definitively the correct interpretation of the now superseded PPG2. Second, as I have explained at [31], the concepts of the extension of a dwelling and of the extension of a building are not necessarily the same and Mr Spence's interpretation of the former is understandable and persuasive. Finally, although I have derived little assistance in my interpretation of [149(c)] from the sundry decisions of inspectors to which reference was made those do show the *Sevenoaks* approach being applied in practice. It follows that the approach being taken in practice and the position as it was in the light of authority at the time of the introduction of the NPPF was that the extension of dwellings in the Green Belt was governed by the decision in *Sevenoaks*. That, in turn, suffices to form the basis for the First Defendant's argument that the Claimant's interpretation of [149(c)] would mean that the introduction of that provision effected a restriction on the scope for installing normal domestic adjuncts to dwellings in the Green Belt.

The Meaning of "the Extension … of a Building".

36. As already noted the approach to be taken to the interpretation of planning policy was summarised by Dove J in the passage I have quoted at [18] above. In short the language used is to be read in the context of the subject matter; the policy framework; and the planning objectives of the policy in question and having regard to the broad nature of statements of planning policy.

37. Mr Fullbrook advanced a number of matters as supporting the Claimant's interpretation of [149(c)].

38. He focused, first, on the wording of that provision. He emphasised that it referred to "the extension … of a building" and that the proviso to it was concerned with the "size of the original building". Alongside that point Mr Fullbrook noted that the reference was to "the extension or alteration" of a building and said that the reference to alteration indicated that the paragraph was concerned with the physical effect on a single building. He contrasted the extension or alteration of a building with the erection of an outbuilding saying that such an erection was not an extension of the existing building but the creation of a separate building.

39. Mr Fullbrook noted the change from the language of PPG2 and the change from a reference to a "dwelling" to one to a "building" saying that this was significant and required attention to be focused on the physical structures.

40. In addition Mr Fullbrook said that the emphasis on the building as a single structure and that interpretation of [149(c)] was supported by the terms of [149(d)] with its focus on the size of the building being replaced. That reference was supplemented by the argument that the First Defendant's interpretation of [149(c)] would enable the restrictions contained in [149(d)] to be subverted. It would mean that, as in this case, a new structure could be erected by way of replacement of an existing building in circumstances where the requirements of [149(d)] were not met. Mr Fullbrook argued that such a result should be regarded as contrary to the intention of the policy. Instead buildings replacing existing buildings should only be permitted under [149(d)]. On this view sub-paragraphs (c) and (d) operated to provide that there could only be additional building if there was an extension physically attached to an existing building or the replacement of such an existing building subject to meeting the proviso to [149(d)]. The

difficulty with this argument is that sub-paragraphs (c) and (d) are not the only parts of [149]. Mr Fullbrook's argument treated them as a comprehensive code and overlooked the other sub-paragraphs which would permit the construction of new buildings which did not satisfy the requirements of either (c) or (d).

41. Mr Fullbrook placed considerable stress on what he characterised as the "everyday meaning" and the dictionary definition of "extension". He said that as a matter of normal usage "an extension of a building is a structure which is added to an existing building and is physically connected to it. A detached building is not an extension." In addition Mr Fullbrook referred to the Oxford English Dictionary definition which gave the primary meaning of the word as "a part that is added to something to enlarge or prolong it; a continuation". As an illustration of that meaning the example of "the railway's southern extension" was given and reference was also made to "a room or set of rooms added to an existing building." Although physical attachment of the extension to the object extended is not said there to be an essential part of the meaning of the word "extension" there is considerable force in Mr Fullbrook's contention that physical attachment is inherent in the examples given. However, it is to be noted that as part of the primary meaning of the word the dictionary also refers to its use as a mass noun to describe "the action or process of becoming or making something larger". Physical attachment is not necessarily inherent in that use (although normally the process will involve physical attachment) and the use in [149(c)] of the words "the extension or alteration of a building" could be read as a reference to such a process.

42. Next, Mr Fullbrook contended that because the sub-paragraphs of [149] set out exceptions to the general principle that the construction of new buildings is inappropriate in the Green Belt they should be construed narrowly. That is in order to avoid undermining that principle. At first sight this is a powerful argument and Miss Hutton accepted it albeit subject to the important qualification that the exceptions are to be seen in the context of the policy as a whole. However, a degree of care is needed as to what is meant by a narrow construction. The First Defendant's acceptance that a narrow construction was appropriate was made by reference to the decision of Green J (as he then was) in *Timmins & another v Gedling BC* [2014] EWHC 654 (Admin). It is apparent that Green J was not indicating there that an artificial approach is to be taken to the interpretation of the exceptions to the principle that the construction of new buildings in the Green Belt is inappropriate development. Instead he was at pains to stress that he was applying the normal canons of construction (see at [25] – [28]) and the absence of any special rule was indicated also by Richards LJ in the Court of Appeal's upholding of Green J's decision (see at [24] in [2015] EWCA Civ 10, [2015] PTSR 837). Green J was explaining that unless development fell properly within one of the exceptions it was inappropriate by definition. As a consequence care was needed to consider whether particular development was within the exception. The exception was not to be expanded artificially and in particular a category of development was not to be regarded as characterised as appropriate by inference. It follows that the construction of the exceptions is to be narrow in the sense that they are not be regarded as applying by inference or artificial extension to categories of development not properly within the language used. It is not, however, to be narrow in the sense of being artificially restrictive and excluding categories of development which are within the exception on a proper reading of that language. The construction is to be narrow but not artificial and as with statements of planning policy more generally the meaning of the exceptions is to be derived from the language used when seen in the context of the

subject matter and the purpose of the policy in accord with the principles summarised by Dove J and set out above. Here the context and purpose are to be seen as the importance of the Green Belts and the purposes which they serve as identified in [137] and [138] of the NPPF having regard to the particular points that inappropriate development is by definition harmful to the Green Belt and that the construction of new buildings is inappropriate development unless within one or more of the exceptions.

43. Finally, Mr Fullbrook asked how the scope of [149(c)] was to be confined if the meaning of "extension" was not restricted to structures which were physically attached to the building being extended. It is right that the interpretation proposed by the Claimant would provide a clear "bright line" definition. That is far from being a conclusive argument and there was considerable force in Miss Hutton's response that rejection of the Claimant's interpretation would not remove all restraint on purported extensions. Instead it would be a matter of fact and degree having regard to the proximity of the new building to the existing building; to the purpose and use of the buildings; and to factors such as the size of the buildings whether the new building was or was not an extension with the result that some detached structures would be found to amount to extensions of existing buildings but that others would not.

44. There are a number of factors which support the First Defendant's interpretation of [149(c)].

45. I have already noted the point that on the Claimant's interpretation the replacement of PPG2 and the *Sevenoaks* approach by the NPPF will have reduced the scope for the installation of normal domestic adjuncts to dwelling houses in the Green Belt and that is a result which appears to run counter to the more expansive tenor of this part of the NPPF.

46. It is to be noted that [149] is concerned with "the construction of new buildings". The wide definition of "building" means that the addition of a new part to an existing building will itself be a new building but such additions are clearly not the main focus of [149]. Rather the provisions of the paragraph as a whole are more naturally read as concerned with new buildings in the sense of new free-standing structures.

47. A building can readily be regarded as being an adjunct to another building even though the two are not physically connected. As Miss Hutton said, buildings can readily be considered to be extensions of other buildings even though the buildings are not physically connected. In the domestic setting it is not artificial to describe garages or other outbuildings as being extensions of the principal dwelling house. In non-domestic settings it is similarly not artificial to see sundry ancillary structures as being ancillary to and extensions of the main building. To adopt an example advanced by Miss Hutton this would not be an artificial way of characterising freestanding entrance kiosks erected outside a sports stadium or a commercial use such as a factory or warehouse.

48. [149(c)] is to be read in the context of the NPPF as a whole and, more particularly, in the light of the purposes of the Green Belt. It is apparent from the sub-paragraphs of [149] that there are a number of instances in which the erection of a new building will not be inappropriate in the Green Belt. To read [149(c)] as permitting extensions which are physically distinct from the building being extended is not obviously harmful to the Green Belt or inconsistent with the thrust of [149] read as a whole. The requirement that the structure in question must not result in "disproportionate additions over and

above the size of the original building" operates to provide protection for the purposes of the Green Belt. There is force in the First Defendant's argument that a physically separate structure may have less impact on the openness of the Green Belt than a physically attached extension. The interpretation advanced by the Claimant could lead to artificial and arbitrary consequences not necessary for furthering the purposes of the Green Belt and arguably inconsistent with those purposes. Thus on the Claimant's approach a building very close to but physically separate from an existing building could never be seen as a permissible extension to that building regardless of its size or purpose whereas (subject to meeting the other requirements of [149(c)]) a structure the bulk of which is further away from a building but connected to it by a covered walkway could be an extension. Putting the point rather more shortly the presence or absence of a physical connection between the original building and the new building is not conclusive as to and arguably is of minimal relevance to the degree of impact on the Green Belt. The artificiality resulting from the Claimant's interpretation is heightened when it is remembered that there are circumstances in which it will be undesirable for a new structure to be attached to the existing building. In the current case the Cottage dates from the Seventeenth Century and has a Grade II listing. As such it does not have the benefit of permitted development rights and although permission has been given for a replacement rear extension the scope for extensions which are physically attached to the building will inevitably be limited by the need to have regard to its special character. One can readily envisage circumstances where that the installation of a detached outbuilding close to a listed dwelling in the Green Belt would be less harmful both to the purposes of the Green Belt and to the character of the listed building than an attached structure. The Claimant's interpretation of [149(c)] would exclude the possibility of such detached structures and would preclude any extension where an attached extension was precluded by reason of the building's listed character.

49. Mr Fullbrook accepted that the Claimant's interpretation of [149(c)] could lead to results which might appear arbitrary or artificial. He said, however, that this should not cause a different interpretation to be adopted. Rather he said that such results were the inevitable consequence of the use of language which has a particular meaning and that the risk of such results should not cause the court to adopt a strained or artificial reading of the words of the sub-paragraph. In addition he submitted that the allegedly artificial consequences and the apparent prohibition of all detached outbuildings save where permitted development rights could be invoked would or could be obviated in practice by application of the doctrine of a fallback development. In essence the contention was that a person seeking permission for a detached outbuilding would be able to use the fallback doctrine to establish that there were very special circumstances warranting approval by saying that if permission were not given that person would rely on [149(c)] to install an attached extension (which on this hypothesis would be less desirable). I need not explore in any detail the extent to which that analysis would work in practice though it faces the difficulty that falling within [149(c)] does not give an entitlement to permission but rather provides that the construction is not inappropriate by definition. It suffices to note that the argument involved overcoming artificiality by a chain of reasoning which was itself artificial or at least convoluted.

50. Miss Hutton contended that the fact that [149(c)] was concerned with "the extension or alteration" of a building supported the First Defendant's position because it indicated that there could be an extension which did not constitute an alteration of the existing building. This point was not persuasive. The use of those words was indicating that the

sub-paragraph addressed both those alterations which added to the extent of the building in question and those which did not. Their use was not an indication that an extension could be physically separate from the building.

51. Similarly, I did not derive assistance from the First Defendant's references to the use of the word "extension" in other parts of the NPPF. Those references showed that the word could be used in different contexts but did not assist in determining the meaning of "the extension …of a building" still less in determining whether such an extension had necessarily to be physically attached to the building being extended.

52. Looking at the matter in the round no one of the points advanced is conclusive by itself but I am persuaded by the combined weight of the points advanced by the First Defendant. It is right to note that if the language of [149(c)] were to be considered in isolation from its context then the Claimant's interpretation of the words used would be the more natural reading of those words. It is not, however, the only legitimate reading of the words and the First Defendant's interpretation that an extension of a building can include a physically detached structure is also a tenable reading of the words used. The First Defendant's interpretation is, in my judgement, the reading which accords considerably more readily with the content and purpose of the relevant part of the NPPF. While the Claimant's interpretation has the potential to lead to artificial distinctions which would do nothing to further the purposes of the Green Belt whereas that advanced by the First Defendant would remove the risk of that artificiality without jeopardising those purposes. Accordingly, I am satisfied that [149(c)] is not to be interpreted as being confined to physically attached structures but that an extension for the purposes of that provision can include structures which are physically detached from the building of which they are an extension.

Conclusion.

53. If, as I have found, an extension can be detached from the building of which it is an extension the Inspector did not err in law in granting planning permission and this claim fails.

Neutral Citation Number: [2022] EWCA Civ 1069

Case No: CA-2021-001629

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE JEFFORD
[2021] EWHC 1114 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2022

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE MOYLAN
and
LORD JUSTICE STUART-SMITH

- -

Between:

WILLIAM CORBETT	**Appellant**
– and –	
CORNWALL COUNCIL	**Respondent**
– and –	
DYMPNA WILSON	**Interested Party**

- -
- -

Richard Humphreys Q.C. (instructed by **TLT Solicitors LLP**) for the **Appellant**
Sancho Brett (instructed by **Cornwall Council**) for the **Respondent**

Hearing dates: 22 June 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be not before 4pm on Wednesday 27 July 2022.

The Senior President of Tribunals:

Introduction

1. In this case a local planning authority granted planning permission for a dwelling-house to be built on land connected by a drive to a road which runs past existing buildings in a hamlet in north Cornwall. It accepted that the proposal complied with a policy of the local plan permissive towards housing development "immediately adjoining" settlements. Did it apply that policy lawfully, having understood it correctly? The judge in the court below held that it did, and, as I shall explain, in my view she was right to do so.

2. With permission granted by Lord Justice Lewison, the appellant, William Corbett, appeals against the order of Mrs Justice Jefford, dated 17 June 2021, dismissing his claim for judicial review of the planning permission granted by the respondent, Cornwall Council, on 3 February 2020 for the construction of a dwelling-house and garage at Beacon House East, Trevarrian. Trevarrian is a hamlet to the north of Newquay and south of Mawgan Porth, near the north coast of Cornwall. Dympna Wilson, the applicant for planning permission and owner of the land on which the development was proposed, is the interested party. She has taken no active part in the proceedings, here or below. At the hearing before the judge, Mr Corbett appeared as a litigant in person. Before us, he was represented by leading counsel.

The issues in the appeal

3. There are two issues in this appeal. First, did the council misinterpret and misapply Policy 3 of the Cornwall Local Plan, in particular the concept of development "immediately adjoining" a settlement, so that its decision to grant planning permission was flawed by an error of law? Second, did it take into account what is said to have been an irrelevant consideration, namely the "functional" relationship between the proposed development and the settlement?

The proposed development

4. As described in the application for planning permission and in the council's decision notice, the proposed development was the "Construction of Dwellinghouse and garage accommodation". It would replace an existing garage, store and utility room within the curtilage of Beacon House East, to the west of the road known as Trevarrian Hill or "the coast road" and within the Watergate and Lanherne Area of Great Landscape Value. Beacon House was built in the 1840s, and subsequently divided into Beacon House East and Beacon House West. Access to it is gained by a drive from Trevarrian Hill, about 60 metres long. As the judge said (in paragraph 2 of her judgment), Trevarrian Hill runs "alongside the west side of the main body of the settlement of Trevarrian", which is "on the other side of the road". On the same side of the road is Shrub Cottage, and "[to] the east of the main body of the settlement is the B3276". The

judge also referred (in paragraph 36) to aerial photographs and maps, which show, in 1907, Beacon House and Shrub Cottage to the west of Trevarrian Hill, and, in 1963, no other dwellings on that side of the road – the settlement having by then formed around the junction with the B3276. Since then some holiday cottages have been built behind the Watergate Bay Hotel and a farmstead above Mawgan Porth.

The relevant policies of the Cornwall Local Plan

5. Policy 3 of the local plan, "Role and function of places", states:

> "…
>
> 3. Other than at the main towns identified in this Policy, housing and employment growth will be delivered for the remainder of the Community Network Area housing requirement through:
>
> - identification of sites where required through Neighbourhood Plans;
> - rounding off of settlements and development of previously developed land within or immediately adjoining that settlement of a scale appropriate to its size and role;
> - infill schemes that fill a small gap in an otherwise built frontage and do not physically extend the settlement into open countryside. Proposals should consider the significance or importance that large gaps can make to the setting of settlements and ensure that this would not be diminished;
> - rural exception sites under Policy 9.
>
> …".

6. The reasoned justification for the policy states, in paragraph 1.68:

> "1.68 In smaller villages and hamlets in which 'infill' sites of one-two housing units are allowed, the settlement should have a form and shape and clearly definable boundaries, not just a low density straggle of dwellings. …
>
> Rounding off: This applies to development on land that is substantially enclosed but outside of the urban form of a settlement and where its edge is clearly defined by a physical feature that also acts as a barrier to further growth (such as a road). It should not visually extend building into the open countryside.
>
> Previously developed land: In principle the use of previously developed land within or immediately adjoining the settlement will be permitted provided it is of a scale appropriate to the size and role of the settlement.
>
> Rural Exception sites: These are affordable housing led developments adjoining, or physically well related to, the built form of existing settlements, (they allow for a proportion of market housing where it is required to support

> delivery of the affordable element). The definition of these sites is set out in Policy 9 of the Local Plan."

7. Five other policies of the local plan were mentioned in argument before us: Policy 1, "Presumption in favour of sustainable development", Policy 2a, "Key targets", Policy 7, "Housing in the countryside", Policy 9, "Rural Exceptions Sites", and Policy 21, "Best use of land and existing buildings".

8. Policy 1 says that "[when] considering development proposals the Council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework ["NPPF"] …".

9. Policy 2a says that the "Local Plan will provide homes in a proportional manner where they can best meet need and sustain the role and function of local communities and that of their catchment", and that "[development] proposals in the period to 2030 should help to deliver", among other things, "[a] minimum of 52,500 homes at an average rate of about 2,625 per year to 2030".

10. Policy 7 says that "[the] development of new homes in the open countryside will only be permitted where there are special circumstances", and that "[new] dwellings will be restricted to" the five categories it identifies: "[replacement] dwellings", the "subdivision of existing residential dwellings", the "[reuse] of suitably constructed redundant, disused or historic buildings that are considered appropriate to retain and would lead to an enhancement to their immediate setting", "[temporary] accommodation for workers" and "[full] time agricultural and forestry and other rural occupation workers". Paragraph 2.33 in the reasoned justification for the policy says that "[open] countryside is defined as the area outside of the physical boundaries of existing settlements (where they have a clear form and shape)", that "[the] Plan seeks to ensure that development occurs in the most sustainable locations in order to protect the open countryside from inappropriate development", that the "[supporting] text to Policy 3 sets out the Council's approach to sustainable development", that while "the majority of development will be provided in settlements … it is recognised that there may be a need for some housing in the countryside", and that "[in] these locations [the council] will seek to provide a focus on efficient use of existing properties and buildings to meet needs and set out other exceptions to development in the countryside …".

11. Policy 9 says that "[development] proposals on sites outside of but adjacent to the existing built up area of smaller towns, villages and hamlets, whose primary purpose is to provide affordable housing to meet local needs will be supported where they are clearly affordable, housing led and would be well related to the physical form of the settlement and appropriate in scale, character and appearance …".

12. Policy 21 says that, "to ensure the best use of land, encouragement will be given to sustainably located proposals that … [use] previously developed land and buildings provided that they are not of high environmental or historic value …". Paragraph 2.130 in the reasoned justification for the policy states that the local plan "seeks to deliver a sustainable balance of development, meeting our communities' needs and seeking to protect and enhance our environment" and that "[the] Plan led system provides the best way of achieving this objective as set out in Policy 3 of this Plan". Paragraph 2.131 says that "[the] importance of the countryside (defined here as the area outside of the

urban form or settlements) ranges from its value as agricultural land, for its landscape value, its biodiversity and historic character …".

The planning officer's advice

13. The application for planning permission came before the council's Central Sub-Area Planning Committee on 20 January 2020. In his report to the committee, the planning officer recommended that planning permission be granted. He said that "[the] proposal is supported by policies 3 and 21 of the Cornwall Local [Plan] in that the new home is on previously developed land immediately adjacent to a settlement" (paragraph 2).

14. He set out the objection of the St Mawgan-in-Pydar Parish Council in full. The parish council contended that the proposal did not comply with Policy 3 of the local plan because the development would be neither rounding-off nor infilling, and that "although Beacon House lies within the settlement of Trevarrian, the main built-up part of the hamlet is situated the other side of the coast road from Beacon House". It said the suggestion that the site constitutes "previously developed land" would "not accord with the definition … in the glossary to the [NPPF] which specifically excludes 'residential gardens in built up areas'" (paragraph 16).

15. In the section of his report entitled "[housing] development", the officer said (in paragraphs 21 to 23):

> "21. The site is located within the countryside. It is previously developed land (PDL) by reason that it contains the garden area of an existing home on land outside of a built up area.
>
> 22. Policy 3 of the Cornwall Local Plan … supports new housing on PDL provided that the site is located within or immediately adjoining a settlement and that … the scale of the proposal is appropriate to its size and role. The application complies with this policy insofar that the proposed new home is located on PDL which adjoins the settlement of Trevarrian.
>
> 23. An important planning judgment required when considering the proposal against Policy 3 is whether or not the application site immediately adjoins Trevarrian. This is arguable as the site and settlement are physically separated by a road and the proposed new house by the same road and a driveway yet a new home on this site would be more immediately adjoining the settlement than not in terms of its setting and how it would functionally operate. The officer conclusion that the site immediately adjoins is underpinned by the judgment that this proposal would extend the residential setting and function of Trevarrian rather than introducing a new home of a more detached nature."

16. The officer went on to say that in his view the proposed development would not harm "the distinctive character and beauty of the surrounding AGLV landscape", because the site was "already residential in nature and function and is well-related to the nearby settlement; the proposed new build replaces an existing double garage; and as the scale and design of the proposed new build combined with established boundary vegetation

would ensure that the proposal does not introduce a new building prominent and/or discordant to the surrounding setting" (paragraph 30).

17. In an addendum to his report, dated 20 January 2020, the officer referred to the parish council's assertion that, because there was a field between the site and the "coast road", the site could not be regarded as previously developed land within or immediately adjoining a settlement, that the applicable policy was Policy 7, and that if it applied that policy, the council should refuse planning permission. His advice was this:

> "The officer response to the new comments submitted from the parish council is as follows:
>
> - A difference in opinion between officers and the parish council relates to whether or not the site is immediately adjoining the settlement. If it is, the proposals can comply with Policy 3 … but it would not if it is not. The officer report makes clear that this judgment is arguable and sets out the reasons why officers have concluded that the site is immediately adjoining a settlement at paragraph 23.
>
> - The parish council are correct that the proposal does not comply with Policy 7 of the CLP but the officer recommendation for approval is not reliant on this policy. Rather, the officer recommendation is underpinned by Policies 3 and 21 of the CLP, as set out in paragraphs 21-24 of the officer report.
>
> - Trevarrian is adjudged by officers to be a settlement because it is a well defined group of dwellings with a collective name. It is a place where people live in permanent buildings which has form, shape and clearly defined boundaries. It doesn't contain a wide range of services and facilities but there is no requirement for such in the CLP or the Chief Planning Officer's Advice Note: Infill/Rounding Off (CPOAN). The CPOAN confirms otherwise, by stating that 'in defining settlements there are no expectations of services and facilities'.
>
> - Officers are not suggesting that previously developed land provides a mechanism to overturn the provisions of an up to date development plan. For the reasons set out in the officer report, officers have concluded that the proposal complied with the development plan."

