

APPENDIX 9 – 1

[HOUSE OF LORDS]

A

SECRETARY OF STATE FOR EDUCATION AND
SCIENCE

APPELLANT

AND

TAMESIDE METROPOLITAN BOROUGH
COUNCIL

RESPONDENTS

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1976 July 22, 23, 26 .

Lord Denning M.R., Scarman and
Geoffrey Lane L.JJ.

1976 July 29, 30, 31;
Aug. 2;
Oct. 21

Lord Wilberforce, Viscount Dilhorne, Lord Diplock,
Lord Salmon and Lord Russell of Killowen

C

Education—School—Secretary of State, powers of—Local education authority proposing to introduce comprehensive system of education—Scheme approved by Secretary of State—Control of authority passing to political opponents committed to retention of grammar schools—Authority proposing selective entry to grammar schools—Direction by Secretary of State to implement scheme of comprehensive education—Whether lawful—Whether authority “proposing to act unreasonably”—Whether sufficient time for authority to put proposals into effect—Duty of teachers to cooperate—Education Act 1944 (7 & 8 Geo. 6, c. 31), ss. 1 (1), 8 (1), 13 (1) (4), 68¹ (as amended by Education Act 1968 (c. 17), s. 1 (2))

D

A local education authority proposed to bring all the schools in their area under the comprehensive principle. Their scheme was approved by the Secretary of State for Education and Science in November 1975, and implementation of the scheme was envisaged by the beginning of the school year in September 1976. In May 1976 local government elections were held, and in the authority's area the survival of the grammar schools was a strongly fought issue on which the opposition party took a stand. The opposition party gained control of the authority, and considered that they had a mandate to reconsider their predecessors' education policy. The new authority proposed to continue and complete three new comprehensive schools which were in the course of construction, to continue 16 secondary modern schools and to postpone plans for conversion of three grammar schools into comprehensive schools or sixth form colleges. In a letter to the Secretary of State on June 7, they said that the schools in their area were not ready for the changed roles proposed by their predecessors and that implementation of those proposals in September would have caused grave disruption to the children's education. They summarised their present plans as being “the maintenance of

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¹ Education Act 1944, as amended, ss. 1 (1), 8 (1): see post, p. 1053B, C-E.

S. 13: “(1) . . . where a local education authority intend to make any significant change in the character, . . . of a county school, they shall submit proposals for that purpose to the Secretary of State. . . . (4) Any proposals submitted to the Secretary of State under this section may be approved by him after making such modifications therein, if any, as appear to him to be desirable: . . .”

S. 68: see post, p. 1046E-F.

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A the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals." All allocations of pupils for the forthcoming year made by their predecessors—some 3,000—would be honoured subject to parents' agreement. Two of the grammar schools would remain grammar schools open to 11-year-old entry, making 240 selective places available. All parents of 11-year-olds were to be given the right to apply for reallocation. If, as was likely, the number of applicants exceeded the number of places available, those pupils most suitable and most likely to benefit from that type of education would be selected by a combination of reports, records and interviews. There would be no formal 11-plus examination. (In the event, there were 783 applications by parents of 11-year-olds for the 240 places in response to letters sent out to 3,200 parents.)

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C On June 11 the Secretary of State, acting under section 68 of the Education Act 1944, directed the authority to give effect to the proposals approved by him in November 1975 and to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming year on a non-selective basis. His letter of direction stated "A change of plan at this stage of the year, designed to come into effect less than three months later, must . . . give rise to considerable difficulties . . ."

D On June 18, 1976, the Secretary of State applied for an order of mandamus ordering the authority to comply with his direction. The Divisional Court held that the Secretary of State was justified in saying that in the circumstances there was no time to carry out the proposed selection procedure by September and that accordingly there had been material on which he had been entitled to express himself as satisfied that the authority were going to act unreasonably. They made the order of mandamus.

E The Court of Appeal received evidence to the effect that the selection procedure proposed by the authority (on the basis of reports, records and interviews) was well known and tried and workable and that sufficient teachers were available to form a selection panel. They allowed the authority's appeal and quashed the order of mandamus.

On appeal by the Secretary of State:—

F *Held*, dismissing the appeal, that under the Act of 1944 a local education authority were entitled to have a policy, and section 68 did not entitle the Secretary of State to require them to abandon it because he disagreed with it; that he could give a direction only if they were acting unreasonably in doing what they were entitled to do; that his objection that their policy was creating a dilemma for parents was insupportable in view of the fact that the electorate, including many parents, had voted for a selective basis of secondary education and the authority were providing it; that the critical question was whether on June 11, 1976, the Secretary of State had had a sufficient factual basis for believing that the change proposed by the authority would lead to educational chaos or undue disruption, bearing in mind that the electorate must have accepted that there would be some disruption; that the question which the Secretary of State should have considered was whether a reasonable authority would have attempted to carry out the selection procedure proposed in the time available or at all; that he did not appear to have directed his mind properly or at all to that question; that although the authority's letter stating that selection would be by a combination of

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reports, records and interviews was lacking in specification it must have conveyed sufficient to the experts at the Department of Education and Science to have enabled them to understand what was meant, and such defects as there were in the proposed procedure did not enable it to be said that no reasonable authority would have attempted to carry it out; that the teachers were public servants with responsibility for their pupils and a duty to produce reports and it could not have been unreasonable for the authority to have taken the view that if the Secretary of State did not intervene the teachers would cooperate; and that, accordingly, there had been no ground on which the Secretary of State, properly directed, could have found that the authority were acting or proposing to act unreasonably (post, pp. 1046H—1047C, 1048B—C, 1050H—1051A, E—G, 1052A, E—G, 1054C, 1058H—1059A, 1061D, F—G, 1062E—G, 1064B, E, G—1065B, 1066B—C, E—F, G—1067A, 1070B—D, F—G, 1071B—C, H, 1072B—C, 1073B—C, 1074D—E, 1075F, G—H, 1076C—D).

Per Lord Russell of Killowen. "Unreasonably" is a very strong word indeed (post, p. 1075C). Facts subsequently brought forward as existing on June 11 could not properly be relied on as showing that the authority's proposals were not unreasonable unless they were of such a character that they could be taken to have been within the knowledge of the Secretary of State (post, p. 1076E).

Decision of the Court of Appeal, post, pp. 1020H et seq., affirmed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.

W. (An Infant), In re [1971] A.C. 682; [1971] 2 W.L.R. 1011; [1971] 2 All E.R. 49, H.L.(E.).

The following additional cases were cited in argument in the House of Lords:

Cumings v. Birkenhead Corporation [1972] Ch. 12; [1971] 2 W.L.R. 1458; [1971] 2 All E.R. 881, C.A.

McEldowney v. Forde [1971] A.C. 632; [1969] 3 W.L.R. 179; [1969] 2 All E.R. 1039, H.L.(N.I.).

Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.).

Reg. v. Minister of Housing and Local Government, Ex parte Chichester Rural District Council [1960] 1 W.L.R. 587; [1960] 2 All E.R. 407, D.C.

Rex v. Bishop of Sarum [1916] 1 K.B. 466.

Sadler v. Sheffield Corporation [1924] 1 Ch. 483.

The following cases are referred to in the judgments of the Court of Appeal:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

City of Plymouth (City Centre) Declaratory Order 1946, In re; Robinson v. Minister of Town and Country Planning [1947] K.B. 702; [1947] 1 All E.R. 851, C.A.

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- A *Liversidge v. Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.).
Nakkuda Ali v. Jayaratne [1951] A.C. 66, P.C.
Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997;
 [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.).
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All
 E.R. 66, H.L.(E.).
Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455;
 [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.
- B *W. (An Infant), In re* [1971] A.C. 682; [1971] 2 W.L.R. 1011; [1971] 2
 All E.R. 49, H.L.(E.).

The following additional cases were cited in argument in the Court of Appeal:

- Bradbury v. Enfield London Borough Council* [1967] 1 W.L.R. 1311;
 [1967] 3 All E.R. 434, C.A.
- C *British Oxygen Co. Ltd. v. Board of Trade* [1969] 1 Ch. 57; [1968] 3
 W.L.R. 1; [1968] 2 All E.R. 177.
Cummings v. Birkenhead Corporation [1972] Ch. 12; [1971] 2 W.L.R. 1458;
 [1971] 2 All E.R. 881, C.A.
- Hanks v. Minister of Housing and Local Government* [1963] 1 Q.B. 999;
 [1962] 3 W.L.R. 1482; [1963] 1 All E.R. 47.
- Mountview Court Properties Ltd. v. Devlin* (1970) 21 P. & C.R. 689, D.C.
- D *Sadler v. Sheffield Corporation* [1924] 1 Ch. 483.
Watt v. Kesteven County Council [1955] 1 Q.B. 408; [1955] 2 W.L.R.
 499; [1955] 1 All E.R. 473, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

- On June 11, 1976, the Secretary of State for Education and Science, in the exercise of the powers conferred by section 68 of the Education Act 1944 and vested in him by the Secretary of State for Education and Science Order 1964, directed the Tameside local education authority, the Tameside Metropolitan Borough Council, to give effect to proposals which he had approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as were required to give effect to the proposals. His letter of direction read:

- "I am directed by the Secretary of State for Education and Science to refer to correspondence between the department and the authority beginning with Mr. J. I. Langtry's letter of May 11 which asked whether the authority intended to implement the secondary reorganisation proposals approved by the Secretary of State on November 11, 1975, and, in the event of the authority deciding not to implement those in September, for full details of the arrangements proposed for the transfer of pupils to county secondary schools in September. On May 19 the education services committee recommended that the authority should not implement the approved proposals but made no statement of any alternative arrangements for the transfer of pupils for the coming school year. On May 20 the authority were invited to discuss the situation with the Secretary of State in the week beginning May 24, but were unable to do so. The department accordingly wrote to the authority again on May 26 asking for a precise and detailed

statement of the plans which the authority hoped to put into effect in September. As a result of that letter, a meeting took place on Wednesday, June 9, between the Secretary of State and representatives of the authority including Councillor Grantham, leader of the council, and Councillor Thorpe, chairman of the education services committee. A