The committee meeting

18. At the committee meeting, as the minutes record, the members discussed the question of whether the site of the proposed development could properly be regarded as "immediately adjoining" the settlement. Mr Corbett, who is a councillor of St Mawgan-in-Pydar Parish Council, spoke against the proposal. One of the councillors "commented that from his knowledge of the area … Beacon House had always formed part of the settlement of Trevarrian". In response to members' questions, officers expressed their view that "Trevarrian was a settlement and that the proposed site was immediately adjoining the settlement". They "made clear that whether or not the site [was] adjoining the settlement [was] arguable, explained why it was arguable and

invited the … committee to make their own judgements on this". They were also "of the view that the development of the site would not set a precedent for development of adjoining green space". A "full and detailed debate ensued". Three things in particular were discussed: first, the view that the "site was immediately adjoining the settlement of Trevarrian"; second, the view that the "proposed development was on previously developed land"; and third, the concern that "the site was outside the settlement, not immediately joining [sic] and that the application site and double garage did not constitute previously development land". The committee resolved that planning permission should be granted, by a majority of nine to five.

Interpreting development plan policy – the role of the court

19. There is ample case law relevant to the interpretation of development plan policies, both in the Supreme Court and in this court. Some basic points are worth repeating here:

(1) Ascertaining the meaning of a development plan policy is, ultimately, a matter of law for the court, whereas its application is for the decision-maker, subject to review on public law grounds (see the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 W.L.R. 1865, at paragraphs 22 to 26). The interpretation of planning policy should not, however, be approached with the same linguistic rigour as the interpretation of a statute or contract. Local planning authorities "cannot make the development plan mean whatever they would like it to mean" (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, at paragraphs 17 to 19). But as was said in this court in *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 (at paragraph 66), "the professional officers of a local planning authority, and members who sit regularly on a planning committee, will not often be shown to have misinterpreted the policies of its development plan".

(2) In seeking to establish the meaning of a development plan policy, the court must not allow itself to be drawn into the exercise of construing and parsing the policy exhaustively. Unduly complex or strict interpretations should be avoided. One must remember that development plan policy is not an end in itself but a means to the end of coherent and reasonably predictable decision-making in the public interest, and the product of the local planning authority's own work as author of the plan. Policies are often not rigid, but flexible enough to allow for, and require, the exercise of planning judgment in the various circumstances to which the policy in question applies. The court should have in mind the underlying aims of the policy. Context, as ever, is important (see *Gladman Developments Ltd. v Canterbury City Council* [2019] EWCA Civ 699, at paragraph 22, and *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610, at paragraphs 16, 17 and 39).

(3) The words of a policy should be understood as they are stated, rather than through gloss or substitution. The court must consider the language of the policy itself, and avoid the seduction of paraphrase. Often it will be entitled to say that the policy means what it says and needs little exposition. As Lord Justice Laws said in *Persimmon Homes (Thames Valley) Ltd. v Stevenage Borough Council*

> [2005] EWCA Civ 1365 (at paragraph 24), albeit in the context of statutory interpretation, attempts to elicit the exact meaning of a term can "founder on what may be called the rock of substitution – that is, one would simply be offering an alternative form of words which in its turn would call for further elucidation".

The judgment in the court below

20. In giving her interpretation of the relevant part of Policy 3, Jefford J. referred to the definitions of the words "adjoin", "adjoining" and "adjacent" in the online Oxford English Dictionary, which, she said, were "wide enough to include "next to" or "very near"" (paragraph 27 of the judgment). The addition of the word "immediately" did not change this. Its presence did "no more than reinforce the word "adjoining" and indicate the element of judgment in whether a site is or is not adjoining, if that word is construed as including "very near" or "next to"" (paragraph 28).

21. Dealing with Mr Corbett's argument that the land to the west of Trevarrian Hill was in "open countryside" and that Policy 7 of the local plan should therefore have been applied, the judge said the application of both policies was "likely to involve matters of planning judgment rather than be predicated on a single restrictive meaning of the words used …" (paragraph 38). The application of Policy 3 might "create a risk of creep into the open countryside", but that, she said, "is a matter of planning judgment" (paragraph 39).

22. As for the dispute between the parties on the question of whether Trevarrian Hill was part of the settlement, the judge's view was that "[the] road itself may be regarded as within the settlement and … the driveway which runs to the road would not then be separated from the settlement by any physical feature" (paragraph 45). A "sensible reading" of Policy 3 was, she said, "one in which the question of whether the development site was immediately adjoining the settlement would involve an element of judgment and not one in which the physical divider necessarily rendered the site not "immediately adjoining"". This was not a question which could be answered by applying a "rigid test" of the kind contended for by Mr Corbett (paragraph 46). The judge rejected the "restrictive meaning" of the expression "immediately adjoining" urged by Mr Corbett. In her view, the words were "apt to include "very near to" and "next to"", and the question of "whether the site falls within that meaning involves an exercise of judgment" (paragraph 49). The advice given to the council's committee in the officer's report was "not misleading in identifying that there was such a judgment to be exercised", and the minutes of the committee meeting made it "clear that that issue was properly debated" (paragraph 51).

Did the council misinterpret and misapply Policy 3 of the local plan?

23. For Mr Corbett, Mr Richard Humphreys Q.C. argued that the words "immediately adjoining" in Policy 3 could only mean "contiguous" or "coterminous". He made three

main submissions. First, the judge had failed to consider the relevant policy context. Policy 3 made it plain that "infill" development must not extend into the open countryside and that "rounding off" must be within an existing settlement. The basic aim of that part of the policy was clearly that only development physically contiguous with a settlement should be supported. Under Policy 7, development in the open countryside would be permitted only in special circumstances. This also suggested a strict interpretation of Policy 3. Second, the use of the adverb "immediately" indicates the narrowest possible interpretation of the word "adjoining" in this policy. Third, the officer had misunderstood what it was that had to be "immediately adjoining" the settlement. He thought Policy 3 meant the "development site" as a whole must be "immediately adjoining". He should have seen that the policy requires this not only of the "previously developed land" but also of the proposed development itself.

24. I cannot accept that argument. I see no legal error in the council's conclusion that the concept in Policy 3 of "development of previously developed land within or immediately adjoining [a] settlement of a scale appropriate to its size and role" could and did embrace the proposed development. This is not a legal concept. It is a concept of planning policy. It requires the exercise of planning judgment on the particular facts of the site and proposal in hand. The words "immediately adjoining" do not require an elaborate explanation. They should not be given an unduly prescriptive meaning. There is a degree of flexibility in them. They do not necessarily mean "contiguous" or "coterminous" or "next to" or "very near". They allow the decision-maker to judge, on the facts, whether the site and proposed development can be regarded as sufficiently close to the settlement in question to be "immediately adjoining" it – which is what the council did here.

25. Policy 3 is permissive towards certain kinds of housing development that have a specific physical and functional relationship to a settlement. The expression "immediately adjoining" must be understood in this context. Here, the question for the decision-maker is not, for example, whether two houses or two parts of a structure are "immediately adjoining" (cf. *CAB Housing Ltd. v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 208 (Admin), at paragraphs 81 to 85). That question calls for an evaluative judgment on the facts. In their context, the words "immediately adjoining" denote a relationship that is considered by the decision-maker to be of sufficient proximity between the site and proposed housing development and the settlement to fall within that description. The extent of the existing settlement, and how the site and proposal relate to it, are quintessentially matters of fact and judgment for the decision-maker. The fact that views might reasonably differ on those questions – as it seems they did here, even within the committee – is itself an indication that the "immediately adjoining" concept should not be treated as if it was rigidly defined.

26. Although it should not normally be necessary to delve into dictionary definitions when one is interpreting planning policy, it was appropriate, I think, for the judge to use the dictionary definition of the words "adjoin" and "adjoining" as a starting point (see *R. (on the application of Crematoria Management Ltd.) v Welwyn Hatfield Borough Council* [2018] EWHC 382 (Admin), at paragraph 32). What that exercise shows is that the word "adjoining" has both a narrower and a broader sense.

27. In my view the use of the word "immediately" to qualify the word "adjoining" is consistent with the intention to use the latter in its broader sense. If "adjoining" in this context meant simply "contiguous", in its literal sense of "touching", the addition of

"immediately" would not have been necessary. I agree with the judge that the effect of this word is to indicate, as she put it, "the element of judgment in whether a site is or is not adjoining, if that word is construed as including "very near" or "next to"". No doubt it narrows the range of evaluative judgment open to the decision-maker on the facts. But it does not remove the need for such judgment to be applied. On the contrary, it confirms the need for that to be done.

28. As Mr Sancho Brett submitted for the council, this understanding of the words "immediately adjoining" in Policy 3 also accords with common sense. The judge was right to avoid attributing to those words a definition which could lead to the perverse result that a site or development largely separate from a settlement but touching it only at a single point would automatically be "immediately adjoining" it, while a site which did not touch the settlement at all but was much more closely related to it as a whole could not be so regarded.

29. I agree with the judge that this is not a case in which a single objective meaning can be given to the policy at issue. Sometimes a policy whose interpretation is in dispute, or an expression used in it, may admit of only one immutable meaning. But often it may require a broader interpretation if its true meaning is to be seen. Policy 3 is a good example. Essential to a proper understanding of the words "immediately adjoining" is that there are, in this part of the policy, two evaluative judgments to be made – perhaps combined in a single conclusion. First, a judgment must be made about the extent of the settlement itself. Secondly, a judgment must also be made whether the site and development are "immediately adjoining" the settlement.

30. The meaning attributed by the judge to the words "immediately adjoining" is also supported by the context in Policy 3 itself. I do not perceive the aim of the policy here as being to support only development physically contiguous with a settlement. As Mr Brett pointed out, it contemplates several different kinds of development: the "rounding off of settlements", the "development of previously developed land within or immediately adjoining [a] settlement …", "infill schemes that fill a small gap in an otherwise continuous built frontage" and "rural exception sites under Policy 9". Whereas some of those categories will comprise development within a settlement, that is not true of them all. This understanding of the policy is confirmed by the reasoned justification in paragraph 1.68. And the restrictive terms of Policy 7 do not call for a more stringent interpretation of Policy 3 than its own language allows. The reasoned justification for Policy 7, in paragraph 2.33, makes clear that while "the majority of development will be provided in settlements … it is recognised that there may be a need for some housing in the countryside". It is implicitly acknowledged, therefore, that Policy 3 contains specific exceptions to the general approach set out in Policy 7 of restricting development in the countryside. Nor do any of the other policies of the local plan imply that the words "immediately adjoining" in Policy 3 should be read more narrowly than I have suggested. Policy 9 provides explicit support for "affordable housing" outside settlements where it is "adjacent to" and "well related to the physical form of the settlement". This does not cut across the interpretation the council has given to the words "immediately adjoining" in Policy 3. If anything, it adds force to that interpretation. Neither Policy 2a, which describes the targets for the development of new housing in Cornwall, nor Policy 21, which encourages the use of "previously developed land", affects the interpretation of Policy 3.

31. In the recent decision of this court in *McGaw v Welsh Ministers* [2021] EWCA Civ 976 a generous interpretation was given to the statutory phrase "immediately adjacent" in article 1(3) of the Town and Country Planning (General Permitted Development) Order 1995, which provides that the height of a proposed building is to be measured "from the surface of the ground immediately adjacent" to the building. In that case the surface immediately adjacent to the building in question was not, in fact, "the surface of the ground", but the wall between the building and the neighbouring garden. In his judgment (with which Lady Justice Asplin and Lewison L.J. agreed), Sir Timothy Lloyd concluded that "the ground which is just the other side of the boundary wall is ground immediately adjacent to the new building", because "[in] practice it is this ground that provides the context, in terms of assessing the extent to which the new building would protrude in height on its southern side so as, potentially, to affect visual amenity in the area" (paragraph 39).

32. That reasoning shows the importance of relevant context in determining the meaning of statutory words, just as context is essential to the interpretation of policy. In *McGaw*, given the purpose of the statutory provisions in question, a pragmatic understanding and application of the concept of "the surface of the ground immediately adjacent …" was justified. In this case, however, we are not concerned with the interpretation and application of a statutory concept, but with the meaning and scope of a policy in a development plan. The task here is different. And, crucially, so is the context. With this in mind, I cannot accept Mr Humphreys' submission that in the absence here of any "tension or conundrum" such as arose in *McGaw*, the expression "immediately adjoining" in Policy 3 must mean, and only mean, "contiguous".

33. It seems to me that the officer's application of Policy 3 in the circumstances of the proposal before the committee was both realistic and, in law, unexceptionable. He concluded that the site was "previously developed land" (paragraph 21 of his report). He recognised that whether or not the site was "immediately adjoining" the settlement was not straightforward. It was, to use his word, "arguable". But it is obvious from his conclusion that "the site immediately adjoins" the settlement of Trevarrian (paragraph 23 of the report), that he thought the words "immediately adjoining" must have a broader meaning than merely "contiguous", and, crucially, that the proposed development would be sufficiently close to the settlement to satisfy Policy 3. This is also evident from his statement that the proposed development was "well-related to the nearby settlement" (paragraph 30). The members themselves considered this question in a "full and detailed" debate. The conclusion of the majority on the compliance of the proposal with Policy 3 was the same as the officer's. Like him, they evidently recognised that the words "immediately adjoining" must have the broader meaning, and, on the facts, they too accepted that the proposal earned the support of the policy thus construed. In my view, the understanding of the expression "immediately adjoining" on which the grant of planning permission was based was correct, and the application of Policy 3 legally unimpeachable. No material defect is to be seen in the officer's relevant advice, either in the report itself or in the addendum (see *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraphs 41 to 42). The interpretation of relevant local plan policy was correct, and, in the application of policy, the conclusions reached in the exercise of planning judgment were neither irrational nor otherwise unlawful.

Did the council take into account an immaterial consideration?

34. Ground 2 of the appeal is that it was legally irrelevant to the interpretation and application of Policy 3 for the officer, in the last sentence of paragraph 23 of his report, to consider whether the proposal "would extend the residential setting and function of Trevarrian rather than introducing a new home of a more detached nature". This, Mr Humphreys submitted, was an immaterial consideration because the concept in Policy 3 of development "immediately adjoining" a settlement signifies a purely physical relationship between development and settlement, not a functional one. This argument does not appear to have featured strongly, if at all, in Mr Corbett's submissions in the court below. But even if it is a new point, I think we can tackle it without causing prejudice or inconvenience to the council, and I shall therefore do so.

35. In my view the submission is mistaken. Though the main focus of this part of Policy 3 is on the physical and visual relationship between the site and development and the settlement, it does not follow that the functional relationship between them can have no bearing upon the necessary exercise of planning judgment. Neither explicitly nor implicitly is that consideration excluded, and I see no reason to think it was regarded as irrelevant by the council when formulating the policy. The reference both in the policy itself and in paragraph 1.68 of the reasoned justification to the "size and role" of the settlement seems consistent with that understanding. In my view, therefore, it was lawful and appropriate for the officer, and the committee, to consider the likely effect of the proposed development on "the residential setting and function of Trevarrian" in assessing the proposal's compliance with Policy 3. This was not an immaterial consideration.

Conclusion

36. For the reasons I have given, I would dismiss the appeal.

Lord Justice Moylan:

37. I agree.

Lord Justice Stuart-Smith:

38. I also agree.

Neutral Citation Number: [2021] EWHC 3285 (Admin)

Case No: CO/644/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

- -

Between :

REGINA **(on the application of EDWARD BLACKER)**	Claimant
-and-	
CHELMSFORD CITY COUNCIL	Defendant
-and-	
(1) MR G SHARP **(2) CHELMSFORD CARS & COMMERCIALS LTD** **(t/a CCC Property)**	Interested Parties

- -
- -

Mr Wayne Beglan (instructed by **Holmes & Hills LLP**) for the **Claimant**
Mr Josef Cannon (instructed by **Chelmsford City Council**) for the **Defendant**

Hearing dates: 02/11/2021

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE THORNTON

The Hon. Mrs Justice Thornton :

Introduction

1. The Claimant is a local resident who challenges the refusal of outline planning permission, by Chelmsford City Council, for 55 new dwellings on land in Roxwell Essex. The planning application was first considered by the Council's Planning Committee at a meeting in November 2020, at which the majority of Committee members were in favour of the application. It returned to the Committee at a second meeting, in January 2021, whereupon the Committee resolved to refuse permission.

2. The Claimant brings the challenge on four grounds. He contends that the Planning Committee's decision making failed to follow the Council's constitution (Ground 1). In resolving to refuse permission at the second meeting, the Committee failed to grasp the "intellectual nettle" of its 'in principle' decision at the first meeting to grant permission (Ground 2). The Committee failed to follow a fair procedure (Ground 3). At the second meeting, the Committee's mind was closed to the business properly before it (Ground 4).

3. In response, the Council contends that the claim misunderstands the decision made by the Committee at the first meeting, which was simply to defer the application for further consideration. The Council's constitution is not as interpreted by the Claimant. There was no unfairness in the procedure and the minds of Committee members were not closed. The Claimant's real complaint is that the Committee changed its mind about the application between the first and second meeting, as to which there is nothing unlawful.

4. The issues raised by the claim are:

    1) What the Planning Committee decided at its first meeting;
    2) Interpretation of the relevant parts of the Council's constitution;
    3) Whether the principle of consistency is engaged by the decision at the first meeting;
    4) The fairness of the decision making; and
    5) Whether the Committee's mind was closed to the business properly before it at the second meeting.

Factual Background

5. The Claimant has been a resident of Roxwell since 1990. He lives opposite the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, Chelmsford, where the residential development was proposed. The Defendant is the local planning authority. The Interested Party is the applicant for planning permission. He plays no part in the proceedings.

6. The application site is currently an industrial estate, allocated for employment use in the Chelmsford Local Plan. It includes a number of buildings, containers and areas of external storage. It includes an area of land that has been used unlawfully to store and process waste and other materials in a mound nearing 15m in height. This has been the subject of enforcement action.

7. The Interested Party applied for outline planning permission for development described as "*Demolition of all existing workshops and commercial buildings, and the removal of hardstanding. Proposed up to 55 new dwellings, alterations to vehicular and pedestrian*

access. The formation of new estate roads, public footpaths, parking spaces, private amenity areas and public open spaces with children's play area and drainage infrastructure". Had the planning application been successful, its effect would have been to extinguish the employment use of the site and introduce a residential use.

8. A Planning Officer prepared a report on the application, recommending refusal. This was on the basis that the proposal is contrary to the local plan. In particular, residential development would be harmful to the intrinsic character and beauty of the countryside. It would represent an isolated and significant enclave of development that would conflict with the linear and sporadic development in the area. The development would remove the employment provision at the site. The report noted that planning enforcement action was the appropriate way to deal with unlawful development of the site.

The first meeting of the Planning Committee

9. The application came before the Planning Committee on 3rd November 2020. The Claimant was supportive of the planning application and spoke in its favour, explaining the difficulties faced by local residents due to the current use of the site:

> *"The site has been a problem, mainly due to the very poor planning conditions set to control the various activities on the site. This has allowed for seven day working and little control of hours worked. For us residents surrounding the site, this means we are unable to have what I would call normal use of our homes. For example, a barbeque on a weekend or bank holiday is not very pleasant with a large excavator and a concrete crusher in the background, and if the wind is in the wrong direction, a cloud of dust will be added to the mix. Just because we're in a small rural community, it shouldn't mean we have to grow up with this sort of disruption. On Monday to Saturday around 50 grab lorries a day enter and leave the site and machinery starts at 5:30 in the mornings. None of this is likely to change. As you know, planning permission cannot be rescinded.*
>
> *The housing, as I see it, is part of normal village life, providing homes for the people in a pleasant, healthy environment. It is also – it is so obviously not where you put heavy industry. I'm sure this type of industrial area would never be granted planning permission today. This is a very rare opportunity to put right the mistakes of the past……I can only see what I think is a choice between a site that has been turned into an environmentally damaging rubbish dump and the chance to turn that eyesore into something good for our community. Hope that common sense will prevail, and the members will grant permission for this development'*

10. Relevant extracts from the minutes of the Committee meeting record the following discussion and resolution on the application:

"Seven statements from members of the public and one from the local ward councillor were heard at the meeting. They argued that although the site was designated in the Local Plan as a rural employment site, and its redevelopment for housing would therefore be contrary to policy, the proposed development would be an improvement on the current use, part of which is unlawful and which caused disturbance and nuisance to local residents. Further, they were of the view that enforcement action would not resolve the problems associated with the current use, that the impact of the proposed development on the countryside would be no more harmful than that of the present use, and that the site was in a sustainable location.

The Committee's ensuing discussion centred on whether material considerations associated with the application could justify a departure from the Local Plan. Some members argued that in this case the benefits afforded by the proposed development, in terms of additional housing and improving the amenity of residents, were material considerations. Others said that whilst there were other rural employments sites not far from the application site, this site had specifically been designated as such in recently adopted Local Plan, which as well as providing sufficient land to meet housing need during the Plan period, also sought to meet anticipated demand for land to support business and economic growth.

Members also expressed doubts about the effectiveness of the enforcement action taken or proposed against the unauthorised uses of the site. Officers said that enforcement action only concerned unauthorised use of the northern part of the site and that the use and operation of the rest of site complied with planning and operational requirements. The effectiveness of planned action involving other authorities could not be judged at this stage.

…

Members also expressed views that the proposed development would not be as detrimental to the appearance of the countryside as the current use, that residential development would provide economic benefits to the area and that it would be more beneficial to biodiversity. There were contrary arguments that whilst the site was brownfield it did not mean that it all of it should be developed for housing, nor that the whole of the site could be regarded as detrimental to the appearance of the countryside.

After votes on motions either to refuse the application or to defer its consideration to enable conditions to be presented on any grant of planning permission, it was:

> *RESOLVED that the Committee, being minded to approve application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, defer it to enable officers to report to a future meeting on conditions that could be attached to any grant of planning permission for the development."* (underlining is the Court's emphasis)

Preparation of the further report

11. On 15th December 2020, the planning officer tasked with drafting the further report, required by the resolution above, sent an e-mail to the Planning Development Services Manager ('Development Services Manager') and the Councillor who had chaired the first Committee meeting ('Committee Chair') in the following terms:

> "*I'm a little bit unsure of what you want the report to look like, but I've drafted this…*"

12. On 17th December 2020 the Committee Chair sent an email to the Development Services Manager and the Head of Planning in the following terms:

> "*I am hoping to speak to [email refers to the leader of Liberal Democrat Group and Cabinet member for planning] about the position the officers will be taking over the Roxwell site. You mentioned needing a steer from the Lib Dem side, the present position being that you will be giving the reasons to approve as per our decision.*
> *Is there anything else I need to mention?*
>
> *We also need to speak with [email refers to a Councillor who attended the first meeting and had objected to the scheme]*."

13. Modifications were made to the draft of the further report by the Development Services Manager on 21st December 2020 (Versions 2, 3 and 4 of the draft). He then emailed the Head of Planning, the Committee Chair and the Cabinet Member (Planning) in the following terms:

> "*Please see draft report attached, and in particular para 1.6. The original report will be attached as an appendix. I've also beefed up 1.3 and 1.4 a bit. Is this ok or do you want something more overt?*"

14. The Cabinet Member responded by email on the same day commenting:

> "*…following discussion with [Head of Planning] today we agreed that it be made clearer to the Committee that the original*

> *recommendation was still available to the Committee if they were not satisfied with the reasons…*"

15. The Committee Chair responded by email on 22nd December in the following terms:

> "*I am pleased with 1.3 and 1.4. I agree more emphasis on being able to go back to the recommendation to refuse will help.*"

16. In light of the comments received from the Councillors, the Development Services Manger proposed further amendments by email dated 22nd December 2020:

> "*I could amend para 1.6 as follows:*
> *1.6 Although the application was deferred to allow officers to prepare conditions and heads of terms for a S106 Agreement, the Committee has not yet made a formal decision on the application. The previous report recommending refusal is attached as an appendix so the Committee has all the information available to make an informed decision on the application.*
> *Or*
> *1.6 Although the application was deferred to allow officers to prepare the conditions and heads of terms for a S106 Agreement, the Committee has not yet made a formal decision on the application. The officer recommendation is for refusal in accordance with the previous report (attached).*
> *Please advise, or amend as necessary*."

17. Further amendments were made to the draft of the Further Report by the Development Services Manger on 22nd December 2021 to create version 5 and version 6 (which was the final version). He sent an email to the two Councillors and Head of Planning in the following terms:

> "*Please see final version attached following discussion with David. You will see that the introduction has been beefed up. (The list of conditions gets removed before publication).*
>
> *Last call for amendments*."