"The background to the meeting is that on March 19, 1975, the authority submitted to the Secretary of State proposals under section 13 of the Education Act 1944. These proposals provided for changes in the character of all their county secondary grammar and modern schools in September 1976 in such a way as to end selection by ability and aptitude and to establish a comprehensive system of secondary education. The Secretary of State approved the proposals on November 11, 1975. Since that date extensive preparations have been made to put the proposals into effect. Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work directly related to changes in the character of some schools has been put in hand; and over 3,000 children due to transfer from primary schools this year have been allocated to secondary schools without reference to ability or aptitude, the former selective processes being no longer appropriate, and largely by reference to parental choice. B C

"At the meeting on June 9 the authority's representatives informed the Secretary of State that the council had on June 8 resolved to continue the 21 schools which were the subject of the proposals approved under section 13, the five grammar schools as '11 to 18 academic high schools' and the remainder as '11 to 16 secondary schools,' and accordingly to modify the arrangements already made for the allocation of pupils to secondary schools for the coming year. Their reasons for these proposals were set out in a letter from the chairman of the education services committee dated June 7 and the proposals themselves were explained in detail by the authority's representatives at the meeting. D E

"The Secretary of State has given the most careful consideration to the representations made to him. He is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the Education Acts 1944 to 1976 * regarding the provision of secondary education for their area and in particular with respect to their powers and duties (express and implied) under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools on transfer from primary schools at the beginning of the coming school year, i.e., on September 1, 1976. A change of plan at this stage of the year, designed to come into effect less than three months later, must in his opinion give rise to considerable difficulties. The authority's revised proposals confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational F G H

* *Reporter's note.* "1976" refers to the Education Bill.

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- A validity. Furthermore it is clear from the terms of paragraph 10 of the resolution adopted at the special council meeting of June 8, which were elaborated in the course of the meeting of June 9 by the authority's representatives, that an abnormally high proportion of pupils might need to be reallocated to different secondary schools during, or at the end of, the educational year beginning in September 1976. This would impose a further measure of disturbance on top of the present uncertainty. In addition the
- B change of plan at this time in the educational year threatens to give rise to practical difficulties in relation to the appointments of staff already made and the construction of buildings for the new comprehensive schools and to create a degree of confusion and uncertainty which could impair the efficient working of the schools.

- "In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him by the Secretary of State for Education and Science Order 1964, the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as is
- D required to give effect to the proposals."

- By notice of motion dated June 18, 1976, the Secretary of State applied pursuant to leave granted by the Divisional Court on that date for an order of mandamus directed to the council requiring them to exercise the powers conferred and duties imposed on them by and under the Education Acts 1944 to 1976 [sic] in accordance with his directions dated June 11, 1976, on the grounds that he, having been satisfied that the council were proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the the Acts of 1944 to 1976 [sic] regarding the provision of secondary education for their area, as he had been entitled to do by section 68 of the Act of 1944, as amended, had given directions to the council dated June 11, 1976; that it had been then and thereafter the duty of the council to
- F comply with that direction and that they did not intend to do so unless required to do so by the court.

On July 12, 1976, the Divisional Court granted the order. In his judgment, Lord Widgery C.J. said:

- "In the end Mr. Woolf's argument, as it seems to me, was this. He said there are lots of things which are going to cause trouble if we get a sudden change of plan at the last minute like this. There are all sorts of difficulties arising and all sorts of wasted building work will occur, but absolutely crucial in this case is the fact that there are 240 grammar school places to fill. They are available to be filled in September. The children have been warned suitably in advance. Yet, says Mr. Woolf, there is nothing in the proposals of the Tameside authority as to how this selection is to be carried out either in the
- H time available or at all.

"We can only set aside the Secretary of State's directions if we are satisfied that he has gone outside his jurisdiction and has made this order when there is no ground upon which it can lawfully be made.

Although I have not found this an easy case, and although, I confess, my opinion of the conclusion has wavered from time to time from one side to the other, I think in the end Mr. Woolf has satisfied us that there was here before the Secretary of State material upon which he could express himself as satisfied that the local authority were going to act unreasonably. A

“This is not in any sense a victory for comprehensive education or selective education. It is simply a conclusion that, when the Secretary of State says there is no time to get this done by September, I think he is right on that one point. I am not required to go into any other grounds. On the question of whether there was time to get this done by September he says he thought not. In my view there was material upon which, if he thought fit, he could reach that conclusion.” B

Cusack J. agreed. May J., also agreeing, said: C

“Having heard the argument on both sides, I have ultimately come to the conclusion that there was relevant material upon which the Secretary of State was entitled to come to the conclusion to which he did come. Shortness of time coupled with the lack of cooperation from some of the teachers in the area I think provided him with sufficient evidence to entitle him to decide as he did. On the affidavits and exhibits before us, I am not impressed with the other grounds referred to by the Secretary of State—the fresh contracts which it is contended have been entered into with teachers within the new comprehensive system; the building work which it is alleged has been put in hand; still less the planning of the new courses which it is said has been done. Further, had the local authority had the cooperation of the teachers concerned, it would I think have been difficult for the Secretary of State to have contended that there was then any relevant material before him upon which he could have reached the necessary conclusion under section 68 of the Act of 1944. Without that cooperation, however, it is certainly arguable that it is difficult to see how all the children under the aegis of this local authority could fairly have been allocated to appropriate secondary schools in time for the new term in September next, and in the end I have come to the conclusion that this was sufficient material upon which a Secretary of State could decide as the Secretary of State in fact did.” D

The council appealed. E

Anthony Lloyd Q.C., Leon Brittan and Andrew Caldecott for the council. F

David McNeill Q.C. and J. J. Hodgson for six parents.

T. H. Bingham Q.C. and Harry Woolf for the Secretary of State. G

LORD DENNING M.R. There is a controversy on this question: should the grammar schools be turned into comprehensive schools? Most educationalists and parents know what the controversy is all about, but for others who do not know the background perhaps I may say a word. The difference lies in the way the children are selected on and after the age of 11. H

- A In order to go to a grammar school, a boy or girl of age 11 has to show some marked ability or aptitude. When he gets there, he or she will mingle with other bright youngsters and be taught there right through until the age of 18. But a comprehensive school takes any boy or girl of age 11 without reference to his or her ability or aptitude. The bright and the dull start together in classes, but they are divided into different streams as they develop in ability or aptitude. They remain at the comprehensive school
- B until they are 16. Most of them then leave to go to work. But those who wish can go on for two more years at a sixth form college where they are given more advanced teaching. That is from 16 to 18.

- Each system has its advocates. Those who support the grammar schools point to their long and distinguished record going back before the Reformation. They were, says Trevelyan, "the typical unit of Elizabethan education . . . where the cleverest boys of all classes were brought up together": see *Trevelyan, English Social History* (1944), p. 162 [*Illustrated English Social History* (1949–1952), vol. 2, p. 23]. Those who seek to retain them claim that they retain the inherited virtues of sound learning and hard work leading to fine achievement: and many parents, they say, wish still to send their children to a grammar school, if it is available, rather than to a comprehensive. In contrast the comprehensive schools are of recent origin. Those who support them claim that they give equally good education for the able children as the grammar schools; and, what is more, they provide better education for the many others. So much support is now given to comprehensive schools that a bill before Parliament seeks to declare that "the comprehensive principle" is to be applied throughout our educational system. It says that pupils are
- D not to be selected "by reference to ability or aptitude."
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- We, of course, in this court support neither side in this controversy: but we have to take notice that the political parties are concerned in it. This is shown by the dispute which is now before the court. It is about education in the Tameside metropolitan area (which was formed in 1974 as a part of Lancashire and Cheshire). Before May 1976 the council was
- F controlled by the Labour party. But on May 6, 1976, there were local elections which brought the Conservatives to power. Whilst the Labour councillors were in the majority, they had made plans to change over to the "comprehensive principle" as soon as it could be done. On March 19, 1975, they made detailed proposals to the minister whereby they were going (1) to put into use three new purpose-built comprehensive schools; (2) to bring 16 secondary modern schools into the comprehensive principle; and
- G (3)—this is the particular proposal now in question—to shut down five grammar schools and to turn three of them into three comprehensive schools and the other two into two sixth form colleges. The buildings for this changeover were not to be purpose-built. The staff and pupils were still to be in the old grammar school buildings. On November 11, 1975, these proposals of the old council were approved by the Secretary of State.
- H But they were opposed by the Conservative party in the council as being premature. At the local elections in 1975 and 1976 the Conservative councillors made it one of their planks in their election campaign. Their leaflets put it in this way:

“ Education.

“ Present comprehensive plan will not be implemented.

“ A review of complete education system will be undertaken to improve opportunities for all children together with freedom of parental choice.”

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On May 6, 1976, the Conservative party gained control. They approved and adopted much that their predecessors had done towards the comprehensive principle. For instance, three new comprehensive schools had been built—purpose-built—as comprehensive schools. The Conservative party considered these as a valuable nucleus for the future. They also approved the proposal that the 16 existing secondary modern schools should be brought into line with the comprehensive principle. But here is the point: they proposed to postpone the plans for the five grammar schools because they thought that the changes would themselves cause much disruption and disturbance to the children's education and it would be better to continue the five grammar schools as they were for a time so that the position could be reviewed. Their policy was, they said, to maintain “the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals.”

When the Secretary of State heard of the postponement by the new council he was much concerned. He thought that the plans of the previous council had gone too far to be put into reverse in this way. He thought that the new council were acting, or proposing to act, unreasonably in postponing the changeover. On June 11, 1976, he directed the new council that they were to implement the old council's proposals and a week later, on June 18, 1976, he followed this up by applying to the Divisional Court for an order of mandamus commanding the new council to implement the old council's proposal. On July 12, 1976, the Divisional Court granted the mandamus. The new council appeal to this court and are supported by some of the parents of the children affected.

Before I go into what the minister has done and his reasons, I will consider the facts by summarising the arguments put on either side on this proposed postponement. The new council—that is, the local authority—rely on the result of the May election. They say that the issue was put plainly before the electorate. The new council consider that they have a mandate for postponing the old council's proposals and that they are morally bound to honour that mandate if they can legitimately do so. That is their first argument.

The new council also say that the old council were proceeding with too much haste to implement the changeover. They say that if the proposals of the old council were implemented immediately—without a pause for review—it would lead to disruption of the studies of many pupils, especially those already in the sixth form (where they spend two years) and those due to go up into it. Those pupils who had been there for one year already would have to stay in the old grammar schools for their last year, taught, they expect, by junior teachers. Those going up into the sixth form at age 16 would have to go to the new sixth form colleges for their last two years in new surroundings and with new teachers and with building work not started or not completed and this, they say, would be at a crucial

A time when they were to take their examinations (such as the "A" levels) on which their future careers depend. Those are not all, but only some, of the arguments which were being adduced by the new council.

On the other hand, there are arguments on the other side. The Secretary of State has strong arguments against any postponement. He says that many preparations have been made for the changeover to take place on September 1, 1976, and it would cause unwarranted disruption if these
B were now to be put into reverse. These preparations were summarised by the department in these words in the letter of June 11:

"Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work . . . has been put in hand; and over 3,000 children" (of 11) ". . . have been allocated [places] without reference to ability or aptitude."
C

Those are the principal arguments being put forward by the Secretary of State.

But to these arguments the new council make their answer. They admit that if the proposals were to be postponed there would be some disruption, but they assert that there would be not nearly so much disruption as the department fears. Staffing, they suggest, will present few problems because
D 95 per cent. of the teachers will remain in the same schools anyway, and their new contracts will be honoured. The new courses, they say, have not been planned in detail and can readily be revised before the new term starts. Little building work has been put in hand, and a great deal will not be completed in time for the new term. As to the 3,000 new 11-year-olds who are coming up, they say that the great majority of parents are content with the places allocated to them. They have written to all those parents with youngsters who are coming up to 11, and have had replies from all. Only 783 wish their children to go to a grammar school, if available. The new council admit that, if the grammar schools are to be retained for a year pending review, there will be only 240 places available. (These will arise because of the change back from the proposed sixth form colleges, Ashton and Hyde.) So the new council will have 240 places
F available for those 783. It will be necessary to find some way of selecting the 240 children to fill them; and furthermore to make the selection in time for the new term starting in September 1976. Eventually, as the argument proceeded, it seemed that this selection became the main crux of the difference between the parties before us.

Now it is most important to remember that we have to view the matter
G—as the parties had to view the matter—as at June 11, 1976, when the Secretary of State made his decision. What were the materials then before the new council? They were hopeful that those 240 could have been selected well and fairly before the end of the summer term. It would not end until July 23. So they had six weeks, and they say that it could have been done if the teachers and staff had been willing to cooperate with the new council in making the selection. They would go through the records and
H recommendations from the primary schools. They would have standardised reasoning tests and then the selection could be well and truly made if only the teachers and staff were willing to cooperate. But unfortunately it

appears that some of the trade unions, speaking through the teachers consultative committee, said that they were unwilling to cooperate in this changeover. Faced with the unwillingness of some at least of the teachers to cooperate, the new council had then in their minds—and have since formulated in affidavits before us—a plan to overcome this difficulty. They say that they will be able to get the records of the 783 pupils from the primary schools and that they can get a “selection panel” of 20 teachers who are willing to serve on a selection board. The chairman is to be the headmaster of a junior school of much experience. He says in his affidavit:

“If I had a selection panel of 20 teachers (10 couples) I am of the opinion that a fair, feasible and practicable selection of 240 places from 783 applications can comfortably be made within one week.”

If this view of the new council is accepted, then it does appear that, although it would be far from perfect, a selection can be made out of the 783 children whereby 240 of the best and brightest of these youngsters can be allocated places at the grammar schools. It can be done even now with only five weeks to go before the new term. All the more so could it have been done on June 11, 1976, when the matter has to be tested. They had good reason then to believe that a fair selection could be made.

Now we have to come to the point: Was the Secretary of State warranted in the course which he took on June 11, 1976? He said he was satisfied that the new council was acting or proposing to act unreasonably. He relied on his powers under section 68 of the Education Act 1944. The question for the court today is whether he was lawfully exercising his powers under that section or not. So I must read it, because the whole case turns upon it. It says, as amended:

“If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority . . . [has] acted or [is] proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient.”

The governing words which we have to consider here are, first, “If the Secretary of State is satisfied,” and, secondly, “that any local education authority . . . [has] acted or [is] proposing to act unreasonably.” So much depends on the interpretation of those words that I must say something upon them.

So far as “satisfied” is concerned, it is suggested—and was suggested by the chief officers of the local authority on June 21, 1976—that once the Secretary of State said that he was “satisfied” his decision could not be challenged in the courts unless it was shown to have been made in bad faith. We were referred by Mr. Bingham to *Liversidge v. Anderson* [1942] A.C. 206, where Lord Atkin drew attention to cases where the Defence Regulations required the Secretary of State to be “satisfied” of something or other. Lord Atkin said, at p. 233: “In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good

- A faith," to which I would add a similar passage by Somervell L.J. in *In re City of Plymouth (City Centre) Declaratory Order 1946: Robinson v. Minister of Town and Country Planning* [1947] K.B. 702, 721. Those statements were made, however, in relation to regulations, in war time or immediately after the war when the decisions of the executive had to be implemented speedily and without question. That was pointed out by Lord Radcliffe in *Nakkuda Ali v. Jayaratne* [1951] A.C. 66, 77
- B and by Lord Reid in *Ridge v. Baldwin* [1964] A.C. 40, 73. Those statements do not apply today. Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another. To my mind, if a statute gives a minister power to take drastic action if he is "satisfied" that a local authority has
- C acted or is proposing to act improperly or unreasonably, then the minister should obey all the elementary rules of fairness before he finds that the local authority is guilty or before he takes drastic action overruling them. He should give the party affected notice of the charge of impropriety or unreasonableness and a fair opportunity of dealing with it. I am glad to see that the Secretary of State did so in this case. He had before him
- D the written proposals of the new council and he met their leaders. In addition, however, the minister must direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he has to consider and the decision to which he comes must be one which is reasonable in this sense: that it is, or can be, supported with
- E good reasons or at any rate is a decision which a reasonable person might reasonably reach. Such is, I think, plain from *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 which is a landmark in our administrative law and which we had in mind in *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455, 493, 510. So much for the requirements if the minister is to be "satisfied."
- F Now I turn to the other important words in this section: that he is satisfied that the local education authority have acted or are proposing to act "unreasonably." The question often arises whether someone has acted, is acting or is proposing to act "unreasonably." To decide this question, it must be remembered, as Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700:
- G "Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable."

- It is one thing to say to a person: "I think you are wrong. I do not agree with you." It is quite another thing to say to him: "You are being quite unreasonable about it." I know it is often done. It is commonplace
- H to say to your adversary: "You are being very unreasonable" when all you mean is: "I think you are wrong." Such hyperbole is excusable in ordinary mortals but not in those who have to consider and apply Acts of Parliament. No one can properly be labelled as being unreasonable unless

he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view.

All the more so when a man—be he a judge or a minister—is entrusted by Parliament with the task of deciding whether another person has acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views—and perhaps his own strong views—as to what should or should not be done. He must be very careful then not to fall into the error—a very common error—of thinking that anyone with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite view cannot be reasonably held by anyone. But he must pause before doing so. He must ask himself: “Is this person so very wrong? May he not quite reasonably take a different view?” It is only when the answer is: “He is completely wrong. No reasonable person would take that view” that he should condemn him as being unreasonable. During the argument I was interested in the question which Scarman L.J. put to Mr. Bingham, and which he accepted: In order for the new local authority to be unreasonable, it must be apparent to them that in all probability the solution which they are suggesting will not work. Put in another way, it seems to me that if, on June 11, 1976, the new council reasonably took the view that their solution would work, and in particular that a fair selection of the 240 could be made in time for the new term, it could not be said that they were acting unreasonably.

It is on this point—on the interpretation of unreasonableness—that I think the minister must have misdirected himself. In his decision letter of June 11, 1976, he has set out the reasons why he thinks the new council are acting wrongly in postponing the changeover. He says: “A change of plan at this stage . . . must . . . give rise to considerable difficulties,” that the parents will be confronted with a “dilemma,” and that the “improvised selection procedure” is such as to “raise substantial doubts about its educational validity.” All these are reasons why the minister thinks that the new council are acting, or proposing to act, *erroneously*. But none of them in my view are reasons for saying that the new council are acting, or proposing to act, *unreasonably*. It seems to me that in considering whether they are acting unreasonably or not there are many considerations to be borne in mind besides those expressly mentioned by the minister. There is the mandate itself which the council believe they have obtained from the electorate. There is the disruption which they feel will result from the premature implementation of the old council’s proposals. They admit that the selection tests in the circumstances of the case are not perfect, but they believe they will work. All these are considerations showing they were acting reasonably: and there is no trace that the minister had regard to them. All things considered, I do not find any evidence on which the minister could declare himself satisfied that they had acted or were proposing to act unreasonably.