18. The Committee Chair responded by email confirming that she was happy with the final draft.

The further report

19. The final version of the Officer's further report on the application was published on the Council's website on 4 January 2021. Paragraph 1.1 of the report stated:

> *"The application is referred to the Planning Committee following a meeting of the Committee on 3rd November where the Committee were minded to approve the application and asked for planning conditions to be prepared. Under the Council's constitution the Planning Committee has not yet made a formal decision on the application and all options are available to the Committee, subject to the normal voting procedures."*

20. The constitutional point was repeated at paragraph 2.5:

> *"Although the application was deferred to allow officers to prepare conditions and heads of terms for a S106 Agreement, the Committee has not yet made a formal decision on the application. The previous report recommending refusal is attached as an appendix so the Committee has all the information available to make an informed decision."*
>
> (underlining is the Court's emphasis)

21. The report included a list of proposed conditions, and addressed the agreed heads of terms for the section 106 agreement. It also included a further letter of representation objecting to the development and addressed the contents of that representation.

Communications with the Interested Party

22. The Interested Party (via his agent) requested the opportunity to speak at the second meeting. He was told by officers that the opportunity to make statements and put questions in person to the Committee had now passed, although he could submit written representations or information. The agent duly provided a written update on the conditions and section 106 agreement.

23. The Interested Party was provided with a copy of the updated information to be put before the Committee, including the representation objecting to the proposal. His agent responded by email dated 12 January 2021, expressing concern about the representation:

> *"Thank you for this and for providing it in advance of the meeting. I know that you must report any correspondence up to the point that the decision is made. I am, however, quite uncomfortable here because the objector (the adjacent landowner I understand) is really seeking to have the Committee's minuted decision: it being minded to approve the application and thus to defer for conditions to be formulated, changed to one of refusal. I am not entirely sure that the Court would see it the same way as the objector suggests, given that Councils must act consistently and have voted on the matter three times to achieve clarity of decision. The singular purpose of the Committee's deferral in November 2020 was solely so that conditions could be formulated. It was not to provide a*

> *platform for a third party, encouraged by whomever, to seek for a different outcome."*

The second meeting of the Planning Committee meeting

24. The application returned to the planning committee on 12th January 2021. The minutes of the meeting and resolution record that:

> *"At its meeting on 3 November 2020 the Committee had been minded to approve application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, contrary to the recommendation of officers that the application be refused. It had deferred the application to enable officers to report to a future meeting on conditions that could be attached to any grant of planning permission for the development.*
>
> *A Green Sheet of additional information containing the comments of a local resident and business owner and a letter of representation from the applicant's solicitor had been circulated to the Committee before the meeting.*
>
> *There was extensive discussion on the application. Several members who had expressed the view at the previous meeting that the application should be granted said that, having considered the matter further, they were now of the opposite view. Their reasons for this varied but included the precedent that would be set by going against, for inadequate reasons a policy in the recently adopted Local Plan and that the development would encroach on green field land. Other members reiterated opinions expressed at the previous meeting in opposing the application and referred to the loss of a rural employment site; the harm the proposed development would do to the countryside; that the development was not sustainable development; and the view that the suggested conditions would not make good what was otherwise a poor application.*
>
> *On being put to the vote, it was*
>
> *RESOLVED that the application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell be refused for the reasons set out in the report to the meeting on 3 November 2020."*

25. The refusal notice was issued on 13 January 2021.

The legal framework

26. Paragraph 4.2.25 of the Council's constitution is headed "Rules specific to certain Committees". Paragraph 4.2.25.3 provides as follows:

> *"The Committee's consideration of planning applications shall operate in accordance with the Planning Code in Part 5.2".*

27. Part 5.2 is headed 'Planning Code of Good Practice'. Paragraph 5.2.7 is headed 'Decisions contrary to officer recommendation'. Paragraph 5.2.7.1 provides that:

> *"If the Planning Committee wants to make a decision contrary to the officer's recommendation the material planning reasons for doing so shall be clearly stated, agreed and minuted. The application should be deferred to the next meeting of the Committee for consideration of appropriate conditions and reasons and the implications of such a decision clearly explained in the report back."*

28. Paragraph *5.2.7.2* provides that*:*

> *Only those Members of the Committee present at both meetings can vote on the reason for the decision. Exceptionally, the Committee may decide that circumstances prevent it from deferring the decision but its reasons must be clearly stated and recorded in the minutes. The Committee may be asked to nominate a 'member witness' at any subsequent appeal hearing in order to justify their decision."*

Submissions of the parties

29. The Claimant submits that the Planning Committee accepted the principle of the development at the first meeting, subject only to the production of suitable conditions. In accordance with its constitution, the Defendant was required at the second meeting to either; (i) grant planning permission subject to execution of a s.106 agreement; or (ii) refuse permission on the basis of a properly reasoned explanation as to why the conditions were not acceptable. No such explanation was provided and permission should therefore have been granted (Ground 1). The principle of consistency applied as between the decisions at the first and second meetings. The committee was reconsidering exactly the same application at the second meeting which it had previously decided to grant in principle. The Council did not grasp the "intellectual nettle" of its first decision. Nor did it provide adequate and intelligible reasons for departing from its first decision (Ground 2). The Defendant's procedure was manifestly unfair in taking account of further material planning considerations at the second meeting without permitting those supporting the application to address those new matters orally or by questions to the members and in not permitting the Interested Party to address the meeting (Ground 3). A number of features of the overall decision making process and particularly the second meeting illustrate that

there is a risk that the Committee's mind was closed to the business properly before it, namely the issue of conditions and the s.106 agreement (Ground 4)

30. The Defendant submits that the claim is in reality no more than a complaint about the exercise of planning judgment, formulated as a series of complaints about the procedure by which the impugned decision was reached. The claim proceeds on a central misunderstanding as to what happened at the first meeting. The decision made at the first meeting was to defer determination of the planning application. The Committee did not determine the application on that date. The claim misunderstands the terms of the Council's constitution and the requirements of fairness. The facts show the Committee's mind was open not closed.

Discussion

The decision at the first meeting

31. The central dispute between the parties, which underpins all four grounds of challenge, is the nature of the decision reached by the Planning Committee at its first meeting in November 2020. The Claimant contends that the Planning Committee decided to approve the principle of the development, subject only to the production of suitable conditions. Accordingly, the purpose of the second meeting was solely to discuss and agree the conditions; the terms of the section 106 agreement and the reasons for the grant of permission. The Council contends that the only decision reached at the first meeting was to defer consideration of the application until a future meeting where it could consider proposed conditions produced by officers in the meantime, to inform its further consideration of the application.

32. It was common ground that a local authority planning committee expresses itself by voting on a resolution and the minute then forms the public record of its decision; R (Shelley) v Carrick DC [1996] Env. L.R. 273, recently followed in R (Cross) v Cornwall Council [2021] EWC 1323 (Admin) at [57].

33. The resolution passed at the first meeting was as follows:

> *"RESOLVED that the Committee, being minded to approve application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, defer it to enable officers to report to a future meeting on conditions that could be attached to any grant of planning permission for the development." (underlining is Court's emphasis)*

34. In my assessment, the meaning of the resolution makes clear that the Committee decided to defer further substantive consideration of the application (and its decision) to a further meeting, on the basis of a preliminary view in favour of the application. Contrary to the Claimant's submissions, the Committee's decision making had not got as far as an 'in principle' decision, only a preliminary view. That the decision making was more inchoate is apparent from the wording of the resolution to the effect that "*...defer [the application]...to enable officers to report... on conditions that could be attached to any grant of planning permission"* (underlining is the Court's emphasis).

35. The Claimant took the Court through the transcript of the meeting and pointed to excerpts which, it was said, showed clearly that Councillors, the Chair of the Committee, its legal adviser and the senior planning officer all approached the discussion on the basis the Committee was deciding whether to approve the application or not. However, the transcript of the meeting cannot usurp the Committee's resolution, for the reasons explained by Schiemann J in R(Beebee) v Poole Borough Council [1990] 2 PLR 27:

> *"All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may have changed them because of what was said subsequently in debate".*

36. It might be said that the rationale for the proposition in Beebee is apparent from a review of the transcript of this particular meeting. There was, at times, considerable confusion amongst participants as to what members were supposed to be voting on. This may have been due to fact the meeting was conducted via Zoom during the Covid-19 pandemic. Nonetheless, by the end of the meeting, the confusion had been resolved. Participants were advised by the Head of Democratic Management that:

> *"Bearing in mind that if there is a vote against the Officer recommendation and in support of Councillor'[s]…recommendation in whatever form, then in effect, that is going to defer the application to a subsequent meeting of the Committee. It won't refuse it, as you know, from the Code of Conduct, because the Committee can't make an actual decision to refuse it on the night without agreeing the conditions. So, all I was going to suggest, Chair, is that it doesn't much matter which way you do it. I think you would need to have a clear understanding of members' wishes and how they, you know, how they want to vote, and then, that will either defer the application to come back with conditions and things like that, or it will agree the recommendation"*

37. Consistent with this advice, members approved a resolution to defer the application.

The Council's constitution

38. It was common ground that a failure to comply with a constitution established pursuant to section 37 of the Local Government Act 2000 renders the resultant decision unlawful and liable to be quashed: R (Domb) v Hammersmith & Fulham LBC [2009] LGR 340 and R (Bridgerow Ltd) v Cheshire West and Chester Borough Council [2015] PTSR 91. The Council's constitution is to be interpreted objectively according to the natural and ordinary meaning of the words used in context and according to common sense

(Lambeth London Borough Council v Secretary of State for Housing Communities and Local Government [2019] 1 WLR 4317 at §19).

39. In my assessment, the natural and ordinary meaning of paragraphs 5.2.7.1 and 5.2.7.2 of the constitution is that the decision making is deferred in circumstances where a Planning Committee is minded to go against an Officer's recommendation. Paragraph 5.2.7.1 says plainly that: "*The application should be deferred to the next meeting of the Committee for consideration of appropriate conditions and reasons and the implications of such a decision clearly explained in the report back.*" (underlining is the Court's emphasis). Further support for this interpretation comes from paragraph 5.2.7.2 which provides that "*exceptionally the Committee may decide that circumstances prevent it from deferring the decision*". Accordingly, the outcome is a pause or a 'breathing space' in the decision making.

40. The Claimant submitted that the only matters deferred are the conditions and the reasons for approval with the in-principle decision having already been made by the Committee. However, this interpretation does not accord with the last sentence of paragraph 5.2.7.1 ("*the implications of such a decision must be clearly explained in the report back*"). There would be no point in a report on the implications of the Committee's decision if it had already been made. Accordingly, the purpose of the pause in decision making "*for consideration of appropriate conditions and reasons and the implications of such a decision*" is to ensure that members have all the necessary information, including conditions (which in the circumstances of this case were not before them given the Officer had recommended refusal) and understand the implications of their proposed course of action when they subsequently come to take their decision. In appropriate cases, the purpose may also be to ensure the decision can be properly defended at any appeal. It was common ground that it is open to a local planning authority to revisit its resolutions prior to the formal grant of planning permission, yet the Claimant's interpretation of the constitution would effectively prohibit the Council from revisiting its decision after the first meeting, even if an obviously material consideration arises between the first and second meetings. Such a material consideration did in fact arise in this case, with the decision on the outstanding enforcement appeal by a Planning Inspector.

41. Given that I have found that the Committee resolved at the end of its first meeting to defer consideration of the application in light of the fact members were minded to act against Officer advice, it follows that there was no failure by the Committee to follow its Constitution and Ground 1 fails.

The Committee's change of mind between the first and second meetings – the principle of consistency

42. The Planning Committee changed its view on the application between the first and second meetings. At the first meeting the majority were minded to approve it. At the second meeting, the majority voted to refuse it. The minutes of the second meeting explain that "*several members who had expressed the view at the previous meeting that the application should be granted said that, having considered the matter further, they were now of the opposite view*".

43. It was common ground that it is open to a local planning authority to revisit resolutions made in relation to planning applications before a formal grant of permission is made, even in the absence of a material change in circumstances: King's Cross Railway Lands Group v London Borough of Camden [2007] EWHC 1515 (Admin), St Albans City and District Council v Secretary of State for Communities and Local Government & Anr [2015] EWHC 655 (Admin). A decision on a planning application does not take effect until it has been notified to the applicant, and not upon a resolution to grant or refuse: R (Burkett) v Hammersmith & Fulham LBC (No.1) [2002] UKHL 23. A previous planning decision in relation to the same land is capable of being a material consideration in a subsequent application: North Wiltshire DC v SSE (1993) 65 P&CR 137.

44. The Claimant relied on the proposition that where a previous decision has been subject to proper consultation and detailed consideration, and where the principle of consistency is engaged, (i) the previous decision is a material consideration; and (ii) the decision maker should consider (carefully) the weight to be given to the previous decision. It is necessary, in such cases, to grasp and address with reasons *"the intellectual nettle of the disagreement"*: (St Albans City & District Council v Secretary of State [2015] EWHC 655 (Admin)) at [24] – [27] and [32]).

45. The Claimant relied, in particular, on the case of R(Davison) v Elmbridge Borough Council [2020] 1 P&CR 1 to submit that the Council failed to engage with the principle of consistency or grasp the 'intellectual nettle' of its earlier approval in principle. He submitted that it was difficult to imagine a clearer case where the nettle ought to have been grasped. The application site and planning application were the same. All the planning issues had been before the Committee at the first meeting. This was not a case, for example, where material information was outstanding.

46. In Davison, the local planning authority had granted planning permission for a sports facility. That decision was subsequently quashed by a Court in judicial review proceedings whereupon the local authority made a fresh decision to grant planning permission. The second permission was also challenged in a second set of proceedings. The question whether a previous decision is a material consideration is highly fact sensitive (§39 of the judgment). The specific, fact sensitive, reasons why the principle of consistency was engaged in the particular circumstances of the decision making in that case were explained at § 60 and 61 of the judgment.

47. The facts of the other cases relied on by the Claimant may be distinguished from the facts of the present case. In St Albans City and District Council v Secretary of State for Communities and Local Government & Anr [2015] EWHC 655 the 'intellectual nettle' that had to be grasped was a previous appeal decision in 2008, following a lengthy public inquiry with cross examination of 17 experts and a 206-page report from the Planning Inspector: *"Given, the conclusions in 2008 of the Inspector and the Secretary of State were the result of that process, it would be wholly unsurprising if considerable weight were to be given to their judgment and evaluation in the determination of the second application."* (Holgate J at § 29).

48. In King's Cross Railway Lands Group v London Borough of Camden [2007] EWHC 1515 (Admin), the 'nettle' to be grasped was a previous resolution to grant planning

permission (subject to the completion of a section 106 agreement) by a planning committee following a two-day meeting with the benefit of an officer's report and appendices nearly 900 pages long. It was common ground that this resolution engaged the consistency principle.

49. I am not persuaded that the principle of consistency is engaged by the facts of the present case. I have concluded that the decision by the Committee at the end of the first meeting was to defer further substantive consideration of the application, on the basis of a preliminary view in its favour. The decision making was inchoate. This was made clear by the second Planning Officer's report which stated that the principle of the application was still at large (see paragraphs 1.1 and 2.5 of the report). I have also found that the Constitution prohibited a substantive decision at the first meeting, save in exceptional circumstances which no-one suggested applied here. There was therefore no 'intellectual nettle' to the first decision which needed to be grasped. The first decision amounted to no more than a procedural decision to defer further consideration, albeit based on a preliminary view in favour of the application.

50. The Claimant emphasised that there had been 104 minutes of detailed debate and consideration of the application by the Committee at the first meeting in November 2020. I accept that the debate may have been lengthy but the decision making remained inchoate. It did not reach a sufficiently concluded view so as to engage the burdens of the principle of consistency. I do not accept the Claimant's submission that this view reduces the debate at the first meeting to 'nought'. It is apparent from a review of the transcript of the second meeting that Councillors had the first debate in mind. It played its part in their developing thinking. Several members had changed their minds since the first debate but that is an entirely normal and ordinary aspect of decision making.

51. It follows that Ground 2 fails.

The Committee's procedure – fairness

52. It was common ground that in deciding a planning application a fair process must be followed (Regina (Wet Finishing Works Ltd) v Taunton Deane Borough Council [2018] PTSR 16; Wokingham Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 303 at [110]; Grafton Group (UK) plc v Secretary of State for Transport [2017] 1 WLR 373 at [41]).

53. The Claimant submitted that the Council's procedure was manifestly unfair in taking account of further material planning considerations at the second meeting without permitting those supporting the application to address those new matters orally or by questions to the members and in not permitting the Interested Party to address the meeting

54. What fairness requires is acutely fact sensitive and depends on all the circumstances of the case (Wokingham Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 303 at §54). Fairness must therefore be assessed in light of my conclusion that the decision making was deferred at the end of the first meeting and continued into a second meeting. Viewed in this context there is nothing unfair about the procedure at the second meeting. The Claimant and the Interested Party had

addressed the Committee at the first meeting. The Claimant did not express a wish to speak at the second meeting. It was common ground that there is no proposition of law or fairness that requires one third party to be given the opportunity to comment on the representations of another third party. The Interested Party was provided with an update on developments since the first meeting prior to the second meeting. He was permitted to submit written representations at the second meeting. There was no suggestion that the Council had failed to follow any relevant procedural rules. Both the Claimant and the Interested Party were given a fair opportunity to put their case.

55. Ground 3 fails.

Closed Minds

56. It was common ground that a process which leads to the conclusion that there was a real risk minds were closed is unlawful: R (Lewis) v Redcar and Cleveland Borough Council [2009] 1 WLR 83 at [68]; R (Miller) v Health Service Commissioner for England [2018] PTSR 801 at [57], [66].

57. It is for the court to assess whether Committee members did make the decision with closed minds or that the circumstances gave rise to such a real risk of closed minds that the decision ought not in the public interest be upheld. When taking a decision Councillors must have regard to material considerations and only to material considerations, and to give fair consideration to points raised, whether in an Officer's report to them or in representations made to them at a meeting of the Planning Committee. However, in doing so the Court must recognise elected Councillors are entitled, and expected, to have, and to have expressed, views on planning issues. They are not required to cast aside views on planning policy that they formed when seeking election or when acting as Councillors. In the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position. Given the role of Councillors, "clear pointers" are required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision (§62-63 Lewis).

58. The Claimant advances twelve factors which amount collectively, it is said, to a demonstration that the Committee's minds were closed to the business properly before it at the second meeting, namely the issue of conditions and the section 106 agreement:
    1) the absence of any substantive discussion of conditions during the second meeting.
    2) the absence of any discussion of the s.106 agreement during the second meeting.
    3) the absence of any framing or discussion of potential reasons for approval in the further report from the Officer or during the second meeting.
    4) the absence of any significant attempt to "grasp the intellectual nettle" of the decision at the first meeting.
    5) The fact that there had been significant 'interchange' between officers and key elected members in relation to the contents of the further Officer's report and hence the advice given to members at the second meeting.
    6) the failure of the separation of duties of officers and members that occurred as a result of that interchange and interventions by key members.
    7) the Committee adopted a procedure which prevented any supporter of the proposed development from making further representations during the second meeting, or asking any questions of members (as to their change of position or otherwise).

8) the Committee – knowing an 8-6 vote had decided the matter at the first meeting - decided to proceed notwithstanding the absence of two members who had previously voted in favour of the proposed development, and knowing a third who had previously supported it felt bound to abstain due to late arrival. There was no material available to those observing to suggest those members were aware that the committee members present intended to revisit the substance of the proposal.
9) the reversal or change of their position by members of the committee who had previously supported the proposal in 'vivid and forceful terms'.
10) the atypical nature of the further report compared with examples of reports generated after in principle decisions to grant planning permission, contrary to officer advice in other applications.
11) the decision to entertain a further representation dealing with the principle of development, after that issue had been determined by the first decision.
12) the overall approach to the second meeting, which created an impression of railroading the proposal to a refusal.

59. The Claimant faces an inherent difficulty in advancing his submissions on this ground, given the conclusions I have arrived at in relation to the nature of the decision making and the Council's constitution. The Committee had not reached a concluded decision by the end of the first meeting, save that it was minded to act against Officer advice. It deferred consideration, as required by the constitution. Accordingly, at the second meeting, the principle of the application remained 'live' for consideration. This had been made clear to members in the further report circulated prior to the meeting and to which no-one had objected. At the second meeting, several members had changed their minds on the application since the first meeting. This might be said to be evidence of open, rather than closed, minds. In these circumstances, discussion of conditions or the s106 agreement was otiose.

60. This then deals with the bulk of the propositions advanced by the Claimant under this ground, several of which are simply a restatement of the other grounds advanced by the Claimant. I am not persuaded that the remaining factors can be said to amount to 'clear pointers' of a closed mind (Lewis at §62), either singly or collectively. Proceeding with the second meeting in the absence of members who had been supportive of the application at the first meeting does not have the significance ascribed by the Claimant in circumstances where the decision making at the first meeting had only reached the status of a preliminary view. The reports from other planning applications provided by the Claimant ranged from 2013 to 2020. They were written by different authors, unsurprisingly they differed in tone, style and content. There was nothing wrong in officers updating the Committee with the representation received after the first meeting, as the Interested Party's agent accepted at the time in correspondence with the Planning Officers. Before me, the Council accepted that it could not be said to be best practice for Officers to have communicated with the Chair of the Committee after the first meeting as to the content of the second report. However, I am satisfied, on careful consideration of the relevant emails, that the communications in question concerned the procedural position (i.e. that all options remained open to the Committee) and were not about the substance of the application. In summary, I am not persuaded that this ground meets the threshold required to demonstrate that the Committee's mind was unlawfully closed to the business before it at the second meeting.

61. Ground 4 fails.

Conclusion

62. For the reasons set out above, the claim fails.

Neutral Citation Number: [2022] EWCA Civ 13

Appeal Nos. See Appendix 1 to [2021] EWHC 1201 (QB)
Case Nos: See Appendix 1 to [2021] EWHC 1201 (QB)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Nicklin
[2021] EWHC 1201 (QB)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 13/01/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ELISABETH LAING

BETWEEN:

(1) London Borough of Barking and Dagenham
(2) Other Local Authorities (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Claimants/Appellants

-and –

(1) Persons Unknown
(2) Other named Defendants (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Defendants/Respondents

-and -

(1) London Gypsies and Travellers
(2) Friends, Families and Travellers
(3) Derbyshire Gypsy Liaison Group

(4) High Speed Two (HS2) Limited
(5) Basildon Borough Council

Interveners

Caroline Bolton and Natalie Pratt (instructed by **Sharpe Pritchard LLP and LB Barking & Dagenham Legal Services**) for the **1st, 6th, 11th, 16th, 26th, 28th, 33rd and 34th claimants** (London Borough of Barking and Dagenham, London Borough of Havering, London Borough of Redbridge, Basingstoke and Deane Borough Council and Hampshire County Council, Nuneaton and Bedworth Borough Council and Warwickshire County Council, Rochdale Metropolitan Borough Council, Test Valley Borough Council, and Thurrock Council)

Ranjit Bhose QC and Steven Woolf (instructed by **South London Legal Partnership**) for the **7th and 12th claimants** (London Borough of Hillingdon, and London Borough of Richmond-Upon-Thames)

Nigel Giffin QC and Simon Birks (instructed by **Walsall Metropolitan Borough Council Legal Services**) for the **35th claimant** (Walsall Metropolitan Borough Council)

Mark Anderson QC and Michelle Caney (instructed by **Wolverhampton City Council Legal Services**) for the **36th claimant** (Wolverhampton County Council)

Marc Willers QC, Tessa Buchanan and Owen Greenhall (instructed by **Community Law Partnership**) for the **first three interveners** (London Gypsies and Travellers, Friends, Families and Travellers, and Derbyshire Gypsy Liaison Group)

Richard Kimblin QC (instructed by **Eversheds Sutherland (International) LLP**) for the **4th intervener** (HS2)

Wayne Beglan (instructed by **Basildon Borough Council Legal Services**) for the **5th intervener** (Basildon Borough Council) (making written submissions only)

Tristan Jones (instructed by **the Attorney General**) as **Advocate to the Court**

Hearing dates: 30 November and 1 and 2 December 2021

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

"Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:30am, Thursday 13 January 2022."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This case arises in the context of a number of cases in which local authorities have sought interim and sometimes then final injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on local authority land. These persons have been collectively described in submissions as "newcomers". Mr Marc Willers QC, leading counsel for the first three interveners, explained that the persons concerned fall mainly into three categories, who would describe themselves as Romani Gypsies, Irish Travellers and New Travellers.