In the circumstances, it seems to me that the minister’s directions were not validly made in accordance with the Act of Parliament. Being invalid, it is not a case for any issue of an order of mandamus to the new council.

One word more on a technical point. It was said that mandamus did not lie directly for a failure to obey directions under section 68, and

A that, before applying for mandamus, the minister ought to have gone through the extra procedure of a declaration of default under section 99. If I am right in thinking the directions under section 68 were invalid that point does not arise for decision in this case, and therefore I will say nothing on it.

B But on the principal point in the case it seems to me that the minister was not justified in asserting that he was satisfied that the new council were acting or proposing to act unreasonably. It is therefore no case for a mandamus. I would allow the appeal accordingly.

C SCARMAN L.J. This appeal raises two questions. One is of technical law, the meaning of the adverb "unreasonably" in section 68 of the Education Act 1944. The other is a question of legal principle in the field of administrative law—the scope of judicial review where what has to be resolved is a dispute as to their powers between two elected authorities, one being the central government and the other a local authority.

D I need not rehearse the facts. The dispute is between the Secretary of State for Education and Science and a local education authority, the metropolitan borough council of Tameside. The Secretary of State has directed that proposals previously made by the authority and approved by him for the introduction into the area of universal comprehensive education be implemented. The council, whose political control has changed hands in a recent election, has changed its policy and no longer wishes to implement the proposals. The Secretary of State says that he is satisfied that the council is, or is proposing, to act unreasonably in the exercise of its powers or in the performance of its duty under the Act and has issued his direction under section 68. The council having made plain that they do not consider themselves bound to comply with the direction, he asks the court for an order of mandamus requiring them to do so.

F It is sufficient, for the purposes of my judgment, to bear in mind (1) that on November 11, 1975, the Secretary of State gave his approval under section 13 of the Education Act 1944 to proposals (which I shall call the section 13 proposals) put forward by the local education authority for introducing universal comprehensive education into the area, beginning on September 1, 1976; (2) that his approval of those proposals imposed no duty upon the local education authority to implement them; (3) that in the election of May 6 of this year control of the authority passed from the Labour party, who supported the section 13 proposals, to the Conservatives who did not, and do not; (4) that the local education authority, now under Conservative control, informed the minister in May that they intended not to implement the section 13 proposals but to retain the existing mixed pattern of education, which includes three comprehensive schools, 16 secondary modern schools and five grammar schools, until such time as a new, well thought out system of education might be devised for the area; (5) that, after receiving the written representations of the local education authority, and after according their representatives a meeting to discuss, in particular, the detailed proposals for the change of plan, the Secretary of State invoked section 68 of the Act of 1944 and

issued by letter dated June 11 his direction to the local education authority to implement the section 13 proposals. A

The authority challenges the lawfulness of his direction. It is, as I have said, a dispute between two public authorities. Judicial review can resolve it: but the review has to embrace not only the lawfulness, or otherwise, of the Secretary of State's direction but also the validity of the local education authority's decision not to implement the section 13 proposals. B

Ultimately there is, I think, only one issue: whether the direction of the Secretary of State was lawful. For, if it was, there can be no doubt, in my judgment, but that mandamus must go. I reject the submission that, even if the direction be lawful, the court in the discretion which it undoubtedly possesses should refuse the order sought. But the submission as to discretion, though it must be rejected, has drawn attention to an aspect of the case of considerable importance, namely, that the local education authority is entitled to have its decision treated with the same respect and approached in the same way as the minister's. The case is no more an appeal against the decision of the local education authority not to implement the section 13 proposals than it is an appeal against the Secretary of State's direction to the authority to implement it. In respect of each decision the court's role is strictly limited to judicial review. C D

As I have said, the Secretary of State acted under section 68 of the Education Act 1944. Being satisfied that the Tameside local education authority—that is to say, the metropolitan borough council of Tameside—was proposing to act unreasonably, he issued his direction by letter of June 11, 1976. He expressed his satisfaction in these terms: E

"He"—that is, the Secretary of State—"is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the Education Acts . . . regarding the provision of secondary education for their area and in particular with respect to their powers and duties (express and implied) under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools on transfer from primary schools at the beginning of the coming school year, i.e., on September 1, 1976." F

His direction in the same letter was put in these terms:

"In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him by the Secretary of State for Education and Science Order 1964, the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as is required to give effect to the proposals." G H

I accept the submission of Mr. Bingham, for the Secretary of State, that

A we must look primarily to the letter for the reasons for his satisfaction, though the Secretary of State is not to be precluded from relying on other reasons if they existed when he gave his direction. The primary reason given in the letter was put as follows:

B “The authority’s revised proposals confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational validity.”

C The letter does refer to additional difficulties arising from the change of plan by the local education authority. But undoubtedly the real reason for the Secretary of State’s direction was his concern over the difficulties of selection and reallocation arising from the change of plan. The other difficulties loom large—surprisingly large, I venture to think—in the evidence by which the Secretary of State seeks to persuade the court to grant him the order he seeks. But I agree with Lord Widgery C.J. when he said, in giving judgment in the Divisional Court, that the allocation problem was the “situation . . . very largely relied upon in the end by the Secretary of State. . . .” Lord Widgery C.J. examined the other matters relied on by the Secretary of State and thought little of them. He based his judgment “on that one point,” that is to say, that the selection of children to fill the 240 places made available by the change of plan at the two grammar schools (which under the section 13 proposals were to become sixth form colleges) could not be carried out “in the time available or at all.” Cusack J. agreed with him: and so did May J. in a judgment which revealed his profound scepticism as to the validity of the other reasons advanced.

F As always with judicial review, it is vital to determine, and then strictly to follow, the correct judicial approach to the problem placed before the court. Mr. Bingham put it correctly when he submitted that the letter of June 11 was crucial to the Secretary of State’s case, and that it must be read fairly, not legalistically, and must be studied in its contemporary context, that is to say, as things were on June 11. Mr. Bingham was also right to remind the court that it is not suggested (a) that in the letter any reliance was placed on extraneous or irrelevant matters; (b) that the Secretary of State had omitted or failed to take into consideration any relevant matters (unless being misinformed is such a failure); (c) that the Secretary of State in using his power of direction under section 68 had any intention other than to secure compliance with the policy and intendment of the statute; (d) that there was bad faith on his part. He submitted—rightly, in my opinion—that *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 is not directly in point, since in that case the minister’s reasons for refusing to appoint a committee of investigation were held to be outside the policy and intendment of the statute. When, however, Mr. Bingham came to summarise the law, he put it, I think, a little too narrowly. He submitted—and, if I may, I will

put his submissions in my own words and not necessarily his—that (1) section 68 confers on the Secretary of State a “subjective” discretion; (2) while judicial review of the exercise of the discretion is not excluded by the section, the court can declare the Secretary of State’s direction unlawful only if there be proved to exist one or other of the following situations: bad faith on the part of the Secretary of State, misdirection in law, taking account of irrelevant matters or omitting to consider relevant matters, and finally a situation where the Secretary of State has taken a view which on the material and the information available to him no reasonable man could have taken; (3) the court must assume the discretion to have been lawfully exercised, until the contrary be shown; (4) the court must always bear in mind that the discretion is the minister’s, not the court’s. He relied on a well known line of cases, of which the familiar landmarks are *Liversidge v. Anderson* [1942] A.C. 206 (particularly the dissenting speech of Lord Atkin, at pp. 232, 235 and 245) and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. I agree with the great majority of Mr. Bingham’s submissions. But, first, I think that the epithet “subjective” is of no assistance in this context. The point of principle is simply that it is not a judicial but a ministerial discretion in an administrative matter which is under review. Of course, the unusual feature of the present case is that we have under review two administrative decisions, each by a different authority: the Secretary of State’s decision to use his section 68 power of direction, and the local education authority’s earlier decision not to implement the section 13 proposals, the decision which in fact led the Secretary of State to act under section 68.

Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr. Bingham. I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact may be either physical, something which existed or occurred or did not, or it may be mental, an opinion. Suppose that, contrary to the minister’s belief, it was the fact that there was in the area of the local education authority adequate school accommodation for the pupils to be educated, and the minister acted under the section believing that there was not. If it were plainly established that the minister was mistaken, I do not think that he could substantiate the lawfulness of his direction under this section. Now, more closely to the facts of this case, take a matter of expert professional opinion. Suppose that, contrary to the understanding of the minister, there does in fact exist a respectable body of professional or expert opinion to the effect that the selection procedures for school entry proposed are adequate and acceptable. If that body of opinion be proved to exist, and if that body of opinion proves to be available both to the local education authority and to the minister, then again I would have thought it quite impossible for the minister to invoke his powers under section 68.

Lord Denning M.R. has briefly referred to some of the case law on the matter; and in the short time available I have looked to see if there is authority which would belie what I believe to be the law, and there is none. I think that the law which I believe to exist follows from the

A cases to which Lord Denning M.R. has referred, and is really to be deduced from a well-known passage in *S.A. de Smith, Judicial Review of Administrative Action*, 3rd ed. (1973), p. 320, where he says:

B “Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by applying a wrong legal test to the question before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied. Such criteria are sufficiently elastic to justify either a broad or a narrow test of validity; and they seem to have become increasingly popular. Thirdly, a court may state its readiness to interfere if there are no grounds on which a reasonable authority could have been satisfied as to the existence of the conditions precedent. This test can be combined with the first and the second.”

C I would add by way of parenthesis and somewhat out of place that in the present case the evidence now before the court does show that the Secretary of State either misunderstood or was not informed as to the nature and effect of the professional educational advice available to the local education authority.