2. The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land. The judge, Mr Justice Nicklin, held that this was the effect of a series of decisions, particularly this court's decision in *Canada Goose UK Retail Ltd. v. Persons Unknown and another* [2020] EWCA Civ 202, [2020] 1 WLR 2802 (*Canada Goose*) and the Supreme Court's decision in *Cameron v. Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau Intervening)* [2019] UKSC 6, [2019] 1 WLR 1471 (*Cameron*). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3. The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong,[1] and that, even if that is what the Court of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v. Gammell* [2006] 1 WLR 658 (*Gammell*), *Ineos Upstream Ltd v. Persons Unknown and others* [2019] EWCA Civ 515, [2019] 4 WLR 100 (*Ineos*), and *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12, [2020] PTSR 1043 (*Bromley*).

4. The case also raises a secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

5. In addition, there are subsidiary questions as to whether (a) the statutory jurisdiction to make orders against persons unknown under section 187B of the Town and Country Planning Act 1990 (section 187B) to restrain an actual or apprehended breach of

[1] There were 38 local authorities before the judge.

planning control validates the orders made, and (b) the court may in any circumstances like those in the present case make final orders against all the world.

6. I shall first set out the essential factual and procedural background to these claims, then summarise the main authorities that preceded the judge's decision, before identifying the judge's main reasoning, and finally dealing with the issues I have identified.

7. I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 (section 37) and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

8. This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.

The essential factual and procedural background

9. There were 5 groups of local authorities before the court, although the details are not material. The first group was led by Walsall Metropolitan Borough Council (Walsall), represented by Mr Nigel Giffin QC. The second group was led by Wolverhampton City Council (Wolverhampton), represented by Mr Mark Anderson QC. The third group was led by the London Borough of Hillingdon (Hillingdon), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by the London Borough of Barking and Dagenham (Barking) and the London Borough of Havering (Havering), represented by Ms Caroline Bolton. The cases in the groups led by Walsall, Wolverhampton, and Barking related to final injunctions, and those led by Hillingdon and Havering related to interim injunctions.

10. The injunctions granted in each of the cases were in various forms broadly described in the detailed Appendix 1 to the judge's judgment. Some of the final injunctions provided for review of the orders to be made by the court either annually or at other stages. Most, if not all, of the injunctions allowed permission for anyone affected by the order, including persons unknown, to apply to vary or discharge them.

11. It is important to note at the outset that these claims were all started under the procedure laid down by CPR Part 8, which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact (CPR 8.1(2)(a)). Whilst CPR 8.2A(1) contemplates a practice direction setting out circumstances in which a claim form may be issued under Part 8 without naming a defendant, no such practice direction has been made (see *Cameron* at [9]). Moreover, CPR 8.9 makes clear that, where the Part 8 procedure is followed, the defendant is not

required to file a defence, so that several other familiar provisions of the CPR do not apply and any time limit preventing parties taking a step before defence also does not apply. A default judgment cannot be obtained in Part 8 cases (CPR 8.1(5)). Nonetheless, CPR 70.4 provides that a judgment or order against "a person who is not a party to proceedings" may be enforced "against that person by the same methods as if he were a party".

12. These proceedings seem to have their origins from 2 October 2020 when Nicklin J dealt with an application in the case of *London Borough of Enfield v. Persons Unknown* [2020] EWHC 2717 (QB) (*Enfield*), and raised with counsel the issues created by *Canada Goose*. Nicklin J told the parties that he had spoken to the President of the Queen's Bench Division (the PQBD) about there being a "group of local authorities who already have these injunctions and who, therefore, may following the decision today, be intending or considering whether they ought to restore the injunctions in their cases to the Court for reconsideration". He reported that the PQBD's current view was that she would direct that those claims be brought together to be managed centrally. In his judgment in *Enfield*, Nicklin J said that "the legal landscape that [governed] proceedings and injunctions against Persons Unknown [had] transformed since the Interim and Final Orders were granted in this case", referring to *Cameron*, *Ineos*, *Bromley*, *Cuadrilla Bowland Ltd v. Persons Unknown* [2020] 4 WLR 29 (*Cuadrilla*), and *Canada Goose*.

13. Nicklin J concluded at [32] in *Enfield* that, in the light of the decision in *Speedier Logistics v. Aadvark Digital* [2012] EWHC 2276 (Comm) (*Speedier*), there was "a duty on a party, such as the Claimant in this case who (i) has obtained an injunction against Persons Unknown without notice, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration". He said that duty was not limited to public authorities.

14. At [42]-[44], Nicklin J said that *Canada Goose* established that final injunctions against persons unknown did not bind newcomers, so that any "interim injunction the Court granted would be more effective and more extensive in its terms than any final order the court could grant". That raised the question of whether the court ought to grant any interim relief at all. The only way that Enfield could achieve what it sought was "to have a rolling programme of applications for interim orders", resulting in "litigation without end".

15. On 16 October 2020, Nicklin J made an order expressed to be with the concurrence of the PQBD and the judge in charge of the Queen's Bench Division Civil List. That order (the 16 October order) recited the orders that had been made in *Enfield,* and that it appeared that injunctions in similar terms might have been made in 37 scheduled sets of proceedings, and that similar issues might arise. Accordingly, Nicklin J ordered without a hearing and of the court's own motion, that, by 13 November 2020, each claimant in the scheduled actions must file a completed and signed questionnaire in the form set out in schedule 2 to the order. The 16 October order also made provision for those claimants who might want, having considered *Bromley* and *Canada Goose*, to discontinue or apply to vary or discharge the orders they had obtained in their cases. The 16 October order stated that the court's first objective was to "identify those local authorities with existing Traveller Injunctions who [wished] to maintain such

injunctions (possibly with modification), and those who [wished] to discontinue their claims and/or discharge the current Traveller Injunction granted in their favour".

16. Mr Giffin and Mr Anderson emphasised to us that they had not objected to the order the court had made. The 16 October order does, nonetheless, seem to me to be unusual in that it purports to call in actions in which final orders have been made suggesting, at least, that those final orders might need to be discharged in the light of a change in the law since the cases in question concluded. Moreover, Mr Anderson expressed his client's reservations about one judge expressing "deep concern" over the order that had been made in favour of Wolverhampton by 3 other judges. By way of example, Jefford J had said in her judgment on 2 October 2018 that she was satisfied, following the principles in *Bloomsbury Publishing Group Ltd v. News Group Newspapers Ltd* [2003] EWHC 1205, [2003] 1 WLR 1633 (*Bloomsbury*) and *South Cambridgeshire District Council v. Persons Unknown* [2004] EWCA Civ 1280 (*South Cambridgeshire*), that it was appropriate for the application to be made against persons unknown.

17. The 16 October order and the completion of questionnaires by numerous local authorities resulted in the rolled-up hearing before Nicklin J on 27 and 28 January 2021, in respect of which he delivered judgment on 12 May 2021. As a result, the judge made a number of orders discharging the injunctions that the local authorities had obtained and giving consequential directions.

18. Nicklin J concluded his judgment by explaining the consequences of what he had decided, in summary, as follows:

    i) Claims against persons unknown should be subject to stated safeguards.

    ii) Precautionary interim injunctions would only be granted if the applicant demonstrated, by evidence, that there was a sufficiently real and imminent risk of a tort being committed by the respondents.

    iii) If an interim injunction were granted, the court in its order should fix a date for a further hearing suggested to be not more than one month from the interim order.

    iv) The claimant at the further hearing should provide evidence of the efforts made to identify the persons unknown and make any application to amend the claim form to add named defendants.

    v) The court should give directions requiring the claimant, within a defined period: (a) if the persons unknown have not been identified sufficiently that they fall within Category 1 persons unknown,[2] to apply to discharge the interim injunction against persons unknown and discontinue the claim under CPR 38.2(2)(a), (b) otherwise, as against the Category 1 persons unknown defendants, to apply for (i) default judgment;[3] or (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance,

---

[2] This was a reference to the two categories set out by Lord Sumption at [13] in *Cameron*, as to which see [35] below.

[3] As I have noted above, default judgment is not available in Part 8 cases.

that the claim be struck out and the interim injunction against persons unknown discharged.

vi) Final orders must not be drafted in terms that would capture newcomers.

19. I will return to the issues raised by the procedure the judge adopted when I deal with the second issue before this court raised by Ms Bolton.

The main authorities preceding the judge's decision

20. It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only 4½ years ago.

Bloomsbury: judgment 23 May 2003

21. The persons unknown in *Bloomsbury* had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt VC continued orders against the named parties for the limited period until the book would be published, and considered the law concerning making orders against unidentified persons. He concluded that an unknown person could be sued, provided that the description used was sufficiently certain to identify those who were included and those who were not. The description in that case [4] described the defendants' conduct and was held to be sufficient to identify them [16]-[21]. Sir Andrew was assisted by an advocate to the court. He said that the cases decided under the Rules of the Supreme Court did not apply under the Civil Procedure Rules: "the overriding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance" [19]. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site [2003] EWHC 1738, [2004] Env. L. R. 9 (*Hampshire Waste*): judgment 8 July 2003

22. *Hampshire Waste* was a protester case, in which Sir Andrew Morritt VC granted a without notice injunction against unidentified "[p]ersons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites … in connection with the 'Global Day of Action Against Incinerators'". Sir Andrew accepted at [6]-[10] that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23. In *South Cambridgeshire*, the Court of Appeal (Brooke and Clarke LJJ) granted a without notice interim injunction against persons unknown causing or permitting hardcore to be deposited, or caravans being stationed, on certain land, under section 187B.

24. At [8]-[11], Brooke LJ said that he was satisfied that section 187B gave the court the power to "make an order of the type sought by the claimants". He explained that the "difficulty in times gone by against obtaining relief against persons unknown" had been remedied either by statute or by rule, citing recent examples of the power to grant such relief in different contexts in *Bloomsbury* and *Hampshire Waste*.

Gammell: judgment 31 October 2005

25. In *Gammell*, two injunctions had been granted against persons unknown under section 187B. The first (in *South Cambridgeshire*) was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second (in *Bromley London Borough Council v. Maughan*) (*Maughan*) was an order made until further order restraining the stationing of caravans. In both cases, newcomers who violated the injunctions were committed for contempt, and the appeals were dismissed.

26. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) said that the issue was whether and in what circumstances the approach of the House of Lords in *South Bucks District Council v. Porter* [2003] UKHL 26, [2003] 2 AC 557 (*Porter*) applied to cases where injunctions were granted against newcomers [6]. He explained that, in *Porter*, section 187B injunctions had been granted against unauthorised development of land owned by named defendants, and the House was considering whether there had been a failure to consider the likely effect of the orders on the defendants' Convention rights in accordance with section 6(1) of the Human Rights Act 1998 (the 1998 Act) and the European Convention on Human Rights and Fundamental Freedoms (the Convention).

27. Sir Anthony noted at [10] that in *Porter*, the defendants were in occupation of caravans in breach of planning law when the injunctions were granted. The House had (Lord Bingham at [20]) approved [38]-[42] of Simon Brown LJ's judgment, which suggested that injunctive relief was always discretionary and ought to be proportionate. That meant that it needed to be: "appropriate and necessary for the attainment of the public interest objective sought - here the safeguarding of the environment - but also that it does not impose an excessive burden on the individual whose private interests - here the gipsy's private life and home and the retention of his ethnic identity - are at stake". He cited what Auld LJ (with whom Arden and Jacob LJJ had agreed) had said in *Davis v. Tonbridge & Malling Borough Council* [2004] EWCA Civ 194 (*Davis*) at [34] to the additional effect that it was "questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B", and that the jurisdiction was to be exercised with due regard to the purpose for which it was conferred, namely to restrain breaches of planning control. Auld LJ at [37] in *Davis* had explained that *Porter* recognised two stages: first, to look at the planning merits of the matter, according respect to the authority's conclusions, and secondly to consider for itself, in the light of the planning merits and any other circumstances, in particular those of the defendant, whether to grant injunctive relief. The question, as Sir Anthony saw it in *Gammell*, was whether those principles applied to the cases in question [12].

28. At [28]-[29], Sir Anthony held, as a matter of essential decision, that the balancing exercise required in *Porter* did not apply, either directly or by analogy, to cases where the defendant was a newcomer. In such cases, Sir Anthony held at [30]-[31] that the court would have regard to statements in *Mid-Bedfordshire District Council v. Brown* [2004] EWCA Civ 1709, [2005] 1 WLR 1460 (*Brown*) (Lord Phillips MR, Mummery and Jonathan Parker LJJ) as to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. The principles in *Porter* did not apply to an application to add newcomers (such as the defendants in *Gammell* and *Maughan*) as defendants to the action. It was, in that specific context, that Sir Anthony said what is so often cited at [32] in *Gammell*, namely:

> In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of [Ms Maughan] she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of [Ms Gammell] she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later.

29. In dismissing the appeals against the findings of contempt, Sir Anthony summarised the position at [33] including the following: (i) *Porter* applied when the court was considering granting an injunction against named defendants. (ii) *Porter* did not apply in full when a court was considering an injunction against persons unknown because the relevant personal information was, *ex hypothesi*, unavailable. That fact made it "important for courts only to grant such injunctions in cases where it was not possible for the applicant to identify the persons concerned or likely to be concerned". (iii) In deciding a newcomer's application to vary or discharge an injunction against persons unknown, the court will take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, applying the *Porter* and *Brown* principles.

30. These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

31. There is nothing in *Gammell* to suggest that any part of its reasoning depended on whether the injunctions had been granted on an interim or final basis. Indeed, it was essential to the reasoning that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them. It may also be noted that there was nothing in the decision to suggest that it applied only to injunctions granted specifically under section 187B, as opposed to cases where the claim was brought to restrain the commission of a tort.

Secretary of State for the Environment, Food and Rural Affairs v. Meier [2009] UKSC 11, [2009] 1 WLR 2780 (*Meier*): judgment 1 December 2009

32. In *Meier*, the Forestry Commission sought an injunction against travellers who had set up an unauthorised encampment. The injunction was granted by the Court of Appeal against "those people trespassing on, living on, or occupying the land known as Hethfelton Wood". The case did not, therefore, concern newcomers. Nonetheless, Lord Rodger made some general comments at [1]-[2] which are of some relevance to this case. He referred to the situation where the identities of trespassers were not known, and approved the way in which Sir Andrew Morritt VC had overcome the procedural problems in *Bloomsbury* and *Hampshire Waste*. Referring to *South Cambridgeshire*, he cited with approval Brooke LJ's statement that "[t]here was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule".[4]

Cameron: judgment 20 February 2019

33. In *Cameron*, an injured motorist applied to amend her claim to join "[t]he person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, but the Supreme Court unanimously allowed the appeal.

34. Lord Sumption said at [1] that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at [11] that, since *Bloomsbury*, the jurisdiction had been regularly invoked in relation to abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He said that in some of the cases, proceedings against persons unknown were allowed in support of an application for precautionary injunctions, where the defendants could only be identified as those persons who might in future commit the relevant acts. It was that body of case law that the majority of the Court of Appeal (Gloster and Lloyd-Jones LJJ) had followed in deciding that an action was permissible against the unknown driver who injured Ms Cameron. He said that it was "the first occasion on which the basis and extent of the jurisdiction [had] been considered by the Supreme Court or the House of Lords".

35. After commenting at [12] that the CPR neither expressly authorised nor expressly prohibited exceptions to the general rule that actions against unnamed parties were permissible only against trespassers (see CPR Part 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at [13] between two kinds of case in which the defendant cannot be named: (i) anonymous defendants who are identifiable but whose names are unknown (e.g. squatters), and (ii) defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction was that those in the first category were described in a way that made it possible in principle to locate or communicate with them, whereas in the second category it was not. It is to be noted that Lord Sumption did not mention a third category of newcomers.

---

4 Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

36. At [14], Lord Sumption said that the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant could properly be tested by asking whether it was conceptually possible to serve it: the general rule was that service of originating process was the act by which the defendant was subjected to the court's jurisdiction: *Barton v. Wright Hassall LLP* [2018] 1 WLR 1119 at [8]. The court was seised of an action for the purposes of the Brussels Convention when the proceedings were served (as much under the CPR as the preceding Rules of the Supreme Court): *Dresser UK Ltd v. Falcongate Freight Management Ltd* [1992] QB 502 per Bingham LJ at page 523. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR 6.15, which was why proceedings against anonymous trespassers under CPR 55.3(4) had to be effected in accordance with CPR 55.6 by placing them in a prominent place on the land. In *Bloomsbury*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. Lord Sumption then referred to *Gammell* as being a case where the Court of Appeal had held that, when proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts. It does not seem that he disapproved of that decision, since he followed up by saying that "[i]n the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis".

37. Accordingly, pausing there, Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell*, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

38. Lord Sumption proceeded to explain at [16] that one did not identify unknown persons by referring to something they had done in the past, because it did not enable anyone to know whether any particular persons were the ones referred to. Moreover, service on a person so identified was impossible. It was not enough that the wrongdoers themselves knew who they were. It was that specific problem that Lord Sumption said at [17] was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard.[5]

39. Pausing once again, one can see that, assuming these statements were part of the essential decision in *Cameron*, they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the

---

5 See *Jacobson v. Frachon* (1927) 138 LT 386 per Atkin LJ at page 392 (*Jacobson*).

proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see [32] in *Gammell*).

40. At [19], Lord Sumption explained why the treatment of the principle that a person could not be made subject to the jurisdiction of the court without having notice of the proceedings had been "neither consistent nor satisfactory". He referred to a series of cases about road accidents, before remarking that CPR 6.3 and 6.15 considerably broadened the permissible modes of service, but that the object of all the permitted modes of service was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so. He commented that the Court of Appeal in *Cameron* appeared to "have had no regard to these principles in ordering alternative service of the insurer". On that basis, Lord Sumption decided at [21] that, subject to any statutory provision to the contrary, it was an essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant. The Court of Appeal had been wrong to say that service need not be such as to bring the proceedings to the defendant's attention. At [25], Lord Sumption commented that the power in CPR 6.16 to dispense with service of a claim form in exceptional circumstances had, in general, been used to escape the consequences of a procedural mishap. He found it hard to envisage circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. He concluded at [26] that the anonymous unidentified driver in *Cameron* could not be sued under a pseudonym or description, unless the circumstances were such that the service of the claim form could be effected or properly dispensed with.

Ineos: judgment 3 April 2019

41. *Ineos* was argued just 2 weeks after the Supreme Court's decision in *Cameron*. The claimant companies undertook fracking, and obtained interim injunctions restraining unlawful protesting activities such as trespass and nuisance against persons unknown including those entering or remaining without consent on the claimants' land. One of the grounds of appeal raised the issue of whether the judge had been right to grant the injunctions against persons unknown (including, of course, newcomers).

42. Longmore LJ (with whom both David Richards and Leggatt LJJ agreed) first noted that *Bloomsbury* and *Hampshire Waste* had been referred to without disapproval in *Meier*. Having cited *Gammell* in detail, Longmore LJ recorded that Ms Stephanie Harrison QC, counsel for one of the unknown persons (who had been identified for the purposes of the appeal), had submitted that the enforcement against persons unknown was unacceptable because they "had no opportunity, before the injunction was granted, to submit that no order should be made" on the basis of their Convention rights. Longmore LJ then explained *Cameron*, upon which Ms Harrison had relied, before recording that she had submitted that Lord Sumption's two categories of unnamed or unknown defendants at [13] in *Cameron* were exclusive and that the defendants in *Ineos* did not fall within them.

43. Longmore LJ rejected that argument on the basis that it was "too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued". Nobody had suggested that *Bloomsbury* and *Hampshire Waste* were wrongly decided. Instead, she submitted that there was a distinction between

injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. Longmore LJ rejected that submission too at [29]-[30], holding that Lord Sumption's two categories were not considering persons who did not exist at all and would only come into existence in the future (referring to [11] in *Cameron*). Lord Sumption had, according to Longmore LJ, not intended to say anything adverse about suing such persons. Lord Sumption's two categories did not include newcomers, but "[h]e appeared rather to approve them [suing newcomers] provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver" was not infringed (see my analysis above). Lord Sumption's [15] in *Cameron* amounted "at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*". Longmore LJ, therefore, held in *Ineos* that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

44. Once again, there is nothing in this reasoning that justifies a distinction between interim and final injunctions. The basis for the decision was that *Bloomsbury* and *Hampshire Waste* were good law, and that in *Gammell* the defendant became a party to the proceedings when she knew of the injunction and violated it. *Cameron* was about the necessity for parties to know of the proceedings, which the persons unknown in *Ineos* did.

Bromley: judgment 21 January 2020

45. In *Bromley*, there was an interim injunction preventing unauthorised encampment and fly tipping. At the return date, the judge refused the injunction preventing unauthorised encampment on the grounds of proportionality, but granted a final injunction against fly tipping including by newcomers. The appeal was dismissed. *Cameron* was not cited to the Court of Appeal, and *Bloomsbury* and *Hampshire Waste* were cited, but not referred to in the judgments. At [29], however, Coulson LJ (with whom Ryder and Haddon-Cave LJJ agreed), endorsed the elegant synthesis of the principles applicable to the grant of precautionary injunctions against persons unknown set out by Longmore LJ at [34] in *Ineos*. Those principles concerned the court's practice rather than the appropriateness of granting such injunctions at all. Indeed, the whole focus of the judgment of Coulson LJ and the guidance he gave was on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the travelling communities.

46. At [31]-[34], Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gipsy and traveller community". Relying on article 6 of the Convention, *Attorney General v. Newspaper Publishing plc* [1988] Ch 333 and *Jacobson*, Coulson LJ said that "the principle that the court should hear both sides of the argument [was] therefore an elementary rule of procedural fairness".

47. Coulson LJ summarised many of the cases that are now before this court and dealt also with the law reflected in *Porter*, before referring at [44] to *Chapman v. United Kingdom* 33 EHRR 18 (*Chapman*) at [73], where the European Court of Human Rights (ECtHR) had said that the occupation of a caravan by a member of the Gypsy and Traveller community was an integral part of her ethnic identity and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also

because it a□ected her ability to maintain her identity as a gipsy. Other cases decided by the ECtHR were also mentioned.

48. After rejecting the proportionality appeal, Coulson LJ gave wider guidance starting at [100] by saying that he thought there was an inescapable tension between the "article 8 rights of the Gypsy and Traveller community" and the common law of trespass. The obvious solution was the provision of more designated transit sites.

49. At [102]-[108], Coulson LJ said that local authorities must regularly engage with the travelling communities, and recommended a process of dialogue and communication. If a precautionary injunction were thought to be the only way forward, then engagement was still of the utmost importance: "[w]elfare assessments should be carried out, particularly in relation to children". Particular considerations included that: (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and article 6 of the Convention, (b) there should be respect for the travelling communities' culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law, and (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide su□cient accommodation and transit sites, (d) borough-wide injunctions were inherently problematic, (e) it was sensible to limit the injunction to one year with subsequent review, as had been done in the Wolverhampton case (now before this court), and (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction. Coulson LJ concluded with a summary after saying that he did not accept the submission that this kind of injunction should never be granted, and that the cases made plain that "the gipsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "[a]n injunction which prevents them from stopping at all in a defined part of the UK comprised a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise".

50. It may be commented at once that nothing in *Bromley* suggests that final injunctions against unidentified newcomers can never be granted.

Cuadrilla: judgment 23 January 2020

51. In *Cuadrilla*, the Court of Appeal considered committals for breach of a final injunction preventing persons unknown, including newcomers, from trespassing on land in connection with fracking. The issues are mostly not relevant to this case, save that Leggatt LJ (with whom Underhill and David Richards LJJ substantively agreed) summarised the effect of *Ineos* (in which Leggatt LJ had, of course, been a member of the court) as being that there was no conceptual or legal prohibition on (a) suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort, or (b) granting precautionary injunctions to restrain such persons from committing a tort which has not yet been committed [48]. After further citation of authority, the Court of Appeal departed from one aspect of the guidance given in *Ineos*, but not one that is relevant to this case. Leggatt LJ noted at [50] that the appeal in *Canada Goose* was shortly to consider injunctions against persons unknown.

Canada Goose: judgment 5 March 2020

52. The first paragraph of the judgment of the court in *Canada Goose* (Sir Terence Etherton MR, David Richards and Coulson LJJ) recorded that the appeal concerned the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. On the claimants' application for summary judgment, Nicklin J had refused to grant a final injunction, discharged the interim injunction, and held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service under CPR 6.16(1). The first defendants were named as persons unknown who were protestors against the manufacture and sale at the first claimant's store of clothing made of or containing animal products. An interim injunction had been granted until further order in respect of various tortious activities including assault, trespass and nuisances, with a further hearing also ordered.

53. The grounds of appeal were based on Nicklin J's findings on alternative service and dispensing with service, the description of the persons unknown, and the judge's approach to the evidence and to summary judgment. The appeal on the service issues was dismissed at [37]-[55]. The Court of Appeal started its treatment of the grounds of appeal relating to description and summary judgment by saying that it was established that proceedings might be commenced, and an interim injunction granted, against persons unknown in certain circumstances, as had been expressly acknowledged in *Cameron* and put into effect in *Ineos* and *Cuadrilla*.

54. The court in *Canada Goose* set out at [60] Lord Sumption's two categories from [13] of *Cameron*, before saying at [61] that that distinction was critical to the possibility of service: "Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional" [14]. This citation may have sown the seeds of what was said at [89]-[92], to which I will come in a moment.

55. At [62]-[88] in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron, Gammell*, *Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v. Pitt* [1976] 1 QB 142 and *Burris v. Azadani* [1995] 1 WLR 1372. At [82], the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at [83]-[88] applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction.

56. It is worth recording the guidelines for the grant of interim relief laid down in *Canada Goose* at [82] as follows:

> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the

proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".

(2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify [precautionary] relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application.

57. The claim form was held to be defective in *Canada Goose* under those guidelines and the injunctions were impermissible. The description of the persons unknown was also impermissibly wide, because it was capable of applying to persons who had never been at the store and had no intention of ever going there. It would have included a "peaceful protester in Penzance". Moreover, the specified prohibited acts were not confined to unlawful acts, and the original interim order was not time limited. Nicklin J had been bound to dismiss the application for summary judgment and to discharge the interim injunction: "both because of non-service of the proceedings and for the further reasons … set out below".

58. It is the further reasons "set out below" at [89]-[92] that were relied upon by Nicklin J in this case that have been the subject of the most detailed consideration in argument before us. They were as follows:

89. A final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v. News Group Newspapers Ltd* [2001] Fam 430 [*Venables*], in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v. Times Newspapers Ltd* [1992] 1 AC 191, 224 [*Spycatcher*]. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in [*Spycatcher*] of the usual principle that a final injunction operates only between the parties to the proceedings.

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v. Afsar* [2019] EWHC 3217 (QB) at [132].

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the

proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

The reasons given by the judge

59. The judge began his judgment at [2]-[5] by setting out the background to unauthorised encampment injunctions derived mainly from Coulson LJ's judgment in *Bromley*. At [6], the judge said that the central issue to be determined was whether a final injunction granted against persons unknown was subject to the principle that final injunctions bind only the parties to the proceedings. He said that *Canada Goose* held that it was, but the local authorities contended that it should not be. It may be noted at once that this is a one-sided view of the question that assumes the answer. The question was not whether an assumed general principle derived from *Spycatcher* or *Cameron* applied to final injunctions against persons unknown (which if it were a general principle, it obviously would), but rather what were the general principles to be derived from *Spycatcher*, *Cameron* and *Canada Goose*.

60. At [10]-[25], the judge dealt with three of the main cases: *Cameron*, *Bromley* and *Canada Goose*, as part of what he described as the "changing legal landscape".

61. At [26]-[113], the judge dealt in detail with what he called the Cohort Claims under 9 headings: assembling the Cohort Claims and their features, service of the claim form on persons unknown, description of persons unknown in the claim form and in CPR 8.2A, the [mainly statutory] basis of the civil claims against persons unknown, powers of arrest attached to injunction orders, use of the interim applications court of the Queen's Bench Division (court 37), failure to progress claims after the grant of an interim injunction, particular Cohort Claims, and the case management hearing on 17 December 2020: identification of the issues of principle to be determined.

62. On the first issue before him (what I have described at [4] above as the secondary question before us), the judge stated his conclusion at [120] to the effect that the court retained jurisdiction to consider the terms of the final injunctions. At [136], he said that it was legally unsound to impose concepts of finality against newcomers, who only later discovered that they fell within the definition of persons unknown in a final judgment. The permission to apply provisions in several injunctions recognised that it would be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR 40.9, which provided that: "[a] person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied".

63. On the second and main issue (the primary issue before us), the judge stated his conclusion at [124] that the injunctions granted in the Cohort Claims were subject to the *Spycatcher* principle (derived from page 224 of the speech of Lord Oliver) and applied in *Canada Goose* that a final injunction operated only between the parties to the proceedings, and did not fall into the exceptional category of civil injunction that could be granted against the world. His conclusion is explained at [161]-[189].

64. On the third issue before him (but part of the main issue before us), the judge concluded at [125] that if the relevant local authority cannot identify anyone in the category of persons unknown at the time the final order was granted, then that order bound nobody.

65. The judge stated first, in answer to his second issue, that the court undoubtedly had the power to grant an injunction that bound non-parties to proceedings under section 37. That power extended, exceptionally, to making injunction orders against the world (see *Venables***)**. The correct starting point was to recognise the fundamental difference between interim and final injunctions. It was well-established that the court could grant an interim injunction against persons unknown which would bind all those falling within the description employed, even if they only became such persons as a result of doing some act after the grant of the interim injunction. He said that the key decision underpinning that principle was *Gammell*, which had decided that a newcomer became a party to the underlying proceedings when they did an act which brought them within the definition of the defendants to the claim. The judge thought that there was no conceptual difficulty about that at the interim stage, and that *Gammell* was a case of a breach of an interim injunction. At [173], the judge stated that *Gammell* was not authority for the proposition that persons could become defendants to proceedings, after a final injunction was granted, by doing acts which brought them within the definition of persons unknown. He did not say why not. But the point is, at least, not free from doubt, bearing in mind that it is not clear whether Ms Maughan's case, decided at the same time as *Gammell*, concerned an interim or final order.

66. At [174], the judge suggested that a claim form had to be served for the court to have jurisdiction over defendants at a trial. Relief could only be granted against identified persons unknown at trial: "[i]t is fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim". Pausing there, it may be noted that, even on the judge's own analysis, that is not the case, since he acknowledged that injunctions were validly granted against the world in cases like *Venables*. He relied on [92] in *Canada Goose* as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. In my judgment, as appears hereafter, that statement was at odds with the decision in *Gammell*.

67. At [175]-[176], the judge rejected the submission that traveller injunctions were "not subject to these fundamental rules of civil litigation or that the principle from *Canada Goose* is limited only to 'protester' cases, or cases involving private litigation". He said that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". Nothing in section 187B suggested that Parliament had granted local authorities the ability to obtain final injunctions against unknown newcomers. The procedural rules in CPR PD 20.4 positively ruled out commencing proceedings against persons unknown who could not be identified. At [180] the judge said that, insofar as any support could be found in *Bromley* for a final injunction binding newcomers, *Bromley* was not considering the point for decision before Nicklin J.

68. The judge then rejected at [186] the idea that he had mentioned in *Enfield* that application of the *Canada Goose* principles would lead to a rolling programme of interim injunctions: (i) On the basis of *Ineos* and *Canada Goose*, the court would not grant interim injunctions against persons unknown unless satisfied that there were people capable of being identified and served. (ii) There would be no civil claim in

which to grant an injunction, if the claim cannot be served in such a way as can reasonably be expected to bring the proceedings to an identified person's attention. (iii) An interim injunction would only be granted against persons unknown if there were a sufficiently real and imminent risk of a tort being committed to justify precautionary relief; thereafter, a claimant will have the period up to the final hearing to identify the persons unknown.

69. The judge said that a final injunction should be seen as a remedy flowing from the final determination of rights between the claimant and the defendants at trial. That made it important to identify those defendants before that trial. The legitimate role for interim injunctions against persons unknown was conditional and to protect the existing state of affairs pending determination of the parties' rights at a trial. A final judgment could not be granted consistently with *Cameron* against category 2 defendants: i.e. those who were anonymous and could not be identified.

70. Between [190]-[241], Nicklin J considered whether final injunctions could ever be granted against the world in these types of case. He decided they could not, and discharged those that had been granted against persons unknown. At [244]-[246], the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see [17] above).

The main issue: Was the judge right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land?

Introduction to the main issue

71. The judge was correct to state as the foundation of his considerations that the court undoubtedly had the power under section 37 to grant an injunction that bound non-parties to proceedings. He referred to *Venables* as an example of an injunction against the world, and there is a succession of cases to similar effect. It is true that they all say, in the context of injuncting the world from revealing the identity of a criminal granted anonymity to allow him to rehabilitate, that such a remedy is exceptional. I entirely agree. I do not, however, agree that the courts should seek to close the categories of case in which a final injunction against all the world might be shown to be appropriate. The facts of the cases now before the court bear no relation to the facts in *Venables* and related cases, and a detailed consideration of those cases is, therefore, ultimately of limited value.

72. Section 37 is a broad provision providing expressly that "the High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so". The courts should not cut down the breadth of that provision by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted.

73. The judge in this case seems to me to have built upon [89]-[92] of *Canada Goose* to elevate some of what was said into general principles that go beyond what it was necessary to decide either in *Canada Goose* or this case.

74. First, the judge said that it was the "correct starting point" to recognise the fundamental difference between interim and final injunctions. In fact, none of the cases that he relied

upon decided that. As I have already pointed out, none of *Gammell*, *Cameron* or *Ineos* drew such a distinction.

75. Secondly, the judge said at [174] that it was "fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim". Again, as I have already pointed out, no such fundamental principle is stated in any of the cases, and such a principle would be inconsistent with many authorities (not least, *Venables*, *Gammell* and *Ineos*). The highest that *Canada Goose* put the point was to refer to the "usual principle" derived from *Spycatcher* to the effect that a final injunction operated only between the parties to the proceedings. The principle was said to be applicable in *Canada Goose*. Admittedly, *Canada Goose* also described that principle as consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard, but that was said without disapproving the mechanism explained by Sir Anthony Clarke in *Gammell* by which a newcomer might become a party to proceedings by knowingly breaching a persons unknown injunction.

76. Thirdly, the judge suggested that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". This was, on any analysis, going too far as I shall seek to show in the succeeding paragraphs.

77. Fourthly, the judge said that it was important to identify all defendants before trial, because a final injunction should be seen as a remedy flowing from the final determination of rights between identified parties. This ignores the Part 8 procedure adopted in unauthorised encampment cases, which rarely, if ever, results in a trial. Interim injunctions in other fields often do protect the position pending a trial, but in these kinds of case, as I say, trials are infrequent. Moreover, there is no meaningful distinction between an interim and final injunction, since, as the facts of these cases show and *Bromley* explains, the court needs to keep persons unknown injunctions under review even if they are final in character.

78. With that introduction, I turn to consider whether the statements made in [89]-[92] of *Canada Goose* properly reflect the law. I should say, at once, that those paragraphs were not actually necessary to the decision in *Canada Goose*, even if the court referred to them at [88] as being further reasons for it.

[89] of *Canada Goose*

79. The first sentence of [89] said that "a final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to

unauthorised encampment cases, at least insofar as they are based on the torts of trespass and nuisance. I would be unwilling to accede to the local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80. *Canada Goose* then referred at [89] to "some very limited circumstances" in which a final injunction could be granted against the whole world, giving *Venables* as an example. It said that protester actions did not fall within that exceptional category. That is true, but does not explain why a final injunction against persons unknown might not be appropriate in such cases.

81. *Canada Goose* then said at [89], as I have already mentioned, that the usual principle, which applied in that case, was that a final injunction operated only between the parties to the proceedings, citing *Spycatcher* as being consistent with *Cameron* at [17]. That passage was, in my judgment, a misunderstanding of [17] of *Cameron*. As explained above, [17] of *Cameron* did not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them (see [32] in *Gammell*). Moreover at [63] in C*anada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people who will or are highly likely in the future to commit an unlawful civil wrong (i.e. newcomers), and (ii) Lord Sumption had referred at [15] with approval to *Gammell* where it was held that "persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings". There was no valid distinction between such an order made as a final order and one made on an interim basis.

82. There was no reason for the Court of Appeal in *Canada Goose* to rely on the usual principle derived from *Spycatcher* that a final injunction operates only between the parties to the proceedings. In *Gammell* and *Ineos* (cases binding on the Court of Appeal) it was held that a person violating a "persons unknown" injunction became a party to the proceedings. *Cameron* referred to that approach without disapproval. There is and was no reason why the court cannot devise procedures, when making longer term persons unknown injunctions, to deal with the situation in which persons violate the injunction and makes themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in *Gammell* had just such an opportunity, even though they were held to be in contempt. *Spycatcher* was a very different case, and only described the principle as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain.

[90] of *Canada Goose*

83. In my judgment both the judge at [90] and the Court of Appeal in *Canada Goose* at [90] were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch) (*Vastint*) was wrong. There, a final injunction was granted against persons unknown enjoining them from entering or remaining at the site of the former Tetley Brewery (for the purpose of organising or attending illegal raves). At [19]-[25], Marcus Smith J explained his reasoning relying

on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945 (Ch)). At [24], he said that the making of orders against persons unknown was settled practice provided the order was clearly enough drawn, and that it worked well within the framework of the CPR: "[u]ntil an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringing the order that makes the infringer a party". Any person a□ected by the order could apply to set it aside under CPR 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

[91] of *Canada Goose*

84. In the first two sentences of [91], *Canada Goose* seeks to limit persons unknown subject to final injunctions to those "within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.

85. The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of [91] are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron.*

86. In the third sentence of [91], the court in *Canada Goose* said that the proposed final injunction which Canada Goose sought by way of summary judgment was objectionable as not being limited to Lord Sumption's category 1 defendants, who had already been served and identified. As I have said, that ignores the fact that the court had already said that Lord Sumption excluded newcomers and the *Gammell* situation.

87. The court in *Canada Goose* then approved Nicklin J at [159] in his judgment in *Canada Goose*, where he said this:

> 158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the final order permitting any newcomers to apply to vary or discharge the final order.
>
> 159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55—60 above. Unknown individuals, without notice of the proceedings, would have judgment and a final injunction granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the "final order" at future protests, the court could be faced with an

unknown number of applications by individuals seeking to "vary" this "final order" and possible multiple trials. This is the antithesis of finality to litigation.

88. This passage too ignores the essential decision in *Gammell*.

89. As I have already said, there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons unknown. Of course, subject to what I say below, the guidelines in *Canada Goose* need to be adhered to. Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at end. A person who is not a party but who is directly affected by an order may apply under CPR 40.9. In addition, in the case of a third-party costs order, CPR 46.2 requires the non-party to be made party to the proceedings, even though the dispute between the litigants themselves is at an end. In this case, as in *Canada Goose,* the court was effectively concerned with the enforcement of an order, because the problems in *Canada Goose* all arose because of the supposed impossibility of enforcing an order against a non-party. Since the order can be enforced as decided authoritatively in *Gammell*, there is no procedural objection to its being made. The CPR contain many ways of enforcing an order. CPR 70.4 says that an order made against a non-party may be enforced by the same methods as if he were a party. In the case of a possession order against squatters, the enforcement officer will enforce against anyone on the property whether or not a newcomer. Notice must be given to all persons against whom the possession order was made and "any other occupiers": CPR 83.8A. Where a judgment is to be enforced by charging order CPR 73.10 allows "any person" to object and allows the court to decide any issue between any of the parties and any person who objects to the charging order. None of these rules was considered in *Canada Goose*. In addition, in the case of an injunction (unlike the claim for damages in *Cameron*), there is no possibility of a default judgment, and the grant of the injunction will always be in the discretion of the court.

90. The decision of Warby J in *Birmingham City Council v. Afsar* [2019] EWHC 3217 (QB) at [132] provides no further substantive reasoning beyond [159] of Nicklin J.

Paragraph [92] of *Canada Goose*

91. The reasoning in [92] is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases.

92. It was illogical for the court at [92] in *Canada Goose* to suggest, in the face of *Gammell*, that the parties to the action could only include persons unknown "who have breached the interim injunction and are identifiable albeit anonymous". There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that "[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

93. In my judgment, the judge was wrong to suggest that the correct starting point was the "fundamental difference between interim and final injunctions". There is no difference in jurisdictional terms between the grant of an interim and a final injunction. *Gammell* had not, as the judge thought, drawn any such distinction, and nor had *Ineos* as I have explained at [31] and [44] above. It would have been wrong to do so.

94. The judge, as it seems to me, went too far when he said at [174] that relief could only be granted against identified persons unknown at trial. He relied on *Canada Goose* at [92] as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. But, as I have said, that misunderstands both *Gammell* and *Ineos*. *Ineos* itself made clear that Lord Sumption's two categories of defendant in *Cameron* did not consider persons who did not exist at all and would only come into existence in the future. *Ineos* held that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

95. I agree with the judge that there is no material distinction between an injunction against protesters and one against unauthorised encampment, certainly insofar as they both involve the grant of injunctions against persons unknown in relation to torts of trespass or nuisance. Nor is there any material distinction between those cases and the cases of urban exploring where judges have granted injunctions restraining persons unknown from trespassing on tall buildings (for example, the Shard) by climbing their exteriors (e.g. *Canary Wharf Investments Ltd v. Brewer* [2018] EWHC 1760 (QB) and *Chelsea FC v. Brewer* [2018] EWHC 1424 (Ch)). One of those cases was an interim and one a final injunction, but no distinction was made by either judge.

96. As I have explained, in my judgment, the judge ought not to have applied [89]-[92] of *Canada Goose*. Instead, he ought to have applied *Gammell* and *Ineos. Bromley* too had correctly envisaged the possibility of final injunctions against newcomers. The judge misunderstood the Supreme Court's decision in *Cameron*.

The doctrine of precedent

97. We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did not mandate the conclusions reached by the judge and [89]-[92] of *Canada Goose*, whether this court would be justified in refusing to follow those paragraphs. That question turns on precisely what *Gammell*, *Ineos* and *Canada Goose* decided.

98. In *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 (*Young*), three exceptions to the rule that the Court of Appeal is bound by its previous decisions were recognised. First, the Court of Appeal can decide which of two conflicting decisions of its own it will follow. Secondly, the Court of Appeal is bound to refuse to follow a decision of its own which cannot stand with a subsequent decision of the Supreme Court, and thirdly, the Court of Appeal is not bound to follow a decision of its own if given without proper regard to previous binding authority.

99. In my judgment, it is clear that *Gammell* decided, and *Ineos* accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron*, and there is and was no basis to suggest that the mechanism in *Gammell* was not applicable to make an unknown person a party to an action, whether it occurred following an interim or a final injunction. Accordingly, a premise of *Gammell* was that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, [89]-[92] of *Canada Goose* were inconsistent with *Ineos* and *Gammell*. Moreover, those paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at [89] above. For those reasons, it is open to this court to apply the first and third exceptions in *Young*. It can decide which of *Gammell* and *Canada Goose* it should follow, and it is not bound to follow the reasons given at [89]-[92] of *Canada Goose*, which even if part of the court's essential reasoning, were given without proper regard to *Gammell*, which was binding on the Court of Appeal in *Canada Goose*.

100. This analysis is applicable even if [89]-[92] of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that [89]-[92] of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v. CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch. 306 at [65]-[67] and [97]).

Conclusion on the main issue

101. For the reasons I have given, I would decide that the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (newcomers), from occupying and trespassing on local authority land.

The guidance given in *Bromley* and *Canada Goose* and in this case by Nicklin J

102. We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at [82] of *Canada Goose* (see [56] above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment cases at [99]-[109] in *Bromley* [see [49] above). It would, therefore, be inappropriate for me to revisit in detail what was said there. I would, however, make the following comments.

103. First, the court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final injunction could not, either as a matter of law or settled practice, be granted. In those circumstances, these passages must, in view of our decision in this case, be viewed with that qualification in mind.

104. Secondly, I doubt whether Coulson LJ was right to comment that: (i) there was an inescapable tension between the article 8 rights of the Gypsy and Traveller community and the common law of trespass, and (ii) the cases made plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another.

105. On the first point, it is not right to say that either "the gipsy and traveller community" or any other community has article 8 rights. Article 8 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* (and unlike in *Manchester City Council v. Pinnock* [2010] UKSC 45, [2011] UKSC 6, [2011] 2 AC 104), newcomers cannot rely on an article 8 right to respect for their home, because they have no home on land they do not own. They can rely on a private and family life claim to pursue a nomadic lifestyle, because *Chapman* decided that the pursuit of a traditional nomadic lifestyle is an aspect of a person's private and family life. But the scheme of the HRA 1998 is individualised. It is unlawful under section 6 for a public authority to act incompatibly with a Convention right, which refers to the Convention right of a particular person. The mechanism for enforcing a Convention right is specified in section 7 as being legal proceedings by a person who is or would be a victim of any act made unlawful by section 6. That means, in this context, that it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person's article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 protocol 1 to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person's private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.

106. Secondly, it is not, I think, quite clear what Coulson LJ meant by saying that the Gypsy and Traveller community had an enshrined freedom to move from one place to another. Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals' qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.

107. Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that

persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.

108. It will already be clear that the guidance given by the judge in this case at [248] (see [18] above) requires reconsideration. There are indeed safeguards that apply to injunctions sought against persons unknown in unauthorised encampment cases. Those safeguards are not, however, based on the artificial distinction that the judge drew between interim and final orders. The normal rules are applicable, as are the safeguards mentioned in *Bromley* (subject to the limitations already mentioned at [104]-[106] above), and those mentioned below at [117]. There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made. The two categories of persons unknown referred to by Lord Sumption at [13] in *Cameron* have no relevance to cases of this kind. He was not considering the position of newcomers. The judge was wrong to suggest that directions should be given for the claimant to apply for a default judgment. Such judgments cannot be obtained in Part 8 cases. A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers.

The secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court

109. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

110. In my judgment, the procedure adopted was highly unusual, because it was, in effect, calling in cases that had been finally decided on the basis that the law had changed. We heard considerable argument based on the court's power under CPR 3.1(7), which gives the court a power "to vary or revoke [an] order". This court has recently said that the circumstances which would justify varying or revoking a final order would be very rare given the importance of finality (see *Terry v. BCS Corporate Acceptances* [2018] EWCA Civ 2422 at [75]).

111. As it seems to me, however, we do not need to spend much time on the process which was adopted. First, the local authorities concerned did not object at the time to the court calling in their cases. Secondly, the majority of the injunctions either included provision for review at a specified future time or express or implied permission to apply. Thirdly, even without such provisions, the orders in question would, as I have already explained, be reviewable at the instance of newcomers, who had made themselves parties to the claims by knowingly breaching the injunctions against unauthorised encampment.

112. In these circumstances, the process that was adopted has ultimately had a beneficial outcome. It has resulted in greater clarity as to the applicable law and practice.