D I have already put in my own words the situation which I think, in addition to those more commonly described, enables the court to exercise its power of review. I would now try to put that situation into a formula; and my formula would be as follows: that the Secretary of State cannot lawfully be satisfied that the local education authority is proposing to act unreasonably unless upon the information that was or ought to have been available to him the local education authority, acting reasonably, could not have acted, or proposed to act, as it in fact did. In other words, while it is not for the court to substitute its view for the minister's, it is also the law that the minister cannot substitute his view for that of the local education authority, provided always that an authority, acting reasonably, could have made the decision that in fact it made.

F Turning to the facts, I think that it is likely that the Secretary of State was not as fully informed as he might have been upon the possibilities of setting up a viable and acceptable method of selecting pupils for the two grammar schools. The weight of advice available to him was that it was not possible to make an acceptable selection between June 11, the date of his direction, and September 1, the beginning of the new school year. But we know, and the minister ought to have been apprised of the fact, that the local education authority could rely on perfectly respectable professional advice that it was possible. Unless this advice can be shown to be unsound, I do not see how it was possible for the Secretary of State to be satisfied that the local education authority was proposing to act unreasonably. We have admitted, without objection, evidence which was not before the Divisional Court, evidence from which it is abundantly clear that, though there might be difficulties, there was no insuperable problem in setting up and carrying through selection tests after June 11 and in time for the new school year beginning on September 1. I would refer to paragraph 6 in the affidavit of Mr. Thomas, one of Her Majesty's chief inspectors of schools. It is to be remembered that on June 11 there

were still almost six weeks of term left in which to have whatever discussions or interviews were needed with teachers or pupils.

There was no suggestion that this period of term time was not enough. The real point was that the teachers' associations, being strongly opposed to the local education authority's change of plan, would not cooperate to get the work done. The point is hypothetical: for no one knows what the teachers would have done had the Secretary of State accepted the decision of the local education authority. But from the mere possibility that the unions might in any event have urged their members not to cooperate with the local education authority one is not, in my judgment, to infer that the local education authority was proposing to act unreasonably. Moreover, as we now know from the evidence adduced in this court and as could have been discovered by the Secretary of State prior to June 11, there was, and is, a sufficient number of teachers willing to cooperate in the selection tests and, as I have already mentioned, a respectable body of professional opinion that the job of selection not only could have been, if started in June, which is the critical moment of time, but can even now be acceptably accomplished by September 1.

Thus, while there are differences of opinion as to the acceptability of the tests proposed, there is none, as I understand the evidence, as to the time factor. There was time enough in June. How can, then, the Secretary of State have been satisfied that the course of action proposed by the local education authority was unreasonable? It may have been unwelcome, attended by some risk and one that called for effort and drive. But none of these factors could, in isolation or accumulatively, constitute unreasonableness. And, when the local education authority had to balance the difficulties associated with "going comprehensive" by September 1, which, as the evidence shows, were genuine difficulties, against those associated with a decision to revert to the existing mixed pattern of comprehensive, secondary modern and grammar school education, I find it impossible to say that there existed grounds on which the Secretary of State could have been satisfied that the local education authority was proposing to act unreasonably. "Unreasonably" must mean in the context of section 68 not "unreasonably policy-wise" but "unreasonably" in the administrative sense: for the Secretary of State very properly concedes that section 68 is not an appropriate vehicle for imposing an unwelcome educational policy upon a local education authority. Moreover, the word "unreasonably" means not "mistakenly" nor even "wrongly" but refers only to a situation in which the authority is acting or proposing to act in a way in which, in the circumstances prevailing and on the expert advice available, no reasonable authority could have acted. The local education authority, being a public authority, is entitled to have its acts assessed by the Secretary of State on that basis.

Finally, there is and can be no suggestion that the Secretary of State has allowed political considerations to influence his decision in this case. The truth is that the Secretary of State was not fully informed as to the practicability of what the local education authority had in mind to do. His advisers may have jumped to the conclusion that the local education authority's proposals were unworkable and unacceptable. But we now know that they were practicable and that their acceptability is recognised

- A by respectable professional opinion. The local education authority, like the Secretary of State, is a democratically elected authority entitled to have its opinion of administrative problems within the area of its responsibility respected. If grounds cannot be shown to exist for treating their decision as unreasonable, it should not be too difficult to show that the Secretary of State had no grounds for being satisfied that they were proposing to act unreasonably. I think that they have shown that he had none: and I would allow the appeal, declaring that no order of mandamus should go.
- B

- Mr. Lloyd, for the local education authority, did raise a further point upon section 99 of the Education Act 1944. He submitted that the machinery for taking action in the event of default by a local education authority under that section was exclusive of the right of the Secretary of State to bring mandamus proceedings in any case in which that statutory machinery had not been invoked. Like Lord Denning M.R., I reserve my opinion on the point, but I will say that I would be very surprised if Mr. Lloyd was right.
- C

- GEOFFREY LANE L.J. On June 11 of this year the Secretary of State for Education and Science gave a directive to the metropolitan borough of Tameside under section 68 of the Education Act 1944. That directive was that the borough should implement proposals approved by the Secretary of State in November 1975 under section 13 of that Act.
- D

- That directive the borough has declined to obey for all practical purposes. Thereupon the Secretary of State on July 12 moved the Divisional Court for and succeeded in obtaining an order of mandamus requiring the borough to comply with his directive. From that order the borough appeals.
- E

The principal if not the only question to be decided is whether the directive from the Secretary of State was a lawful and valid order which under the terms of the Act the borough was obliged to obey.

- The details of the unhappy differences between the Secretary of State and the new councillors for Tameside have already been given, and it is unnecessary for me to repeat them. The two sides of the dispute can perhaps be conveniently summarised as follows. The Secretary of State is saying that there is already in process of being implemented a scheme approved by him for replacing the selection of pupils by merit with the so-called comprehensive system of education. The proposal, he says, of the borough to revert to the old merit system and to retain the grammar schools in their old capacity is an unworkable proposal and is therefore unreasonable. Therefore, he says, "I, the Secretary of State, direct you the borough to discontinue your plan and to implement the comprehensive system which I have already approved."
- F
- G

- On their side the borough reply by saying that they appreciate that there are difficulties in the path of their proposals. But, they say, there are difficulties of at least comparable size in the path of the comprehensive system proposed by the minister. Their own difficulties, they say, can all be overcome.
- H

At the root of the dispute, and there is no advantage in closing one's eyes to the fact, are the two opposing views as to the better form of second-

dary education. Unfortunately the argument has become politically aligned, with the result that the true issues may sometimes become lost in the dust of political battle. A

One thing is, however, clear in the present case and that is that both sides are fervently and genuinely convinced that their own view is the correct one—not only that their own scheme is the best for the pupils, but that their own scheme is practicable.

The situation is somewhat unusual. We are concerned to decide not the question whether the Secretary of State is in breach of a duty cast upon him by law, but whether the directive from the Secretary of State requiring the borough to act was a lawful order. There are thus two stages rather than the more usual one single stage. What is being judged is the Secretary of State's judgment of the actions of the borough. It is of course not for the court to substitute its own views for those of the Secretary of State. The task of the court, in the present circumstances, is to decide whether there was any foundation of fact upon which the Secretary of State could properly come to the conclusion on June 11, 1976, that the borough had acted as no reasonable local authority could have acted in refusing to implement the comprehensive scheme. If there was such a foundation, then he was entitled to issue the directive even though the court may differ from his view. B C D

What then were the grounds upon which the Secretary of State reached his conclusion? In the affidavit sworn on his behalf by Mr. Jenkins the reasons for his decision are not expressly set out. Reference is made to the letter of June 11, and one is left to extract such reasons as one can from that and also from the statements in the affidavit. Mr. Lloyd, on behalf of the borough, submits that there are five such reasons. Four, he says, are plainly wrong and the fifth (which he suggests was an after-thought) is on closer examination no better. Mr. Bingham, for the Secretary of State, submits that the first four so-called reasons were not reasons at all, but only part of the historical background, and that Mr. Lloyd's fifth reason was a more than adequate basis for the Secretary of State's directive. I, myself, have no doubt at all that the four items were being put forward as reasons by the Secretary of State, and not merely as part of the history. There was no reason, otherwise, for selecting them as part of the historical background rather than a hundred other facts. Those four reasons are set out in the affidavit of Mr. Jenkins, that affidavit being dated June 17, and there is no need for me to read them in full here. It is clear in short, to my mind, that none of those four grounds has any substance and indeed I have to say that Mr. Jenkins' affidavit is something less than frank on one of them—that is, the second—which suggests on first reading that a large number of transfers of staff had been made to implement the original scheme; when, however, one comes to examine the figures in detail it seems that only 35 transfers have been made and the rest were promotions and other appointments. It is the fifth ground which is really the nub of the case, and that is the suggestion that in the time available it is not possible to operate a sufficiently accurate merit selection system which is the foundation of the borough's whole scheme. The objection is that it is impossible to carry out the selection procedure in time for the beginning of the new term on September 1. This has been complicated, E F G H

A.C.

Education Sec. v. Tameside B.C. (C.A.)

Geoffrey Lane L.J.

- A it seems, by the attitude of some of the teachers' unions who have encouraged their members not to cooperate with the borough's proposals. Affidavits from Mr. Beard, who has accepted an invitation to act as chairman of the selection panel, and from Mr. Potts, who is a very experienced educationalist, which are before this court make it clear that even in the short time of five weeks available from today it will be possible to carry out a reasonably accurate selection for the 780-odd children who are involved in the difficulty. The one matter which could frustrate that objective would be if the heads of the junior schools refused to release the records of pupils. These records belong to the borough, and I find it hard to believe that any of the heads involved would take such a step as to withhold those documents from the people who are entitled to have them. I think we should assume that they will not withhold them. There will, it is true, be insufficient time for a standardised verbal reasoning test to be carried out. Such a test is desirable in order to cater for the differing standards amongst the junior schools, but its lack is not fatal to a selection procedure, as Mr. Thomas, one of Her Majesty's chief inspectors of schools, in an affidavit made clear. The furthest that he goes is to say in the final paragraph of his affidavit:

- D "I conclude that the arrangements for the selection of pupils for grammar schools in Tameside this year which are referred to in Mr. Beard's affidavit would not, with reasonable certainty, allow a fair selection between border-line candidates."