The statutory jurisdiction to make orders against person unknown under section 187B to restrain an actual or apprehended breach of planning control validates the orders made

113. The injunctions in these cases were mostly granted either on the basis of section 187B or on the basis of apprehended trespass and nuisance, or both.

114. Section 187B provides that: (1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part. (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach. (3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown. (4) In this section "the court" means the High Court or the county court.

115. CPR 8APD.20 provides at [20.1]-[20.6] in part as follows: 20.1 This paragraph relates to applications under – (1) [section 187B]; 20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant. … 20.4 In the claim form, the applicant must describe the defendant by reference to – (1) a photograph; (2) a thing belonging to or in the possession of the defendant; or (3) any other evidence. 20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings. (The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place). 20.6 The application must be accompanied by a witness statement. The witness statement must state – (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him; (2) the steps taken by him to ascertain the defendant's identity; (3) the means by which the defendant has been described in the claim form; and (4) that the description is the best the applicant is able to provide.

116. In the light of what I have decided as to the approach to be followed in relation to injunctions sought under section 37 against persons unknown in relation to unauthorised encampment, the distinctions that the parties sought to draw between section 37 and section 187B applications are of far less significance to this case.

117. In my judgment, sections 37 and 187B impose the same procedural limitations on applications for injunctions of this kind. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment cases under section 187B as they are to one sought in such a case to restrain apprehended trespass or nuisance. Indeed, CPR 8APD.20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.

118. There is, therefore, no need for me to say any more about section 187B.

Can the court in any circumstances like those in the present case make final orders against all the world?

119. As I have said, Nicklin J decided at [190]-[241] that final injunctions against persons unknown, being a species of injunction against all the world, could never be granted in unauthorised encampment cases. For the reasons I have given, I take the view that he was wrong.

120. I have already explained the circumstances in which such injunctions can be granted at [102]-[108]. Beyond what I have said, however, I take the view that it is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37. Injunctions against the world have been granted in the type of case epitomised by *Venables*. Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate in some protester cases as is demonstrated by the authorities I have already referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required.

121. I conclude that the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

Conclusions

122. The parties agreed four issues for determination in terms that I have not directly addressed in this judgment. They did, however, raise substantively the four issues I have dealt with.

123. I have concluded, as I indicated at [7] above, that the judge was wrong to hold that the court cannot grant final injunctions against unauthorised encampment that prevent newcomers from occupying and trespassing on land. Whilst the procedure adopted by the judge was unorthodox and unusual in that he called in final orders for revision, no harm has been done in that the parties did not object at the time and it has been possible to undertake a comprehensive review of the law applicable in an important field. Most of the orders anyway provided for review or gave permission to apply. The procedural limitations applicable to injunctions against person unknown are as much applicable under section 37 as they are to those made under section 187B. The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

124. I would allow the appeal. I am grateful to all counsel, but particularly to Mr Tristan Jones, whose submissions as advocate to the court have been invaluable. Counsel will no doubt want to make further submissions as to the consequences of this judgment. Without pre-judging what they may say, it may be more appropriate for such matters to be dealt with in the High Court.

Lord Justice Lewison:

125. I agree.

Lady Justice Elisabeth Laing:

126. I also agree.

Neutral Citation Number: [2020] EWCA Civ 1440

Case No: A2/2019/2802 & A2/2019/2804

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HHJ KEYSER QC (sitting as a judge of the High Court)
[2019] EWHC 2587 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2020

Before :

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE SINGH
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between :

HILLSIDE PARKS LIMITED	**Appellant**
- and -	
SNOWDONIA NATIONAL PARK AUTHORITY	**Respondent**

- -
- -

Mr Robin Green (instructed by **Aaron & Partners LLP**) for the **Appellant**

Mr Gwion Lewis (instructed by **Geldards LLP**) for the **Respondent**

Hearing dates : 7 and 8 October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 a.m. on Tuesday, 3 November 2020.

Lord Justice Singh :

Introduction

1. This is an appeal against the order of HHJ Keyser QC (sitting as a judge of the High Court), dismissing the Appellant's claim for certain declarations relating to the current status of a planning permission granted in 1967. The judgment was given on 8 October 2019.

2. Permission to appeal to this Court was granted by Leggatt LJ on 19 December 2019.

Factual Background

Events from 1966 to 1987

3. The case concerns a site comprising 28.89 acres of land at Balkan Hill, Aberdyfi, ("the Site"). Planning permission was applied for on 19 December 1966 by Mr John Madin and was granted by Merioneth County Council, which was at that time the local planning authority, on 10 January 1967 ("the 1967 permission"). The relevant application, which incorporated a plan referred to as the "Master Plan", was for the development of 401 dwellings. The proposed siting for each of the dwellings was shown on the plan along with a proposed internal road network. The Master Plan detailed five key types of dwelling: Type A (3-bedroom semi or terrace); Type B (2-bedroom bungalow); Type C (2-bedroom flat); Type D (3-bedroom and study bedroom); and Type E (2-bedroom and study bedroom). The 1967 permission was granted subject to one condition, that water supply be agreed before work commenced. That condition does not give rise to any issue in the present appeal.

4. Building of the first two houses began on 29 March 1967, but the approved location was found to be the site of an old quarry. Planning permission was applied for the houses as built and granted on 4 April 1967. Further planning permissions for departures from the Master Plan were granted on:

   (1) 14 September 1967 for the addition of a 3-bedroom flat to the two built houses;

   (2) 22 October 1970 for 2 houses and 5 garages which departed from the Master Plan on the Site "as part of development already approved";

   (3) 9 May 1972 for "adjustments to the agreed layout";

   (4) 13 June 1972 for "variation to approved plans for 2 flats with garages beneath";

   (5) 19 October 1972 for the "erection of dwelling houses and garages"; and

   (6) 28 June 1973 for another variation to the layout of the Master Plan.

5. Merioneth County Council was replaced by Gwynedd County Council on 1 April 1974.

6. Landmaster Investments Limited acquired the Site in June 1978.

7. A dispute arose between the parties in January 1985, which led to proceedings being issued in the High Court. Gwynedd County Council denied that the 1967 permission was still valid.

The action before Drake J in 1987

8. The action was commenced by writ on 8 May 1985. The statement of claim sought declarations as to the status of the 1967 permission.

9. In the pleaded defence, dated 21 June 1985, issue was taken with the application for the declarations numbered 2, 3 and 4. The two issues that were raised, at paras. 6 and 7 of the defence, were that, first, the development permitted had not begun before 1 April 1974 and therefore could not lawfully be carried out because the permission had expired by operation of law; alternatively, if the development was begun before 1 April 1974, it was alleged to be in breach of the condition attached to the 1967 permission as to an adequate water supply.

10. Drake J gave judgment after a six day trial on 9 July 1987. By the time of the hearing before him the issues had been clarified, as he set out at page 2 of his judgment. It was agreed by the defendant that the 1967 permission was lawful. The defendant's contentions were as follows:

(1) The condition as to water supply was never fulfilled.

(2) Certain development on the land was carried out but, as the condition had not been satisfied, such development was unlawful.

(3) As no lawful development was ever commenced, the 1967 permission lapsed on 1 April 1974 by operation of law as a result of the statutory time limit for implementation of a planning permission.

(4) Such development as had been carried out was not pursuant to the 1967 permission but was pursuant to subsequent planning permissions granted in response to subsequent applications for certain development on the land.

11. It is clear from the judgment of Drake J that he viewed the subsequent grants of planning permission, for example that granted on 4 April 1967, as "a variation of the Master Plan": see e.g. page 13G of his judgment.

12. It was common ground before us that, strictly speaking as a matter of law, the power to vary a planning permission did not exist at the material time and only exists in limited form even now, since amending legislation was enacted by Parliament in 1987 and subsequently. Nevertheless, what is submitted on behalf of the Appellant is that, as a matter of substance, the judgment of Drake J (and indeed the understanding of the local planning authority at the time) was that the subsequent permissions which were granted were in effect variations of the 1967 permission rather than additional permissions. Certainly this is consistent with the conclusion reached by Drake J at page 20C of his judgment:

> "… Although development has gone on very slowly and with a number of variations, the Master Plan remains in force, and if the development is allowed to progress further it can be completed substantially in accordance with the rest of the Master Plan."

13. Judgment was given by Drake J on 9 July 1987 and an order was made granting four declarations to the following effect. First, the full planning permission of 10 January 1967 was lawfully granted. Secondly, the 1967 permission was a "full permission which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details". Thirdly, "the development permitted by the January 1967 Permission has begun; and that it may lawfully be completed at any time in the future". The fourth declaration concerned the satisfaction of the condition attached to the 1967 permission. It is the third declaration that is of particular relevance to the present proceedings.

Events since the judgment of Drake J

14. Hillside Parks Limited acquired the Site from Landmaster Investments Limited on 6 February 1988. It is the Appellant before this Court.

15. Snowdonia National Park Authority ("the Authority" or "the Respondent") came into existence on 23 November 1995 and became the relevant local planning authority for the Site on 1 April 1996.

16. Departures from the Master Plan were granted by the Authority on:

(1) 27 June 1996 for a single dwelling house as a variation to the 1967 Permission.

(2) 20 June 1997 for "two terraces forming: 1 attached dwelling, six apartment units and 8 garages with apartments over" as a variation to the 1967 permission.

(3) 18 September 2000 for a two-storey detached dwelling house and garage on Plot 5 of the Site.

(4) 24 August 2004 for 5 detached houses and 5 garages as a variation to the 1967 permission.

(5) 4 March 2005 for the erection of a 2-storey dwelling and detached garage on Plot 17 on the Site.

(6) 25 August 2005 for the erection of a detached dwelling at Plot 3 of "Phase 1" on the Site.

(7) 20 May 2009 for the erection of 3 pairs of dwellings.

(8) 5 January 2011 for 1 dwelling at Plot 3 on the Site.

17. On 23 May 2017, the Authority contacted the Appellant, stating that, in its view, the 1967 permission could no longer be implemented because the developments carried out in accordance with the later planning permissions rendered it impossible to implement the original Master Plan. The Authority required that all works at the Site should be stopped until the planning situation had been regularised.

The present proceedings

18. The present proceedings were commenced by the Appellant as a claim under CPR Part 8. The details of the claim set out the history and the nature of the dispute which had arisen between the parties from 2017. The Appellant sought the following declarations, at para. 17:

    (1) The Respondent is bound by the judgment and declarations of Drake J given on 9 July 1987.

    (2) The planning permission granted on 10 January 1967 by Merioneth County Council with reference number TOW.U/1115/P is a valid and extant permission.

    (3) The said planning permission may be carried on to completion, save insofar as development has been or is carried out pursuant to subsequent planning permissions granted for alternative residential development.

19. It should be noted that there was an application by the Authority to strike out the claim on the ground, among others, that it was an abuse of process because the argument in the claim should have been made under the planning legislation by way of an application for a certificate of lawful development. An application for a certificate of lawfulness of proposed development can be made under section 192 of the Town and Country Planning Act 1990. That application to strike out was dismissed by HHJ Keyser QC on 10 May 2019 and no more need to be said about it in this appeal.

The judgment of the High Court

20. In his judgment HHJ Keyser QC set out and dealt with two issues as he had identified them to be. These were not the issues as formulated by the parties.

21. The first issue was whether Drake J was wrong in law in his determination that the 1967 permission could be completed at any time in the future. The Judge concluded that Drake J did not err in law and was entitled to make the declarations that he did.

22. The second issue was whether the Authority is still bound by the third declaration in the Order made by Drake J that the 1967 permission "may lawfully be completed at any time in the future". This issue was split by the Judge into two sub-issues:

> "2a) Does the declaration in the 1987 Order bind the Authority according to its terms regardless of whether it was wrongly made?

> "2b) Do events since the 1987 Order mean that the development permitted by the January 1967 Permission may not now be completed lawfully, so that (whether rightly or wrongly made) the declaration can no longer bind according to its terms?"

23. The Judge held that the question that he identified as 2a did not need to be dealt with as he had determined that the 1987 Order was not wrongly made.

24. In relation to the question that he identified as 2b, he determined that the development which has occurred since 1987 now renders the development granted by the 1967 permission a physical impossibility and that future development pursuant to that permission would no longer be lawful.

Grounds of Appeal

25. **Ground 1:** HHJ Keyser QC erred in his approach to the issue whether Drake J was wrong in law in holding that the 1967 permission could be completed at any time. The Judge did not follow Drake J's interpretation of the 1967 permission, but rather gave his own interpretation of the 1967 Permission.

26. **Ground 2:** The Judge was wrong to conclude that *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1966) 17 P & CR 111 did not apply and therefore that the 1967 permission authorised one single scheme of development.

27. **Ground 3:** The Judge did not correctly construe the Additional Permissions to the 1967 permission.

28. **Ground 4:** The Judge took an inconsistent position in regard to whether developments could be carried out in accordance with different Additional Permissions that had been granted.

29. **Ground 5:** The errors contained within the judgment meant that the Claimant's case was not properly addressed, particularly the arguments in relation to *res judicata*.

Submissions of the parties

The Appellant's submissions

30. On behalf of the Appellant Mr Robin Green submits that the Judge erred in saying that the first issue to be dealt with was whether Drake J was wrong to determine that the 1967 permission could be completed at any time in the future. The Respondent could not provide any legal basis on which it could say that it was not bound by the judgment of Drake J. Unless it could be shown that the Respondent was not bound by the 1987 Order then the question of whether Drake J was correct in law did not arise and should not have been dealt with by the Judge.

31. Mr Green submits that the Authority was bound by Drake J's judgment by virtue of the statutory continuity of functions and the binding effect of a judgment *in rem*.

32. He also submits that the effect of subsequent variations to the 1967 permission is *res judicata* as it was determined by Drake J in 1987. The Authority cannot now raise a defence which was available at the time of the 1987 judgment by reason of the doctrine of issue estoppel and the rule in *Henderson v Henderson* (1843) 3 Hare 100. It would also be an abuse of process for the Authority to pursue the argument that the building work being completed pursuant to the variations of the Master Plan render the 1967 permission no longer capable of completion. The Authority has itself granted such variations of the 1967 permission since it came into existence in 1995.

33. Mr Green submits that there has been no material change in circumstances since the judgment of Drake J in 1987.

34. It is also submitted that the Judge's reasoning was internally inconsistent. He found that the Additional Permissions granted before 1987, and therefore considered by Drake J, were variations of the 1967 Permission with specific modifications but implicitly held that the same was not true of the Additional Permissions granted after 1987. Complaint is made that there is no reasoning given in the judgment to show that the Additional Permissions granted after 1987 should be considered differently from the ones before 1987. If all the Additional Permissions were considered in this way, then the remainder of the Master Plan with the specific modifications which were granted could still be developed.

35. It is further submitted that the Judge was wrong to determine that *Lucas* did not apply to the present case and that the 1967 permission was only for the Master Plan in its entirety and could not be considered as permitting separate acts of development.

36. By way of summary, Mr Green submits that the errors in the judgment below had the effect that the case of the Appellant before the Judge was not properly addressed by him.

The Respondent's submissions

37. On the issue of whether the Authority is bound by the judgment of Drake J, it is accepted by Mr Gwion Lewis on behalf of the Respondent that the Judge should have dealt with this issue first in his judgment. However, submits Mr Lewis, the principle of *res judicata* does not compel the court to determine that the judgment of Drake J still binds the parties. The court should make its own determination of whether the 1967 permission is still valid for three reasons:

    (1) The circumstances have changed significantly since the Order of Drake J in 1987.

    (2) The decision of the House of Lords in *Sage v Secretary of State for the Environment* [2003] UKHL 22; [2003] 1 WLR 983 holds that a "holistic approach" should be taken and regard should be had to the totality of the

operations which the grant of a planning permission originally contemplated would be carried out.

(3) Although the line of authority beginning with *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 was not presented to Drake J, it would not be an abuse of process for the Authority to rely on it in these proceedings. It is entitled to seek to prevent building in a National Park which could be against the public interest.

38. Mr Lewis further submits that the Judge was correct in determining that *Lucas* does not apply to the present case.

The principles of *res judicata*

39. It was common ground before us that the general principles of *res judicata* were correctly summarised by Lord Sumption JSC in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46; [2014] AC 160, at paras. 17-26. In particular, at para. 17, Lord Sumption said that the phrase *res judicata* is "a portmanteau term which is used to describe a number of different legal principles with different juridical origins." The three particular principles which, it is common ground, potentially arise in the present case are the fourth, fifth and sixth as outlined by Lord Sumption. The fourth was the doctrine of "issue estoppel", that is where some issue which is necessarily common to both disputes has been decided on an earlier occasion and is binding on the parties. The fifth principle was that based on *Henderson*, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier case. Sixthly, Lord Sumption said, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles.

40. In his skeleton argument for the present appeal, Mr Green invoked the sixth principle separately as well as the fourth and fifth principles. At the hearing before us he accepted, on reflection, that in the present case the sixth principle adds nothing of substance to the fifth and made submissions about both principles together.

41. An example of a situation in which there may be "materially altered circumstances" which justify a departure from the *Henderson* principle was given by Lord Sumption in *Virgin Atlantic* at para. 20: the decision of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93. In that case there had been a subsequent development in the law.

42. At para. 24 Lord Sumption quoted Lord Bingham of Cornhill in the decision of the House of Lords in *Johnson v Gore-Wood and Co* [2002] 2 AC 1, at page 31:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later

> proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

43. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 the House of Lords considered whether and to what extent the doctrine of *res judicata* applies in public law proceedings. The main opinion was given by Lord Bridge of Harwich: see in particular page 289. He concluded that in principle that doctrine does apply to adjudications in the field of public law. This is subject to the important public law requirement that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers. As Lord Bridge explained, it is for this reason that there can be no such fetter which arises from an estoppel by representation. I would add, in the light of more recent developments in public law, that there could not be any such fetter arising from the doctrine of legitimate expectation.

Analysis

44. Although there are five grounds of appeal, the submissions before us were not made separately by reference to those grounds. In similar vein, I will address the substance of the grounds rather than address each one of them separately.

45. Both in the grounds of appeal and in his oral submissions Mr Green complained on behalf of the Appellant about the way in which the Judge dealt with the judgment of Drake J. Particular complaint is made that the Judge failed to deal with the principles of *res judicata*: see e.g. para. 57 of the judgment. To a large extent Mr Lewis on behalf of the Respondent agreed that it would have been preferable for the Judge to address the issue of *res judicata*; indeed that is how the case for the Respondent had been argued before him.

46. Nevertheless, in my view, what is crucial is that the Judge ultimately concluded on what he identified as the first issue before him that Drake J's judgment and the 1987 order made by him were not wrong. In reaching that conclusion he rejected the Respondent's contention that they were wrong: see para. 55 of his judgment. Accordingly, the Judge approached what he identified as the second issue before him (and in particular issue 2b) on the footing that the judgment and order of Drake J in 1987 were to be treated as being correct. He set out his reasoning for deciding that issue in favour of the Respondent and against the Appellant at paras. 56-62 of his judgment.

47. At para. 58 the Judge said that:

> "The third declaration in the 1987 Order obviously does not mean that, regardless of how the facts and the law may change or develop at any time thereafter, the development permitted by the January 1967 Permission would necessarily be capable of lawful completion in perpetuity. Events might occur that would render it physically impossible to complete the development 'substantially in accordance with the rest of the Master Plan'. Or the law might change. The declaration was concerned, as was Drake J in his judgment, with two questions: first, whether the January 1967 Permission had been implemented; second, if it had been implemented, whether completion of the development thereby permitted was possible. The declaration reflects and gives effect to the judge's affirmative answers to both questions. It does not determine whether completion of the development remains possible in the light of the physical alterations that have taken place since 1987."

48. The Judge then said, at para 59:

> "In my judgment, the development permitted by the January 1967 Permission cannot now be completed lawfully in accordance with that permission. This conclusion follows from two matters that have already been mentioned in this judgment, as I shall explain."

49. I hope it will be convenient if I set out the two matters to which he referred in the opposite order to that used by the Judge. The second reason he gave was set out as follows at para. 61:

> "Second, it is physically impossible to complete the development fully in accordance with the January 1967 Permission in the circumstances briefly set out in paragraph 37 above. This is not a matter of minor deviations from the detail in the Master Plan: the state of affairs existing on the ground in the north-west part of the Site means that the remaining development there cannot be carried out and that further development will require new design and fresh permission. Regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the January 1967 Permission, it is plain that such a conclusion can no longer be reached. Mr Christopher Madin rightly conceded in his second witness statement that by reason of what had been constructed since 1987 'it [was] not … physically possible to build out the entirety of the scheme of development approved in 1967'."

50. Since the Judge in that passage cross-referred back to para. 37 of his judgment, it is necessary to set out that paragraph here:

> "The first contention concerns the effect of what has already been put on the land on the ability to comply with the January 1967 Permission in the future on the undeveloped parts of the Site. At the time of the hearing before Drake J, only a few houses in the extreme south of the Site had been built, all of them pursuant to Additional Permissions. The evidence shows that the positions of some of those houses conflicts not only with their positions as shown on the Master Plan but also to some extent with the positions of estate roads and a footpath as shown on the Master Plan. More important, perhaps, is what has happened since 1987. This later development is all in the north-west part of the Site and, again, has all been carried out pursuant to Additional Permissions. The easternmost row of terraced houses in this later development has been built across the positions shown on the Master Plan for two distinct rows of houses and an access cul-de-sac between them. To the north-west of these houses, an estate road has been constructed along the line of part of a row of terraced houses shown on the Master Plan; the estate road also runs through the positions of another house and garden shown on the Master Plan. Other examples could be given here and are given in the first statement of Mr Jonathan Cawley (the Authority's director of Planning and Land Management) of the knock-on effect of what has already been done on the ability to develop the rest of the Site in accordance with the January 1967 Permission. The result is that, although there are large parts of the development shown on the Master Plan that could be carried out in accordance with the Master Plan, there are other parts, particularly in the north-west of the Site, where further development will necessarily involve departure from what is shown on the Master Plan."

51. I turn to the other reason which the Judge gave, which was in fact his first reason and which he set out as follows at para. 60:

> "First, the facts of this case do not fall within the *Lucas* exception to the general requirement that a development be carried out fully in accordance with the permission said to authorise it. See paragraph 44 above."

52. At para. 62 the Judge then said the following:

> "Hillside did not advance any cogent answer to the problem of physical impossibility, other than reliance on *Lucas*. Mr Lowe said, and I accept, that much of the Site is unaffected by the

> development that has taken place. The conflicts with the provisions of the Master Plan regarding the remainder of the north-west part of the Site remain. Mr Lowe submitted that the issues could be worked out. That may well be right. However, they can only be worked out by a fresh grant of planning permission. The consequence is that, if the *Lucas* exception does not apply, the Authority is correct to say that future development pursuant to the January 1967 Permission would be unlawful."

53. At the hearing before us Mr Green made clear that he does not contend that the third declaration made by Drake J in 1987, when properly construed, could have binding effect in perpetuity regardless of how the facts and the law might develop subsequently. In that regard therefore, what the Judge said at the beginning of para. 58 of his judgment is common ground. In my view, that concession was correctly made. It is inconceivable that, in 1987, Drake J could possibly have intended, certainly as an objective matter, that his declaration should continue to bind the parties regardless of future developments either as a matter of fact or in law. No judge could reasonably be taken to make such an order or declaration.

54. Furthermore, as is plain from the middle of para. 61 of the judgment, HHJ Keyser QC approached his task on the basis that, regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the 1967 permission, it was now plain that such a conclusion could no longer be reached. The correctness of the decision of Drake J therefore was not material to the way in which the Judge disposed of this case. For that reason, in my view, much of the argument about *res judicata* (although interesting) is not to the point.

55. There can certainly be no question of issue estoppel in relation to this part of the Judge's reasoning. The issue with which he was dealing concerned developments since 1987. He was not deciding anything which had already been decided by Drake J in 1987 on the basis of the facts as they were up to that date.

56. That said, the Judge's reasoning at para. 61 does call for some consideration by this Court of whether the principle in *Henderson*/Abuse of Process has the consequence that the Judge was wrong to reason as he did in that passage.

57. What Mr Green submits is that the Respondent's predecessor (in whose shoes it stands) had the opportunity to raise an argument before Drake J based on *Pilkington*, which had been decided in 1973, but did not do so for whatever reason. He submits that it would be an abuse of process for the Respondent now to argue that point.

58. In *Pilkington*, at page 1531, Lord Widgery CJ said that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.

59. Where there are arguably inconsistent planning permissions in respect of the same land, Lord Widgery CJ said, at page 1532:

> "One looks first of all to see the full scope of that which is being done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented."

60. *Pilkington* was subsequently approved by the Court of Appeal in *Hoveringham Gravels Limited v Chiltern District Council* (1978) 35 P & CR 295.

61. In *Pioneer Aggregates (UK) Limited v Secretary of State for the Environment and Others* [1985] AC 132, *Pilkington* was approved in the opinion of Lord Scarman at pages 144-145.

62. At page 145 Lord Scarman said:

> "The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation."

63. I do not accept Mr Green's submissions in this regard. In my view, the doctrine in *Henderson*/Abuse of Process does not prevent the Respondent from arguing the *Pilkington* point in this case now even though its predecessor did not do so before Drake J in 1987.

64. It is clear from *Johnson v Gore-Wood*, in the passage from the opinion of Lord Bingham which I have cited earlier, that that would be too "dogmatic" an approach to take. The principle in *Henderson*/Abuse of Process is not an absolute one. It requires a merits-based assessment of all the facts, including the public and private interests concerned. In this context, there are undoubtedly important private interests, including the commercial interests of the Appellant. However, there are also important public interests at stake, including the public interest in not permitting development which would be inappropriate in a National Park.

65. Furthermore, I would accept the submission made by Mr Lewis on behalf of the Respondent that there have been significant legal developments since the decision of Drake J in 1987. In particular, the decision of the House of Lords in *Sage* has placed greater emphasis on the need for a planning permission to be construed as a whole. It has now become clearer than it was before 2003 that a planning permission needs to be implemented in full. A "holistic approach" is required.

66. In *Sage* the main opinion was given by Lord Hobhouse of Woodborough, although there was also a concurring opinion by Lord Hope of Craighead. Mr Green emphasised that, on the facts of that case, what Lord Hobhouse was considering in terms was a planning permission for "a single operation": see e.g. para. 23. It was in that context, submits Mr Green, that the House of Lords held that a planning permission must be implemented "fully" and that a "holistic approach" must be taken. Mr Lewis observed that, at para. 6, Lord Hope used the word "totality of the operations" (plural rather than singular). In my view, the important point of principle which arises cannot be determined according to semantic differences between the different opinions in the House of Lords. I would accept Mr Lewis's fundamental submission that the decision in *Sage* made it clearer than it had previously been that a planning permission should be construed "holistically."

67. As a matter of principle, I would endorse the approach taken by Hickinbottom J in *Singh v Secretary of State for Communities and Local Government and Another* [2010] EWHC 1621 (Admin), in particular at paras. 19-20, where *Sage* was cited. Hickinbottom J was of the view that, reflecting the holistic structure of the planning regime, for a development to be lawful it must be carried out "fully in accordance with any *final* permission under which it is done" (emphasis in original). He continued:

> "That means that if a development for which permission has been granted cannot be completed because of the impact of other operations under another permission, that subsequent development as a whole will be unlawful."

68. At the hearing before us there was an interesting debate about a point which ultimately this Court does not need to resolve on this appeal. That issue is whether, in the circumstances envisaged by Hickinbottom J, all the development which has already taken place, apparently in accordance with the first grant of permission, is rendered unlawful simply by virtue of the fact that subsequent operations take place pursuant to another permission which is inconsistent with the first. The phrase used by Hickinbottom J ("subsequent development") might suggest that it is only the later development which would fall to be regarded as unlawful. Mr Lewis contended that as a matter of principle it must be the whole of the development, including any development that has already taken place. That would have the consequence that there could be enforcement action, and potentially criminal liability, in relation to the development that has already taken place, even though it was at the time apparently in accordance with a valid planning permission. Mr Lewis submitted that in such circumstances it would be unlikely that enforcement action would be taken in practice. Even if that is right, that would mean that whether or not enforcement action is taken would be a matter of discretion rather than law. These are potentially

important questions on which we did not receive full argument because they do not need to be decided on this appeal. I would therefore prefer to express no view on them.

69. Returning to the present case, in my view, Mr Lewis was correct in his submission that, as a matter of fact and degree, the Judge was perfectly entitled to reach the conclusion that it is no longer possible to implement the 1967 Permission in the light of factual developments since the judgment of Drake J in 1987. For that purpose it is necessary to turn to the evidence that was before the Judge, at least briefly.

The evidence

70. In the second witness statement of Mr Madin, at para. 3, as the Judge noted, it was accepted that what has been constructed since 1987 on the Site does not accord with the approved Master Plan and it is not therefore physically possible to build out the entirety of the scheme of development approved in 1967. However, Mr Green pointed out that, at para. 4 of his statement, Mr Madin had gone on to say:

> "… While I accept that it is no longer possible to create the whole development layout as shown on the Master Plan, there is no physical impediment to completing the remainder of the Master Plan scheme as shown on my 2019 plan."

71. Although we have been assisted by a number of plans, including one which shows the original permitted development on the Site together with what has happened subsequently by way of actual development, it has to be noted that these plans will not be on the public register. As Lord Scarman observed in *Pioneer Aggregates*, it is important that the public, including potential purchasers of land and neighbours who may be affected by development, should be able to ascertain with reasonable certainty what is or is not permitted development by reference to what is available on a public register. This is important not least because a planning permission runs with the land.

72. At the hearing before us we were taken in some detail through the various plans and shown what has been developed on the Site since 1987. It is unnecessary to go into those matters in detail for present purposes, since this is an appellate court and it is not our function to redetermine questions of fact. Nevertheless, what is clear to us is that the development which has taken place consists not only of a different type of housing, with different alignment, but has included the construction of roads on the estate which would be clearly incompatible with the road layout as depicted on the Master Plan. This does not necessarily mean that the Appellant is wrong to say that some at least of the individual units shown in the original Master Plan could still be erected on those parts of the Site which are not affected by the actual development which has taken place. What it does tend to show, in my view, is that the Judge was entitled, having all the evidence before him, to reach the conclusion that events since 1987 have made it impossible now for the original planning permission of 1967 to be implemented.

73. That indeed was the expert view of Mr Jonathan Cawley, in his first witness statement filed in these proceedings, at paras. 12-13, where he set out in detail the development which has taken place since 1987, including the roads which have been constructed on the Site, and concluded that:

> "The development carried out on Site since 1987 is accordingly entirely incompatible with the 1967 Permission."

74. Mr Green complains on behalf of the Appellant that the Authority itself has changed its view since around 2017. Before that time the Authority itself took the view that the 1967 permission could still be implemented on those parts of the Site where there had not been subsequent development pursuant to a variation: see e.g. a letter from the Director of Planning and Cultural Heritage at the Authority dated 10 October 2008.

75. In my view, while the stance which the Authority took between 1995 and 2017 is a relevant factor to be taken into account, it is certainly not conclusive that it has acted in a way which leads to an abuse of process because it is now arguing the contrary in these proceedings.

76. In view of the factual and legal developments which have taken place since the judgment of Drake J in 1987 and after balancing the public and private interests at stake in this case, I conclude that it was not an abuse of process for the Authority to seek to argue the points which it has. Further, I conclude on this part of the appeal that the Judge was entitled to reach the conclusion which he did at para. 61 on the evidence before him.

77. What that then leaves is the reliance placed by the Appellant before this Court, as it was before the trial Judge, on the decision of the High Court in *Lucas*.

The argument based on Lucas

78. *Lucas* was decided by Winn J in 1964. In that case, in 1952, planning permission was granted to develop a plot of land by the erection of 28 houses in a cul-de-sac layout. Later the plaintiffs applied for permission to develop the same plot by building six detached houses, each on a plot fronting the main road. Permission for this later development was granted in 1957 and two houses were built in accordance with it. Later, however, the plaintiffs proposed to proceed in reliance on the earlier permission from 1952 by building the cul-de-sac and the 14 houses on the southern side of it. That land was still undeveloped at that time. The plaintiffs sought a declaration that the earlier permission was still effective and entitled them to carry out the proposed development on that part of the site where it could still take place. Winn J concluded that the 1952 permission was not to be regarded in law as a permission to develop the plot as a whole but as a permission for any of the development comprised within it. Accordingly, it did authorise the "partial" development proposed by the plaintiffs.

79. At page 116 Winn J said:

> "… Whilst a planning authority may well have as its object in granting planning permission for a contemplated housing estate upon a lay-out, considered by the planners, the achievement of a whole, it does not follow as a matter of law that development conforming with that lay-out is only permitted if the whole lay-out is completed and conditionally upon its completion."

80. At page 117 he continued:

> "… I think that it is right to approach this problem on the basis of an assumption that Parliament cannot have intended to leave individual owners of separate plots comprised in the contemplated total housing scheme dependent upon completion of the whole of the scheme by the original developer, or by some purchaser from him, so that they would be vulnerable, were the whole scheme not completed, separately to enforcement procedure which might deprive them of their houses and of the money which they would have invested in those houses, whether or not they built them themselves."

81. Later on the same page he said:

> "Were it right to say that the grantee of such a planning permission as this 1952 planning permission was only enabled thereby to develop the area of land conditional upon his completing the whole contemplated development, it would be very difficult at any given moment to say whether (assuming that some houses had been built but that not all the sites included in the scheme had been filled) the development already achieved was permitted development or development without permission, insofar as it could possibly in those circumstances be said to depend upon the intention of the developer … I think that the right view is that this planning permission in 1952 permitted each and every item comprised in the application made and granted."

82. *Lucas* was considered by the Divisional Court in *Pilkington*. At page 1533 Lord Widgery CJ described it as "a rather exceptional case". He said that Winn J had in that case construed the first planning permission as authorising the carrying out of a number of independent acts of development, and taking that view it naturally followed that the implementation of the second permission did not prevent the owner of the rest of the land from carrying out the independent acts of development authorised on such part of the site as remained under his control.

83. In *Hoveringham*, at page 302, Roskill LJ also considered the decision in *Lucas* and noted that it was subsequently treated by the Divisional Court in *Pilkington* as a rather exceptional case (he thought "rightly").

84. Although *Lucas* does not appear to have been cited to the House of Lords in *Pioneer Aggregates*, both *Pilkington* and *Hoveringham* were cited and they did refer to *Lucas*.

85. In my view, this is not a *Lucas* case.

86. This issue does squarely raise a potential question of issue estoppel. This is because Mr Green submits that it was implicitly decided by Drake J in 1987 that the present case did indeed fall within the *Lucas* exception to the general requirement that a development must be carried out fully in accordance with the permission granted for it. There are two difficulties with that submission.

87. First, it is difficult to see how Drake J can be said to have decided this issue at all. *Lucas* was certainly not mentioned in his judgment and it does not appear to have been raised before him. It did not feature in the pleaded case between the parties before him nor, so far as one can now tell, in the way in which the case was argued before him at a six day trial.

88. Secondly, *Lucas* was a highly exceptional case. It has never been approved by an appellate court. It has never been followed or applied, so far as counsel have been able to show us, by any court since. Furthermore, it was described as being an exceptional case by Lord Widgery CJ (a judge with immense experience in the field of planning law) in *Pilkington*. Both this Court and the House of Lords have had the opportunity in the many decades since *Lucas* to consider whether it should be regarded as setting out a general principle or not.

89. In my view, it would not be appropriate for this Court now to overrule *Lucas*. In order to do so we would have to be satisfied that it was wrongly decided on its particular facts. It is not possible to be satisfied of that, not least because we do not have the advantage of seeing the precise terms of the planning permission which was granted in that case. It suffices to say that the case should be regarded as having been decided on its own facts.

90. As Hickinbottom J observed in the case of *Singh*, at para. 25, it is conceivable that, on its proper construction, a particular planning permission does indeed grant permission for the development to take place in a series of independent acts, each of which is separately permitted by it. I would merely add that, in my respectful view, that is unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate. Typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements concerning highways, landscaping, possibly even employment or educational uses, which are all stipulated as being an integral part of the overall scheme which is being permitted. I doubt very much in those circumstances whether a developer could lawfully "pick and choose" different parts of the development to be implemented.

Conclusion

91. For those reasons I consider that the Judge was entitled to reach the conclusions which he did. I would therefore dismiss this appeal.

Lady Justice Nicola Davies :

92. I agree.

Lord Justice David Richards :

93. I also agree.

Neutral Citation Number: [2020] EWCA Civ 1331

Case No: C1/2019/1730

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE ANDREWS DBE
CO/5012/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th October 2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

DB SYMMETRY LIMITED	**Appellant**
- and -	
SWINDON BOROUGH COUNCIL	**First Respondent**
-and-	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Second Respondent**

- -
- -

MR RICHARD HUMPHREYS QC (instructed by **Jones Day**) for the **Appellant**
MR RICHARD HARWOOD QC (instructed by **Swindon Legal Department**) for the **First Respondent**
MR RICHARD HONEY & MR CHARLES STREETEN (instructed by the **Government Legal Department**) for the **Second Respondent**

Hearing dates : 7th and 8th October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 16th October 2020

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether a condition attached to the grant of planning permission for employment development of various kinds lawfully required the public to have rights of passage over roads to be constructed as part of the development. A planning inspector said "no" but Andrews J said "yes". Her judgment is at [2019] EWHC 1677 (Admin). With my permission, the developer appeals.

The facts

2. The development site lies in the north-eastern outskirts of Swindon to the south of the A420. It is part of what the local development plan calls the New Eastern Villages ("the NEV") which are identified as a strategic allocation to deliver sustainable economic and housing growth, including the provision of about 8,000 homes, 40 hectares of employment land and associated retail, community, education and leisure uses. The application for planning permission on the development site was the first part of the NEV to be determined.

3. The application for planning permission was accompanied by an Illustrative Landscape Masterplan. That showed the application site lying to the immediate south of the A420. Within the western part of the site, a road ran southward from a new junction with the A420 and continued to the southern boundary. It was labelled "North-South access road". Halfway down that road a roundabout was shown, from which another road, described on the plan as the "East-West spine road", ran to the eastern boundary of the site. The portion of the North-South access road which ran from the A420 junction to the roundabout was described as a "dual carriageway" on the Masterplan. The southerly continuation of the North-South access road from the roundabout was labelled "North-South link to wider NEV" and described as a single carriageway. The annotations to each road were that they contained a "carriageway" and "footpaths/cycleways to both sides", giving the respective widths (between 59 and 61 metres).

4. Three development areas were indicated: area A on the eastern side of the North-South access road, and to the north of the East-West spine road; area B to the south of the East-West spine road; and area C, on the western side of the North-South access road, above the roundabout, and quite close to the A420. An addendum to the Design and Access Statement stated that it had been amended "to show highways extending to the site boundaries". The purpose of that amendment was to "show the connectivity of the site to surrounding land".

5. The application for outline planning permission was placed before Swindon's planning committee. We do not have a minute of the meeting; but we do have a copy of the officer's report that the committee considered. One of the points that the officer made in several paragraphs of the report was that the application site was part of a wider development proposal. It was to "integrate physically and functionally" with

adjoining development. The NEV was to come forward as "a series of new interconnected villages." Each scheme had to demonstrate how it fitted into the wider NEV. The proposal "must provide connections to future development within the [NEV] in the interests of enabling the comprehensive and sustainable development of the NEV as a whole".

6. One section of the report was headed "Infrastructure requirements". Paragraph 63 said that the site was "a key gateway" to the NEV; and paragraph 64 referred to the need for proposals to meet the infrastructure needs to mitigate the impact of the development. Paragraph 65 said that the transport requirements arising from the scheme included "a combination of direct provision of infrastructure and financial contributions towards mitigation of direct impact." But importantly, the legal context in which they were discussed in paragraph 64 was regulation 122 of the Community Infrastructure Levy Regulations 2010 dealing with planning obligations rather than conditions. It is also of note that the heading to what became condition 37 included a reference to a "section 38 agreement".

7. At the end of what was a very comprehensive report, the recommendation was to grant planning permission "subject to the satisfactory completion of a planning obligation".

8. On 3 June 2015 Swindon granted outline planning permission in respect of the site, subject to no less than 50 conditions. The development was described as:

> "Outline application for employment development including B1b (research and development/light industrial), B1c (light industrial), B2 (general industrial) and B8 (warehouse and distribution), new landscaping and junction to A420 (means of access not reserved)".

9. Condition 3 required the submission of reserved matters and the implementation of development to be in broad accordance with the Illustrative Landscape Masterplan. The internal points of access into development areas A and B (denoted on the plan) were to be subject to detailed assessment at the reserved matters stage. The reason for that condition was:

> "to ensure that the arrangement of employment uses on site is acceptable and allows for north/south and east/west highway linkages to site boundaries in the interests of the proper and comprehensive planning of the wider New Eastern Villages Development Area".

10. Condition 4 required a phasing plan including "details of buildings, roads and footways" to be submitted and the development to be carried out in accordance with it. Conditions 9 and 10 required details of "the surface treatment of any roadways, footpaths, footways or parking areas" to be submitted within the strategic landscaping and each development phase respectively. Condition 16 required there to be acoustic fencing between the access road and Lock Keepers Cottage; and precluded any occupation of the development before the completion of the submitted landscape design.

11. Condition 34 required parking and turning areas to be constructed in accordance with Swindon's parking standards "in the interests of amenity and highway safety." A number of other conditions were imposed for reasons which were expressed to be in the interests of highway safety, for example, condition 40, which related to a minimum footway width for a proposed bus shelter; condition 42, which stipulated the minimum distance between entrance gates and the back edge of the highway; condition 43, relating to the gradient of private accesses within 10 metres from junctions with "the public highway"; condition 44, which required visibility splays for all private accesses to be provided before the development was brought into use; and condition 45, which required the submission of detailed junction analysis of "any junctions with the north south spine road to inform the design and ensure appropriate capacity".

12. Condition 37, under the heading "Local Highways Authority", provided as follows:

> "The proposed estate roads, footways, footpaths, verges, junctions, street lighting,… service routes…vehicle overhang margins,…accesses, carriageway gradients, driveway gradients, car parking and street furniture shall be constructed and laid out in accordance with details to be submitted and approved by the Local Planning Authority in writing before their construction begins. For this purpose, plans and sections, indicating as appropriate, the design, layout, levels, gradients, materials and method of construction shall be submitted to the Local Planning Authority.
>
> Reason: to ensure that the roads are laid out and constructed in a satisfactory manner."

13. Condition 38, entitled "Foot/Cycleways" states that:

> "The proposed footways/footpaths shall be constructed in such a manner as to ensure that each unit, before it is occupied or brought into use, shall be served by a properly consolidated and surfaced footway/footpath to at least wearing course level between the development and highway.
>
> Reason: to ensure that the development is served by an adequate means of access."

14. Condition 39 is the condition on which this appeal turns. It stated:

> "Roads
>
> The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.

> Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

15. The dispute between the parties is whether that condition required the developer to dedicate the roads as public highways (as Swindon contends) or whether it merely regulates the physical attributes of the roads (as the developer, supported by the Secretary of State) contends).

16. Condition 50 made it clear that the approval was in respect of the accompanying plans and documents, which are listed, and included the Illustrative Landscape Masterplan.

17. The day before the outline permission was granted, Swindon, as envisaged by the resolution to grant, entered into an agreement with the developer and the owners of the land under section 106 of the Town and Country Planning Act 1990, ("section 106 agreement") subject in the usual way to the grant of planning permission. There was no collateral agreement pursuant to section 38 of the Highways Act 1980.

18. The section 106 agreement specifically referred to the North-South link to wider NEV and the East-West spine road described in the Illustrative Landscape Masterplan. Schedule 2 paragraph 2 required the owners to transfer certain land, referred to as "the A420 Improvements Land", to Swindon for the purposes of carrying out improvements to the A420, and to grant them a licence to enter other land for the same purpose. In the event of a transfer of the A420 Improvements Land, it was either to be dedicated by Swindon as a highway maintainable at public expense, or to be used solely for undertaking the A420 improvements. The A420 Improvements Land was shown on a separate plan as lying to the west of the north-south access road and just below the A420. The land over which the licence was granted lies immediately beneath it and just above development area C.

19. Paragraph 3 of the same Schedule contains covenants by the owners with Swindon that within a year from the date of first occupation of area A they will construct the East-West Spine Road to base course level to the application site boundary in accordance with condition 39 of the planning permission, and that within a year from the date of first occupation of area B they will do likewise in respect of the North-South link. The final alignment of these roads would be as approved in reserved matters and under condition 37.

20. On 19 June 2017 the developer applied to Swindon for a certificate under section 192 of the Town and Country Planning Act 1990 that the formation and use of private access roads as private access roads would be lawful. Swindon refused the certificate; and the developer appealed. On 6 November 2018 Ms Wendy McKay LLB, an experienced planning inspector, allowed the appeal. She certified that the use of the access roads for private use only would be lawful.

21. Swindon succeeded before the judge on an application for a statutory review of that decision.

Highways

22. In ordinary legal usage a highway is a way over which the public have rights of passage. They may be rights on foot only (a footpath), on foot or with animals (a bridleway or driftway); or on foot, with animals and with vehicles (a carriageway). These definitions are replicated in section 329 (1) of the Highways Act 1980; and are applied to planning legislation (except in so far as the context otherwise requires) by section 336 (1) of the Town and Country Planning Act 1990.

23. The way in which a highway comes into existence is through dedication and acceptance by the public. Dedication may be express, or may be inferred from public use. Both dedication and acceptance are necessary at common law, although there is a rebuttable statutory presumption of dedication after 20 years use as of right by the public. Before 1835 liability to repair highways was that of the inhabitants of the parish unless it could be shown that responsibility had attached to an individual or a corporate body by reason of tenure, inclosure or prescription. The imposition on the inhabitants of the parish of what could, potentially, be an onerous obligation led to the requirement of the common law that the existence of a highway could only be established by proving both dedication by the owner and acceptance by the public. Acceptance by the public demonstrated that there was a public benefit that justified the public assumption of liability to repair. Although the Highways Act 1835 abolished the universal rule that any highway was repairable at the public expense, it did not do away with the twin requirements of dedication and acceptance. It introduced a second stage, namely adoption, before a highway became maintainable at the public expense. Since the Highways Act 1959, as regards liability to repair, highways fall into three main classes:

    i) highways repairable at the public expense;

    ii) highways repairable by private individuals or corporate bodies; and

    iii) highways which no one is liable to repair.

24. Section 38 (3) of the Highways Act 1980 provides:

> "A local highway authority may agree with any person to undertake the maintenance of a way—
>
> (a) which that person is willing and has the necessary power to dedicate as a highway, or
>
> (b) which is to be constructed by that person, or by a highway authority on his behalf, and which he proposes to dedicate as a highway;
>
> and where an agreement is made under this subsection the way to which the agreement relates shall, on such date as may be specified in the agreement, become for the purposes of this Act a highway maintainable at the public expense."

25. Section 278 of that Act provides:

> "(1) A highway authority may, if they are satisfied it will be of benefit to the public, enter into an agreement with any person—
>
> (a) for the execution by the authority of any works which the authority are or may be authorised to execute, or
>
> (b) for the execution by the authority of such works incorporating particular modifications additions or features, or at a particular time or in a particular manner,
>
> on terms that that person pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement."

26. Under these provisions, then, a highway authority (which may or may not be the same as the local planning authority) may arrange for the construction of a road at a developer's expense, followed by the dedication of that road as a highway repairable at public expense. Alternatively, the carrying out of the works prior to adoption may be carried out by the developer; commonly under a section 106 agreement.

27. Section 263 of the Highways Act 1980 provides for the vesting of highways in the highway authority. But that section only applies to highways "maintainable at the public expense". If a highway is not maintainable at public expense, it remains vested in the owner of the soil, subject to public rights of passage.