- E That, it seems to me, is a tentative statement, and it was a statement made on July 21 of this year. We are now at the end of July. Had the Secretary of State allowed the borough's plans to go forward on June 11 instead of placing an embargo upon them, then these difficulties would, practically speaking, have no doubt disappeared. I do not believe that the teachers would have taken the attitude which they have taken if that directive had not been given by the Secretary of State. I believe that the heads would have cooperated. Thus the minister's action is itself partly responsible for the existing situation.

- F I find it quite impossible to say that there were any valid grounds for the Secretary of State's decision when it was given that no reasonable local authority could have acted as the borough did here. No doubt the Secretary of State is convinced that the borough's decision is wrong and even deplorable. No doubt the borough think the same of the Secretary of State's attitude. But that is not to say that either is acting unreasonably or that anyone can legitimately come to the conclusion that either is being unreasonable. I would allow the appeal on this ground, and I agree that that decision makes it unnecessary to consider Mr. Lloyd's further point and ancillary argument based on his interpretation of section 99. I would allow the appeal.

*Appeal allowed with costs.
Leave to appeal refused.*

H

Solicitors: Oswald Hickson, Collier & Co.; Vaudrey, Osborne & Mellor, Manchester; Treasury Solicitor.

A. H. B.

On July 29, 1976, the Secretary of State petitioned the House of Lords for leave to appeal.

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T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State. It is accepted that you are not entitled to say that a person is unreasonable because he disagrees with you. The question is whether, viewed objectively, the decision is unreasonable or not. The fact that discretion is entrusted to a minister by Parliament does not mean that his exercise of it is not open to review by the courts. It can be challenged if it can be shown that he has misdirected himself in law. But neither the council here, while saying that the Secretary of State's letter of June 11 is a misdirection, nor the Divisional Court, have been able to show that it contains a misdirection in law. It is not suggested that the matters in paragraph 2 of the letter are matters to which the Secretary of State should not have paid attention. The moment the court says that what the Secretary of State was being told about the selective system was wrong, it is entering into the discretion which has been entrusted to the Minister. The principle enunciated by Scarman L.J. regarding new evidence, ante, p. 1030E, is not only new but wrong. It is a vastly important extension of the field of judicial review, and potentially very extensive. If the Secretary of State took the view that the council's selection system could not be put into operation fairly, then that entitled him to take the view that the council were being unreasonable. He did not take into account things which he ought not to have taken into account, etc., and in so far as the Court of Appeal took new evidence into account that was a new principle and ought to be gone into. The Court of Appeal were wrong in not confining their decisions to saying that there was material on which the Secretary of State could say that the council were acting unreasonably. They strayed into being conditioned, at least, by material which had not been available to the Secretary of State. The new evidence to the effect that the council's procedure would be satisfactory is not accepted.

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While the court should be astute to restrain a minister from acting in excess of his powers—that is recognised as a function of the rule of law—the converse applies too: the minister should be free to exercise his executive authority within its field. The Court of Appeal here has nullified a decision which the Secretary of State was perfectly entitled to make. They relied on grounds which were not legitimate for doing what they did.

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Anthony Lloyd Q.C., *Leon Brittan* and *Andrew Caldecott* for the council. The council make the following points. 1. Three judges in the Court of Appeal have all come to the conclusion on the facts that there was no ground here on which the Secretary of State could lawfully be satisfied that the council were acting or proposing to act unreasonably: see, e.g., *per* Lord Denning M.R., ante, p. 1026D. He drew the inference, at p. 1026G, that the Secretary of State must have misdirected himself as to the question which he should ask: not, did he agree with the council, but, was the council acting unreasonably? The section 76 point is a difficult one. It is easier to carry out one's policy if the electorate is with you. Geoffrey Lane L.J., ante, p. 1035F, allowed the appeal on the basis that there were no valid grounds on which the Secretary of State could have come to his

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A conclusion. Much the same view was in fact taken by Lord Widgery C.J. in the Divisional Court, ante, pp. 1019G—1020c, and by May J., ante, p. 1020C—F.

The teachers' consultative committee have met, and invited the head teachers to hand in the reports. Seven have, and there is no reason to suppose that the others will not. This does not bear on the rightness of the Secretary of State's decision, but had it been before the Divisional Court they would not have taken the view that the Secretary of State had established grounds for making his direction because of the opposition to the council's scheme. At that stage the teachers were in dispute. If it had been apparent to the council that they would not be able to put their scheme into operation, they would not have attempted to do so. The three judges in the Divisional Court would have come to the same conclusion as the Court of Appeal if they had had this evidence. So the council's case is a strong one on the facts.

2. There is no great question of law here. It is fundamentally a question of fact whether there were grounds for the Secretary of State's decision. If there is a great question of constitutional law here, it is not seemly to deal with so important a question at too great a pace.

3. It may be that the importance of the case has been, or could be, exaggerated in other respects, besides that of the law. If here the future of 3,000 children were at stake, it would be a very serious matter, but that is not the case. The council are proposing simply to maintain the status quo for a year, not to rush into anything in September. The effect of preserving the status quo in relation to the two grammar schools is that 240 places will be available for boys and girls. The council could have left the 240 places empty without affecting the character of the schools. By not turning them into sixth form colleges they simply have 240 places available. Against that background, it is almost absurd to talk of jeopardising the whole educational position of this age group. There will be no imbalance between boys and girls. There have been only 198 applications by girls out of the total of 783 applications. That is the same proportion—a quarter—as the places available for girls (60).

Although Scarman L.J.'s judgment is important, it is not of such importance that your Lordships should give the Secretary of State leave to appeal. In his petition for leave, the Secretary of State seems to be saying that, assuming that the Court of Appeal were right on the evidence before them, they should have shut their eyes to that evidence and decided the appeal solely on the material which had been placed before the Secretary of State. That, if correct, is a remarkable proposition. The Court of Appeal rightly asked themselves: could the Secretary of State have been satisfied on the evidence? The Secretary of State's reasons for his decision should be considered together: one cannot subtract the bad reasons and ask whether the rest were all right. It is not right to say that the Court of Appeal equated the role of the Secretary of State in relation to the council to that of the court reviewing a decision of the Secretary of State, but none the less there are distinct similarities (see *per* Lord Upjohn in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997).

David McNeill Q.C. and J. J. Hodgson for the six parents adopted the submissions for the council.

Bingham Q.C. in reply. Lord Widgery C.J. correctly directed himself as to the question of law which he had to answer, and correctly answered it. A

The Appeal Committee (Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Salmon and Lord Russell of Killowen) granted the Secretary of State leave to appeal. The hearing of the appeal took place on July 30 and 31.

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State. It was a question in the Court of Appeal whether section 8 of the Education Act 1944, beginning "It shall be the duty . . .," imposed any duty with regard to allocation to schools. There was a decision in 1972 that it did, and it is not really contested. *Cumings v. Birkenhead Corporation* [1972] Ch. 12 shows that it is an administrative discretion which has to be exercised fairly and reasonably. If the authority are acting unreasonably, they are acting in breach of the power in section 8. The Secretary of State's approval under section 13 is only a starting point: it gives leave; it does not impose an obligation. The authority do not have to go ahead if they do not want to. The two criteria in section 13 (10) of the Act of 1944, added by section 1 (2) of the Education Act 1968 are satisfied here: alterations in age, and alterations in admission arrangements by reference to ability and aptitude. The relevance of section 17 is that it is in some sense the counterpart of section 8: a particular choice at particular schools. Under section 37 there is a right of parental choice unless good reason is given. The Secretary of State cannot hold examinations, but he can satisfy himself that the selection procedure is satisfactory. Here, a system is proposed which is not satisfactory. 500 parents are likely to complain. The Secretary of State will find himself in a position in which he cannot satisfy himself that the selection procedure is satisfactory. These are not mere difficulties, but are very substantial obstacles to the proper performance of his duty to resolve disputes when they arise. [Reference was made to section 68 and 99 of the Act of 1944.] A week before June 11, the teachers were stating their view. The crux may be whether they were going to cooperate, and here is material on which the Secretary of State was clearly entitled to take the view that they were not. *Provided* that the council had had the cooperation of all concerned, perhaps they would have been entitled to act as they did, but, on the material before the Secretary of State, they did not have that cooperation. Strictly, one has to judge their reasonableness as at that moment, though the same state of affairs persisted thereafter. B C D E F

Just because the Secretary of State has given reasons for his decision, he cannot be shut out from saying that his mind was affected by other things, even if he does not refer to them specifically. The collective disputes procedure in operation between three of the teachers' unions and the council is not so far outside what he had referred to that it ought to be shut out. It is clearly capable of being regarded as evidence of unreasonableness on the part of the council when someone says that they are going ahead despite those factors. On the other side, see the report of the chief executive, the director of education and the director of administration to the council on June 21, 1976. There was evidence on which the G H

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A Secretary of State could take the view that what the council were proposing to do was (having regard to the time scale) unreasonable and their objections to the implementation of the approved comprehensive scheme were trivial compared with the objections the other way.

As regards the giving of reasons, the Secretary of State relies on what Scarman L.J. said, ante, pp. 1028H—1029A. Where reasons are given in fairly general terms, the court should not exclude material falling within the ambit of those reasons if it appears likely that it will have affected the mind of the person giving them.