Lawfulness of planning conditions

28. Section 70 of the Town and Country Planning Act 1990 enables a planning authority to grant planning permission either unconditionally or "subject to such conditions as they think fit". Despite the apparent width of these words, it is well-settled that there are legal constraints on a planning authority's ability to impose conditions on the grant of planning permission which I will come to in due course. Section 72 of the 1990 Act also deals with conditions. It provides, so far as material:

> "(1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section—
>
> (a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission…".

29. Running alongside section 70 is section 106 of the 1990 Act. It provides, so far as relevant:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section … as "a planning

> obligation"), enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically."

30. Mr Harwood QC, for Swindon, argues that it is lawful for a planning condition (as opposed to a planning obligation) to require a developer to dedicate land as a highway. If and in so far as that allows a local authority to have the benefit of a highway without the payment of any compensation, he relies on the proposition that a public authority may lawfully use powers which do not involve the payment of compensation in preference to powers that do. That proposition is well supported by authority: *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508; *Cusack v Harrow LBC* [2013] UKSC 40, [2013] 1 WLR 2022. It is to be noted, however, that *Westminster Bank* involved no more than a refusal of planning permission for development to protect future road widening; while *Cusack* involved a choice between two express statutory powers. In addition, Mr Harwood's proposition simply begs the question: is it lawful for a condition attached to a planning permission to require the developer to dedicate part of his land as a highway without compensation?

31. Whether a planning condition is lawful depends on satisfying the so-called *Newbury* criteria (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578); namely:

> "the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them."

32. These principles were recently reaffirmed by the Supreme Court in *R (Wright) v Forest of Dean District Council* [2019] UKSC 53, [2019] 1 WLR 6562, in which that court declined the Secretary of State's invitation to "update *Newbury*".

33. The question whether a planning condition can lawfully require the developer to dedicate land for public purposes has been considered by the courts on a number of occasions. In *Hall & Co Ltd v Shoreham by Sea Urban DC* [1964] 1 WLR 240 sand and gravel importers and the owners and occupiers of land in an area scheduled for industrial development, applied for planning permission to develop part of their land for industrial purposes. The land adjoined a busy main road which was already overloaded. The highway authority intended to widen it at a future date and to acquire for that purpose a strip forming part of the developer's land. The planning authority

granted planning permission subject to a condition requiring the developer to "construct an ancillary road over the entire frontage of the site at their own expense, as and when required by the local planning authority and shall give right of passage over it to and from such ancillary roads as may be constructed on the adjoining land." It is to be noted that the condition did not require the transfer of the land itself.

34. This court held that the imposition of that condition was unlawful. At 247 Willmer LJ summarised the developer's argument as follows:

> "It is contended that the effect of these conditions is to require the plaintiffs not only to build the ancillary road on their own land, but to give right of passage over it to other persons to an extent that will virtually amount to dedicating it to the public, and all this without acquiring any right to recover any compensation whatsoever. This is said to amount to a violation of the plaintiffs' fundamental rights of ownership which goes far beyond anything authorised by the statute."

35. It is important to note first that at 244 he regarded the planning authority's objective of avoiding further congestion as "admirable" from a planning point of view; second that at 248 he accepted that the condition related to the proposed development; and third that at 249 he accepted that the local planning authority's objective was "a perfectly reasonable one". But nevertheless, he held it was unlawful. The essence of his reasoning is, I think, encapsulated by the following passage in his judgment at 250:

> "The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs' expense, on the plaintiffs' land, and without the necessity for paying any compensation in respect thereof.
>
> Bearing in mind that another and more regular course is open to the defendants, it seems to me that this result would be utterly unreasonable and such as Parliament cannot possibly have intended."

36. Harman LJ said at 256:

> "It is not in my judgment within the authority's powers to oblige the planner to dedicate part of his land as a highway open to the public at large without compensation, and this is the other possible interpretation of the condition. As was pointed out to us in argument, the Highways Acts provide the local authority with the means of acquiring lands for the purpose of highways, but that involves compensation of the person whose land is taken, and also the consent of the Minister."

37. Pearson LJ said at 261:

> "I agree with Willmer LJ that condition 3 is ultra vires because it is "unreasonable" in the sense which has been explained in

> *Kruse v Johnson* and other cases. I should, however, be inclined to say that the element of ultra vires is to be found in the conflict with the general law relating to highways. The general words of section 14 (1) of the Town and Country Planning Act, 1947, should not be interpreted as authorising a radical departure from the general law relating to highways."

38. Mr Harwood submitted that *Hall* was a decision that turned on its own facts; and did not establish any wider principle. I disagree.

39. Both Willmer LJ and Harman LJ placed considerable reliance on the existence of "another and more regular course" as demonstrating the unreasonableness of the condition. That other course would have been by the exercise of powers of compulsory purchase under the Highways Act 1959. This was certainly how the decision was interpreted by Lord Wilberforce in *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 (referring to it as a "well-established principle of law"); and by Diplock LJ in *Westminster Bank Ltd v Beverley BC* [1968] 1 QB 499 ("it is a misuse of a power granted by statute for one object to use it in order to achieve a different object for which Parliament did not intend it to be used"). In *Leeds CC v Spencer* [2000] LGR 68 Brooke LJ quoted the same extracts from the judgments of Willmer and Pearson LJJ which he said set out "the governing principle". It is also how the editors of the Encyclopedia of Planning Law and Practice interpret the decision, which is cited in support of the proposition that:

> "A condition will be invalid if its effect is to destroy private proprietary rights, such as to require the construction of an ancillary road on the application site and to make it available for use by owners of adjoining properties, effectively requiring its dedication as a highway without compensation …"

40. *Hall* has never been overruled or disapproved for what it actually decided. On the contrary, it has been followed and applied in a number of cases. In *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1987) 53 P & CR 55 the planning authority granted permission for the building of 200 houses subject to a condition requiring the widening of a roadway as shown in the amended plans. Once widened, the roadway was to form part of the highway. This court upheld the decision of the Secretary of State discharging the condition on the ground that it was manifestly unreasonable. *Hall* was directly applied and found to be indistinguishable.

41. *MJ Shanley Ltd v Secretary of State for Environment* [1982] JPL 380 concerned a condition requiring a developer to provide 40 acres of land for public use. Woolf J held:

> "That condition, as specified by the Secretary of State in his decision letter, is, in my view, undoubtedly one which is invalid and unenforceable. It was requiring as a condition of planning permission the providing to the public of 40 acres of land. It falls, in my view, four square within the situation considered in *Hall & Co Ltd v Shoreham-By-Sea Urban District Council*."

42. In our case the judge noted at [39] that *Hall* has not been overruled, although she did seem to consider that some doubt had been cast on the decision by the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. That is not my reading of Lord Hoffmann's speech. As the judge correctly said, Lord Hoffmann's speech was not the leading speech; and none of the other Law Lords expressly agreed with it.

43. Lord Hoffmann referred to *Hall* as a "landmark case". As he noted, one result of *Hall* was that planning authorities used different methods to achieve the result that the imposition of conditions could not achieve. Foremost among these was the use of planning agreements (now planning obligations). Lord Hoffmann commented on the use of such agreements, and their relationship with planning conditions. At 775 he referred to Circular 16/91 which dealt with the content of planning obligations under section 106. That circular took the view that a developer could reasonably be expected to "pay for or contribute to the costs of infrastructure" which would not have been necessary but for his development. Lord Hoffmann went on to say at 776:

> "… the Circular sanctions the use of *planning obligations* to require developers to cede land, make payments or undertake other obligations which are bona fide for the purpose of meeting or contributing to the external costs of the development. In other words, it authorises the use of planning obligations in a way which the court in *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* … would have regarded as Wednesbury unreasonable in a condition." (Emphasis added).

44. That observation is clearly directed to planning obligations and not to conditions.

45. He then said at 776:

> "Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While *rejecting the politics of using planning control to extract benefits for the community at large*, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs." (Emphasis added).

46. He returned to the point later in his speech at 779:

> "It does not follow that because a condition imposing a certain obligation (such as to cede land or pay money) would be regarded as *Wednesbury* unreasonable, the same would be true of a refusal of planning permission on the ground that the developer was unwilling to undertake a similar obligation under section 106. I say this because the test of *Wednesbury* unreasonableness applied in *Hall & Co Ltd v Shoreham-by-Sea*

> *Urban District Council* to conditions is quite inconsistent with the modern practice in relation to planning obligations which has been encouraged by the Secretary of State in Circular 16/91 and by Parliament in the new section 106 of the Town and Country Planning Act 1990 and the new section 278 of the Highways Act 1980 and approved by the Court of Appeal in *Reg v South Northamptonshire District Council, Ex parte Crest Homes Plc*."

47. These passages clearly recognise a difference between what can be achieved by conditions on the one hand; and what can be achieved by planning agreements (or planning obligations) on the other. I cannot regard this as casting any doubt on the correctness of *Hall* for what it decided. On the contrary, the direction of travel in the planning legislation has been to encourage a wider use of planning agreements and obligations, while leaving the scope of the power to impose conditions untouched. In 1991, for instance, section 106 of the Town and Country Planning Act 1990 was substituted by a new section which expressly empowered a planning obligation to provide for the payment of money to the planning authority. *Hall* was also cited approvingly by Brooke LJ in *Leeds CC v Spencer* [2000] LGR 68 (albeit in a different context) and by Lord Collins in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20, [2011] 1 AC 437 at [46].

48. In addition, in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [2017] UKSC 66, [2017] PTSR 1413 Lord Hodge said that planning obligations enable a planning authority to control matters which it might otherwise have no power to control by the imposition of planning conditions. It is clear, then, that the power to impose conditions on the grant of planning permission is narrower than the power to enter into planning agreements or to accept planning obligations.

49. The judge commented on *Tesco* at [39]. She said:

> "However it is quite clear from the tenor of Lord Hoffmann's speech that he did not subscribe to the view that in principle it would be *Wednesbury* unreasonable in the modern era for a local authority to require the developer to bear some of the external costs of the development, whether by way of condition or by imposing a planning obligation under s.106."

50. What this statement fails to recognise is that, at least in 1995 when *Tesco* was decided, there was a difference between the scope of what could lawfully be achieved by the imposition of a condition attached to the grant of planning permission, and the content of a planning obligation. In addition, contrary to what the judge said in the last sentence of the quoted extract, a planning obligation cannot be *imposed* by a local planning authority. It can result only from an agreement, or from a unilateral undertaking offered by the developer. If no satisfactory agreement is made or undertaking offered, the local planning authority may refuse permission.

51. It is possible that the permissible content of a planning obligation may have been altered by regulation 122 of the Community Infrastructure Levy Regulations 2010 which imported the *Newbury* criteria into such obligations where those obligations

"constitute a reason for granting planning permission". But whether that is or is not the case, that regulation undoubtedly does not expand the permissible scope of lawful conditions attached to planning permissions.

52. I consider that, at least at this level in the judicial hierarchy, a condition that requires a developer to dedicate land which he owns as a public highway without compensation would be an unlawful condition. Whether the unlawfulness is characterised as the condition being outside the scope of the power because it requires the grant of rights over land rather than merely regulating the use of land; or whether it is a misuse of a power to achieve an objective that the power was not designed to secure; whether it is irrational in the public law sense, or whether it is disproportionate does not seem to me to matter. In my judgment *Hall* establishes a recognised principle which is binding on this court.

53. If (as is likely to be the case in this appeal) the condition cannot be severed from the grant of planning permission the consequence would be, as in *Hall* itself, that the planning permission cannot stand either.

Government policy

54. We were shown extracts from a number of policy statements issued by central government over the years. The earliest we were shown dates from 1951. Paragraph 13 of that statement said:

> "Conditions requiring for example, the cession of land for road improvement or for open space should not therefore be attached to planning permissions."

55. The latest, from 2019 states:

> "Conditions cannot require that land is formally given up (or ceded) to other parties, such as the Highway Authority."

56. Intermediate statements of government policy all say the same thing.

57. At [37] of her judgment the judge commented on Lord Hoffmann's speech in *Tesco* once again. She said:

> "In his speech, Lord Hoffmann described *Hall v Shoreham* as having exercised a decisive influence upon the development of British planning law and practice. He referred to the circulars issued by the Ministry of Housing and Local Government for the guidance of local planning authorities in the wake of that decision, quoting from what was then the most recent. I note in passing that that circular included the statement that "conditions may in some cases reasonably be imposed to oblige developers to carry out works, e.g. provision of an access road, which are directly designed to facilitate the development". Thus, *Hall v Shoreham* was (rightly) not regarded as giving rise to an absolute ban on imposing such obligations. The question whether a condition which is imposed for a planning purpose

> and relates to the development is *Wednesbury* unreasonable is fact specific."

58. If the judge interpreted that circular as authorising the imposition of conditions which not only required a developer to provide an access road, but also to dedicate it to public use as a highway, I consider that she was wrong. Such an interpretation would be flatly contrary to consistent government policy for nearly 70 years. In my judgment *Hall does* impose an absolute ban on requiring dedication of land as a public highway without compensation as a condition of the grant of planning permission. I also consider, contrary to Mr Harwood's submission, that there is no difference for this purpose between dedicating a road as a highway and transferring the land itself for highway use. As I have said, the condition in *Hall* did not require the land itself to be transferred, yet it was still held to be unlawful.

The interpretation of a planning permission

59. There was little dispute about the principles applicable to the interpretation of a planning permission; not surprisingly since they have recently been stated at the highest level: *Lambeth LBC v Secretary of State for Housing Communities and Local Government* [2019] UKSC 33; [2019] 1 W.L.R. 4317. In that case the Supreme Court applied the principles that had already been articulated in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85.

60. The court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.

61. In carrying out that exercise, there is no absolute bar on the implication of words, although the court will be cautious in doing so.

62. There is no special set of rules applying to planning conditions, as compared to other legal documents.

63. Like any other document, a planning permission must be interpreted in context. The context includes the legal framework within which planning permissions are granted.

64. Since the context includes the legal framework, the reasonable reader must be equipped with some knowledge of planning law and practice: *Lambeth LBC v Secretary of State for Housing Communities and Local Government* [2018] EWCA Civ 844, [2019] PTSR 143. (Although the decision in the case was reversed by the Supreme Court, it was common ground that this principle remained unaffected).

65. As Lord Carnwath summarised the position in *Lambeth* at [19]:

> "In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find "the natural and ordinary meaning" of the words there

> used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

66. Planning permission is granted under a statutory framework. If Parliament defines its terms in an Act (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined will govern what is proposed, authorised or done under or by reference to that Act: *Wyre Forest DC v Secretary of State for the Environment* [1990] 2 AC 357.

67. Where it is said that a condition attached to a planning permission excludes a land owner's existing rights, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion: *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192, [2017] JPL 848.

68. As noted, the Supreme Court held that the same principles apply to the interpretation of a planning permission as apply to other documents. One principle that applies (both to contracts and to other instruments) is that the court will prefer an interpretation which results in the clause or contract being valid as opposed to void. It is known as the validity or validation principle: see, most recently, *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38. This approach is triggered where the court is faced with a choice between two realistic interpretations: *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] AC 154. In that case Lord Wilson described the principle at [38]:

> "… the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred."

69. He went on to consider a number of cases on the appropriate trigger for the application of the principle. At [42] he said:

> "To require a measure of equal plausibility of the rival meanings is to make unnecessary demands on the court and to set access to the principle too narrowly; but, on the other hand, to apply it whenever an element of ambiguity exists is to countenance too great a departure from the otherwise probable meaning."

70. He went on to say:

> "In *Great Estates Group Ltd v Digby* … Toulson LJ explained that, if the contract was "capable" of being read in two ways, the meaning which would result in validity might be upheld "even if it is the less natural construction". And in Tindall *Cobham 1 Ltd v Adda Hotels* … Patten LJ, with whom the

> other members of the court agreed, observed at para 32 that the search was for a "realistic" alternative construction which might engage the principle. In my view Megarry J, Toulson LJ and Patten LJ were identifying the point at which the principle is engaged in much the same place. Let us work with Patten LJ's adjective: let us require the alternative construction to be realistic."

71. I see no reason why this approach should be excluded in the interpretation of a planning permission. Indeed, it was applied to a condition in a planning permission by Harman and Pearson LJJ in *Hall*.

Is there a realistic interpretation of condition 39 which does not result in unlawfulness?

72. I do not think that the judge really appreciated the consequences of her decision. In my judgment, if the judge was right in her interpretation of the condition, the condition (and probably the whole planning permission) is invalid. In those circumstances, the validation principle comes into play. The question, then, is whether the inspector's interpretation of condition 39 was realistic (even if not the most obvious or natural one).

73. In answering this question, I do not derive much help from the planning officer's report, on which Mr Harwood strongly relied. As I have said, the recommendation to grant was subject to completion of a satisfactory planning obligation (i.e. a section 106 agreement) and the transport infrastructure requirements were all discussed in the report within the legal framework of regulation 122 (which applies only to section 106 agreements). Nor do I find persuasive the argument that the test of lawfulness is necessarily the same for the imposition of a condition and the contents of a section 106 agreement. In the way that the law has developed, they are subject to different constraints and achieve different purposes. Moreover, planning obligations under section 106 can only arise with the developer's consent. They cannot be imposed by the local planning authority.

74. In her decision letter, the inspector expressed her conclusion at [20] as follows:

> "Whilst the term "*highway*" usually means a road over which the general public have the right to pass and repass, the phrase "*fully functional highway*" cannot be divorced from the beginning of the sub-clause which states "*shall be constructed in such a manner as to ensure*…". In my view, Condition 39 simply imposes a requirement concerning the manner of construction of the access roads and requires them to be capable of functioning as a highway along which traffic could pass whether private or public. It does not require the constructed access roads to be made available for use by the general public. I believe that a reasonable reader would adopt the Appellant's understanding of the term "*highway*" as used in the context of the condition with the clear reference to the construction of the roads as opposed to their use or legal status. The distinct inclusion of the term "*public highway*" in the

> reason for imposing Condition 39 reinforces my view on that point."

75. Moreover, the inspector stated at [23] that the construction of condition 39 was "neither difficult nor unclear".

76. At [63] the judge acknowledged that the interpretation adopted by the Secretary of State was a possible one. She said:

> "Looked at in isolation, it is possible to construe condition 39 in the manner for which [the Secretary of State] contends. It is headed "roads" and it appears in juxtaposition to a condition headed "foot/cycleways", thus it is possible to infer that it is dealing with the matters that are not covered by that previous condition, i.e. vehicular access to and within the site. Conditions in a planning permission are not interpreted like statutes, so, whilst it would be slightly odd, it is not impossible for the words "road" and "highway" to be used to mean the same thing in the same condition. However, condition 39 cannot be read in isolation, and when looked at in context of the overall permission, that is not how the reasonable informed reader would construe it."

77. The first point to make is that condition 39 does not expressly require dedication which is a necessary prerequisite of the creation of a highway. Nor (unlike the condition in *Hall*) does it expressly refer to the grant of rights of passage. Dedication could not be inferred from public use, for the simple reason that until the roadways have been constructed at which point (on the judge's interpretation) they become highways, there will have been no public use. Although he disclaimed any intention of implying terms into condition 39, Mr Harwood argues that the only way to give effect to the repeated use of the word "highway" in that condition ("highway purposes" and "fully functional highway") is by requiring dedication of the roads as highways. In other words it is implicit in the use of the word "highway" that the roads have been dedicated to public use. In my judgment, that is implication, because it extrapolates a legal meaning which is not apparent in the words of the condition.

78. Second, it was by no means clear to me which parts of the development were to be dedicated as highways. Take the "turning spaces" for example. Mr Harwood suggested that these might be lay-bys on the north-south link and the east-west spine roads. But, even if the expression "turning spaces" could be stretched to include a lay-by, given the width of those roads as shown on the Illustrative Landscape Masterplan, it is impossible to see where lay-bys or turning areas might be required. In addition, the condition requires only that each unit is served by a fully functional highway. As Nugee LJ pointed out in argument, it is perfectly possible to satisfy this requirement without dedicating both the whole of the north-south link road and the whole of the east-west spine road.

79. Third, the condition itself refers to "areas that serve a necessary highway purpose" whereas the reason given for imposing the condition refers to "access to the public highway". The drafter of the condition thus appears to distinguish between a

"highway" and a "*public* highway". The same distinction between the "highway" and the "public highway" also appears in condition 43.

80. Fourth, as the inspector noted, the obligation imposed by the condition is one which at least on its face relates to the *construction* of the roads, which are themselves described as "access roads", rather than as highways.

81. Fifth, the reason for imposing the condition states that it is imposed to ensure that "the development" (rather than individual units or other areas within the development) has "adequate means of access to the public highway". Individual units or areas within the development are to have access to the public highway by means of the "proposed access roads".

82. Sixth, condition 38 (although headed "Foot/cycleways") deals only with footways and footpaths. The condition says that they must be constructed to wearing course level "*between* the development and highway". That suggests, at the very least, that the highway does not form part of the development. Mr Harwood said that this condition also required dedication of the footways and footpaths as public footways and footpaths. That submission depended entirely on the statutory definition of "footway" and "footpath" in the Highways Act 1980. But to my mind, that is a very oblique way of requiring a developer to dedicate land for perpetual public use.

83. Seventh, the power to impose conditions on the grant of planning permission should not be interpreted as derogating from the rights of the owner to exercise his property rights, in the absence of clear words. The right in issue in this case is the right to forbid access to the land to anyone who enters it without the owner's permission. This is not a right which is dependent on the construction of roads. It is a right inherent in the ownership (or perhaps more accurately the possession) of land. If condition 39 means what Swindon says it means, the land owner will have lost that right so far as it extends to the access roads. Swindon argue that the right in issue is the right to charge for granting a licence to use the roads. That is, no doubt, part of the right (and the immediate occasion for the dispute). But whether or not any adjoining owner agrees to contribute to the repair of the roads, on Swindon's interpretation any member of the public (whether a licensee or not) may use the roads; and the land owner is powerless to prevent them.

84. Eighth, the planning permission as granted says nothing about repair of the roadways once constructed. Although it is legally possible to create a newly constructed highway which no one is liable to repair, in modern times that is unusual.

85. Ninth, the reasonable reader would be disposed to understand that in imposing conditions on the grant of planning permission, the local planning authority had complied with long-standing government policy. *Hall*, or at least the rule which it embodies, was a landmark in planning law, and also forms part of the relevant legal context. The reasonable reader could not suppose that the local authority intended to grant a planning permission subject to an invalid condition, let alone to grant an invalid planning permission.

86. Tenth, there is a readily available statutory mechanism for securing the adoption of a way as a highway; namely by agreement under section 38 of the Highways Act 1980. A section 106 agreement could have required the carrying out of works to bring the

roads to adoption standards. Neither of these familiar mechanisms were used. They, too, are part of the statutory context in which the planning permission must be interpreted.

87. Finally, the courts should give some weight to the expertise of an experienced and specialist planning inspector. Their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865. Although this was said in the context of the interpretation and application of national policy it also applies (though perhaps to a lesser extent) to the interpretation of a planning permission.

88. In my judgment, the interpretation adopted by the inspector is, to put it no higher, a realistic one even if it is not the most natural. The validation principle therefore applies; and condition 39 should be given the meaning that she ascribed to it.

Result

89. I would allow the appeal.

Lord Justice Arnold:

90. I agree that this appeal should be allowed. For the reasons given by Lewison LJ at [77]-[86], I consider that the inspector's interpretation of condition 39 was the correct one. If I was in doubt as to the correct construction, then I would agree with Lewison LJ that the validation principle confirmed the inspector's interpretation. I would only add that it is clearly established that the validation principle applies to documents other than contracts. Thus it also applies to patents, which are public documents: see Terrell on the Law of Patents (19th ed) at paras 9-71 to 9-78. The validation principle is not the same as the formerly recognised rule of benevolent construction: see Terrell at paras 9-80 to 9-85.

Lord Justice Nugee:

91. I also agree.