The principles governing the approach of the Court of Appeal to ministerial discretion in this case are as follows. 1. Its function is to see that the Secretary of State does not exceed his power. 2. The scope of review is determined by the language of the grant of power. "Satisfied" leads to a different review from "has reason to believe" (*Liversidge v. Anderson* [1942] A.C. 206) or "if it appears to the Minister." The Secretary of State does not know of any other section with language comparable to that of section 68. 3. The Secretary of State's decision can be impugned if it can be shown that he misdirected himself in law, on the familiar grounds. 4. The Secretary of State's duty is to take such steps as are reasonably necessary to satisfy himself. 5. His decision may, depending on the circumstances, be open to challenge if he is shown to have misdirected himself in fact on the material before him. The authority for this proposition is extremely slender (see *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455. It would be contrary to principle for the Secretary of State's decision to be impugned on the basis of material which comes into existence after it has been made. [Reference was made to *S.A. de Smith, Judicial Review of Administrative Action*, 3rd ed. (1973), p. 320; *Reg. v. Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587.]

There is no reason to suppose that the Secretary of State was not fully alive to the meaning of "reasonable" and gave it proper consideration. [Reference was made to *McEldowney v. Forde* [1971] A.C. 632, *per* Lord Diplock, at p. 659.] There is no substantial support for some of the passages in *de Smith* quoted by Scarman L.J. in the Court of Appeal.

F Lastly, reasonableness is a matter of fact and degree, so long as there is some evidence of it: see *per* Lord Hailsham of St. Marylebone L.C. in *In re W. (An Infant)* [1971] A.C. 682, 699. The teachers' non-cooperation is at the heart of this matter.

Anthony Lloyd Q.C., Leon Brittan and Andrew Caldecott for the council. The council's propositions are as follows. 1. The question which the Secretary of State should ask himself under the Act is: "Am I satisfied that the council are proposing to act in a way in which no reasonable council would act in the particular circumstances?" It would not be enough for him merely to disagree with them or think them wrong. "Unreasonably" must be interpreted in its full sense (this is now probably common ground): see *per* Lord Hailsham of St. Marylebone L.C. in *In re W. (An Infant)* [1971] A.C. 682, 699–700. "Reasonably" should not be whittled down. It is used in the context of the Act where there is an elaborate balance of powers and duties. The Act did not intend a collision unless the local authority were acting unreasonably.

2. The Court of Appeal is entitled, indeed bound, to look at the reasons given by the Secretary of State for saying that he is satisfied. If the Court of Appeal takes the view that no reasonable person could be satisfied on those reasons, there is no doubt that it can set the Secretary of State's decision aside. The field of review is already set very narrowly. Because that is so, while being fair to the Secretary of State, one should perhaps not give him the benefit of the doubt. A

If the council had been neglecting the view that there might be non-cooperation by the teachers, that would make their view unreasonable. B

Assuming that the Secretary of State is a reasonable man, he must have misdirected himself on some question of law or fact. So approached, the case is well within *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997: see *per* Lord Denning M.R., at p. 1006; the council also rely on *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455. A misdirection in fact means a misdirection on the facts as they really were at the time, not just on the facts which were before the Secretary of State. C

3. Having regard to the reasons given in the Secretary of State's letter of direction, and particularly in his letter of May 26, 1976, and in Mr. Jenkins's affidavit, the Secretary of State is not just saying (if he is saying it at all) that it is too late now to carry out a proper selection test. What he is saying is that the progress towards comprehensive reorganisation has now gone so far that it would be unreasonable for the council to turn back. D

There is no distinction between a reason which is intrinsically irrelevant and a reason which is potentially relevant but which has no substance in fact. The reasons regarding staff and buildings, which were originally put forward by the Secretary of State with vigour (less so in the Court of Appeal), have now virtually gone. Really the only reasons which are put forward are those in the Secretary of State's letter of May 26, 1976. The Secretary of State ignored responsible and professional opinion as to the feasibility of selection tests; the council adopt what the Court of Appeal said on this. E

It is not right as a matter of law to say that the court is confined to looking at the material which the Secretary of State himself had, or ought to have had, unless by that one means all the relevant material. Suppose that he genuinely thought that on the material which he had the selection process could not be completed by September; the highest at which the matter could then be put in his favour would be: "how can he be said to have acted unreasonably when on the material which he had a reasonable person could have taken the view which he has in fact taken?" F That illustrates the fallacy in the Secretary of State's argument regarding confining the matter to the material which was before him. The question is not whether the Secretary of State himself subjectively was acting reasonably or unreasonably. The question is objective: on the reasons which he has given, do those reasons objectively support the view his view on the material which was available at the time, not just the material which he in fact had? Suppose that the Secretary of State decided to close down a school on the ground that there were too many schools in the area, and without his knowledge another school had burned down. That sort of argument would get nowhere. The question, on a judicial review, H

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A whenever one is dealing with a misdirection in fact, as in law, does not depend on the material actually before the Secretary of State, or on what he ought to know (unless one assumes that he ought to know all the material facts). One assumes that he is going to know all the relevant facts, not just that he is going to do his best. He must inform himself of all the relevant facts.

B The question which the Secretary of State asks in relation to the authority is, is it acting reasonably or unreasonably? The court does not ask, is the Secretary of State acting reasonably (subjectively). If he has not all the relevant facts, his decision, objectively, goes. If his function is, as it is, to have regard to the true facts, evidence was admissible in the Divisional Court to establish what those facts were. As to what Scarman L.J. said, the test is not what he knew or ought to have known. Scarman L.J., rather than going too far, does not go far enough. His judgment is a valuable reformulation of the law rather than an extension of judicial review. The question is not whether there was a body of opinion available to the Secretary of State, but whether it existed. The Secretary of State has a duty to inform himself of all relevant facts, not just to take all reasonable steps to do so.

D To summarise the council's argument on the selection point: 1. It is an obvious point that parents did not have to apply on behalf of their children for the 240 places. There was no pressure on them to reply; they were merely invited to do so. To talk of a "dilemma" is extravagant, just as it is to talk of the educational provision for the whole age group being put in jeopardy. 2. In the very broadest sense (only), it was not unreasonable for the council to attempt to put into practice the policy which they had indicated to the electorate in two elections. 3. It was not unreasonable—again in the broadest sense—for the council to attempt to fill the 240 places which would have been left empty by not going ahead with the sixth form colleges. If the worst came to the worst, they could have left the places empty. 4. The council have not attempted at any stage to "override" the views of the teachers; they have attempted to carry the teachers (or their unions) with them. 5. When they were asked to explain their plans, they did so in considerable detail in their letter of June 7, 1976. It was a very reasonable letter to write, both in content and in manner. 6. It was not unreasonable for them to hope that the teachers would coöperate, although it was true that they had declared a dispute, at least to the extent that they would hand over the reports and records. If the worst came to the worst, the council could have compelled them to do so. If necessary, they would have taken that course.

G In this connection, the council now apply to put before the House an affidavit bringing this matter up to date. It shows, first, what may have been true of the attitude of the teachers on June 11: that they are now prepared to hand over the records. Secondly, on the question of discretion: if the House feels that it is now too late for the council to go ahead with their plans, it should be aware that the records are now being handed over. It is evidence of a state of mind.

H *Bingham Q.C.* The affidavit should not be let in without an opportunity being given to the Secretary of State of answering it.

[LORD WILBERFORCE. The House will not admit the affidavit at this stage.] A

Lloyd Q.C. continuing. There was no material on which the Secretary of State could properly come to the conclusion that it was unreasonable for the council to try to put their plan into operation. He should at least have allowed them to try a bit longer.

The disturbance to the pupils if the approved plans had been carried out would have been much greater than if the council's selection system were operated. It would clearly have been sensible to wait for a year until the buildings were completed before putting the approved plan into operation. The council had to choose between two courses, each involving some disruption. How can it be said that in choosing one difficulty rather than the other they were acting in a way in which no reasonable council would have acted? It comes down to one point: all that the Secretary of State is putting forward is grounds on which one might disagree with what the council are doing, but there is no ground sufficient in law to say that they were unreasonable in what they were doing. B C

The Act does not say on what basis the Secretary of State decides. The question is not between comprehensive and selective education, but between one comprehensive scheme and another.

There are the following additional points. When the court is looking at the reasons for a decision, it infers two things: (1) that the reasons given are the best reasons; (2) that all the reasons played some part in the decision-making process. It follows from (1) that the Secretary of State cannot add to his reasons: there is neat authority for this in *Reg. v. Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587. What is added will be second best. The reason is one of policy as much as anything. Equally, the Secretary of State cannot subtract from his reasons, because all are presumed to have played some part in the decision-making process. [Reference was made to *Sadler v. Sheffield Corporation* [1924] 1 Ch. 483.] This point is another way of saying that if the Secretary of State takes into account irrelevant considerations then his decision must fall. D E

Discretion only arises if the council are wrong in their argument so far. The Secretary of State arrived at a correct decision, but on what is now known it had no substance in fact, and, assuming that the court had no power to declare his decision invalid—the council says that it had—no court in the circumstances would enforce it by mandamus. F

On section 68, the only people who have the right to choose a school are the parents or the Secretary of State, not the local authority. One would think that it would be provided that the local authority should allocate the children between schools, but that provision simply is not there: there is no such power or duty. G

On section 99, a procedural point, the council would accept that once a direction is given under section 68 there is a duty on the local authority to comply with the direction, provided, of course, that it is valid. Until the direction is given, however, there is no duty to implement the section 13 proposal, even though it has been approved by the Secretary of State. The duty arises for the first time under section 68. The question then is how it is to be enforced: normally by mandamus. Most statutes, however H

- A (see, e.g., the Housing Finance Act 1972, section 95), especially those regulating procedure between local and central government, have a procedure by way of default orders. Turning to the default section in the Act of 1944, section 99 (1), this lays down how the Secretary of State is to enforce the duty in case of a default. Here, the Secretary of State has jumped a step, eliding the step which he should have gone through in section 99. In every case where action is being brought by central government against the local authority under this Act which provides for a default order, this default order is an important step which must be complied with.

Bingham Q.C. in reply. It would be odd to find the Secretary of State in his decision letter saying: "I have given 'unreasonable' the following meaning. . . ." Nor should the court say "It is 50/50 what he meant." It should approach his decision on the basis that he is likely to have directed himself correctly regarding an expression common in statutes. It is not desirable that he should be cross-examined as to what he meant.

- C Regarding the correspondence leading up to the Secretary of State's direction, it is unlikely that the department would have specified express concern about selection if it had known what was proposed about selection. Everything which the Secretary of State relies on is covered by the wording which he uses. It is not tied to a particular intake of pupils, or to a particular aspect of the matter. He cannot be said to have thought of things ex post facto. He should certainly have asked himself: "If I do not intervene, will the teachers do their duty?" The construction of section 68 for which the council contend would make it virtually a dead letter: the Secretary of State could never discover all the facts. He is dealing with a local authority which ex hypothesi is proposing to act unreasonably. He is entitled to rely on the educated knowledge and experience within his department.

In *Reg. v. Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587 the minister was obliged to give reasons. His decision could not be upheld on the basis of reasons which he had not given. The case is distinguishable.

- F As to discretion, where there is a public duty to perform, mandamus will lie. Discretion has a very small part to play. [Reference was made to *Rex v. Bishop of Sarum* [1916] 1 K.B. 466, 470.]

Section 8 creates a power and a duty. Lord Denning M.R. so treated it in *Cumings v. Birkenhead Corporation* [1972] Ch. 12, 35-36.

- G There are four distinctions between section 99 and section 68. (1) Section 99 has been in the Education Acts in one form or another for a long time, first in section 16 of the Act of 1902 (public inquiry held first), then in section 150 of the Act of 1921. Section 68 was first included in 1944. (2) Section 68 is both prospective and retrospective, section 99 retrospective only. (3) Section 68 refers to powers and duties, section 99 to duties alone. (4) Section 99 makes express reference to mandamus; section 68 does not. There are two explanations for these distinctions. First, historical: in 1902 it was sought to make it clear that mandamus would lie. Secondly, to make it clear that mandamus was available at the suit of the Secretary of State and not of anybody else.

H The real objection to the council's argument is the practical one. On that argument, if the Secretary of State were satisfied that a local authority

were proposing to act unreasonably, he would take the following course: (i) give a direction; (ii) wait to see what course the local authority would follow; (iii) make a default order under section 99; again, a pause, then (iv) apply for mandamus. One would need very strong arguments on construction to conclude that the legislature intended anything so unwieldy: see, again, *Cumings v. Birkenhead Corporation* [1972] Ch. 12. A real remedy is provided, not just a press-button for section 99.

The six parents did not appear and were not represented at the hearing of the appeal.

August 2. Their Lordships announced that they were of the opinion, for reasons to be announced, that the appeal failed.

Their Lordships took time for consideration.

October 21. LORD WILBERFORCE. My Lords, this appeal is concerned with secondary education in the metropolitan borough of Tameside. Tameside is a new unit of local government created under the Local Government Act 1972; it includes areas formerly in Cheshire and Lancashire. Its resources in secondary education included 16 secondary modern and five grammar schools and three purpose-built comprehensive schools under construction. Soon after its creation the council, as local education authority, put forward a scheme for bringing all the schools in the area under the comprehensive principle—"comprehensive" in this context not bearing its normal meaning in English, or the meaning it bore in the Education Act 1944, but its meaning in modern political jargon of a system which, in theory, lets everyone in to any school without selection by aptitude or ability. Grammar schools, by contrast, allocate places by selection. This scheme was brought in and, as the law required, was laid before the Secretary of State for Education and Science on March 10, 1975; it was very detailed and would clearly take some time to implement. Briefly, it provided (1) for setting up three new purpose-built comprehensive schools (those mentioned above) (2) for bringing the 16 secondary modern schools into the comprehensive principle (3) for abolition of the five grammar schools by turning three of them into comprehensives and two into sixth form colleges. These proposals in due course, on November 11, 1975, received the Secretary of State's approval, and the council then became entitled to put them into effect: but—and this is important—the Secretary of State's approval imposed no duty on the council to implement them. In fact, the council did take some steps towards their initial implementation by the beginning of the school year in September 1976. These steps were of a rather hurried nature, and, the respondents now contend, premature, and made not without an eye upon the local government elections to be held in May 1976. It is certainly fair to say that it was and is clear that necessary buildings for the changeover could not be completed, or in some cases more than just begun, by September 1976, and that if the new proposals were to start at that date there would be a good deal of improvisation and temporary disruption. There was some impressive evidence of this from a number of experienced teachers.

- A Local elections were held on May 6, 1976. The issues no doubt were numerous and of varying importance, but the survival of the grammar schools as selective entry schools was one issue strongly fought, and on which the opposition party took its stand. A large number of parents had signed a petition against the 1975 proposals and no doubt supported the opposition. The opposition gained control of the council, and they considered themselves to have been given a mandate to reconsider their
- B predecessors' education policy. They formulated their own proposals as not involving a total reversal of that policy. They set them out in a carefully thought out and moderate letter addressed to the Secretary of State on June 7, 1976. They proposed to adopt what had already been done in the direction of comprehensive education—the three new comprehensives would be continued and completed as “a valuable nucleus of any future scheme.” The 16 secondary moderns would be continued.
- C But they did not propose to implement at once the plans for conversion of the grammar schools. They proposed to postpone these plans and to continue the schools for a time so that the position could be reviewed, in the light, amongst other things, of the new Education Bill then before Parliament. Their policy was
- D “... the maintenance of the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals.”

- The Secretary of State, and his department, were greatly concerned with the difficulties likely to be brought about by a change in control of the local education authority. Undoubtedly such changes are an administrator's nightmare. The department had approved the “comprehensive”
- E plan, and they knew and approved that the authority had planned to start introducing it in September 1976. A change of course only three months before the new school year was to start very naturally worried the officials. There was correspondence between the department and the authority in May and June in which the authority was asked to explain its plans, particularly with regard to the selection of pupils; there was a meeting
- F on June 9, which does not seem to have been amicable or conclusive. The Secretary of State remained of the opinion that it was too late to reverse the previous council's plans and that the new council were acting unreasonably in doing so. So on June 11, 1976, he gave a direction to the council to implement their predecessors' proposals, and on June 18, 1976, he asked for an order of mandamus that they should do so. This order was granted by the Divisional Court but on July 26, 1976, on
- G appeal by the authority, it was discharged by the Court of Appeal, leave to appeal being refused. By an emergency procedure which started with an application for leave to appeal on July 29 and which phased into a full hearing of the appeal, your Lordships heard full, and I must say admirable, arguments on a complete documentary record on July 29 to 31. I would like to acknowledge the efforts and cooperation of those
- H advising each side which enabled this exceptionally quick procedure to be carried out. The argument was concluded on July 31, and on August 2 it was announced that their Lordships were of opinion, for reasons to be announced and now set forth, that the appeal failed.

I must now set the legal scene. The direction of June 11, 1976, was given under section 68 of the Education Act 1944. Education is still governed by this notable statute, as amended, and it is necessary to understand its structure. Under the Act responsibility for secondary education rests upon a fourfold foundation: the Minister (as he was then called); local authorities; parental wishes; and school managers and governors. All have their part to play. The primary responsibility rests on the Minister. He has to promote the education of the people of England and

“ . . . to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive ” (old meaning) “ educational service in every area.” (section 1.)

But local education authorities, which are elected, have their place defined. It is they who are responsible for “ providing secondary education ” in schools

“ . . . sufficient in number, character, and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, . . . ” (section 8.)

Section 13 is an important section—it is that which was acted on in 1975. It enables local education authorities to make “ significant changes ” in the character of any school but requires them to make proposals to that effect to the Secretary of State. So the initiative is theirs: ultimate control is with the Secretary of State: there is no obligation, before or after his approval, on the authority to carry its proposals out. Section 68 must be quoted in full:

“ If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors, give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . . ”

This section does not say what the consequences of the giving of directions are to be, but I accept, for the purposes of the appeal, that the consequences are to impose on the authority a statutory duty to comply with them which can be enforced by an order of mandamus.

Analysis of the section brings out three cardinal points.

(1) The matters with which the section is concerned are primarily matters of educational administration. The action which the Secretary of State is entitled to stop is unreasonable action with respect to the exercise of a power or the performance of a duty—the power and the duty of the authority are presupposed and cannot be interfered with. Local education authorities are entitled under the Act to have a policy, and this section

A does not enable the Secretary of State to require them to abandon or reverse a policy just because the Secretary of State disagrees with it. Specifically, the Secretary of State cannot use power under this section to impose a general policy of comprehensive education upon a local education authority which does not agree with the policy. He cannot direct them to bring in a scheme for total comprehensive education in their area, and if they have done so he cannot direct them to implement it. If he tries to use a direction under section 68 for this purpose, his direction would be clearly invalid. A direction under section 68 must be justified on the ground of unreasonable action in doing what under the Act the local authority is entitled to do, and under the Act it has a freedom of choice. I do not think that there is any controversy upon these propositions.

B The critical question in this case, and it is not an easy one, is whether, on a matter which appears to be one of educational administration, namely whether the change of course proposed by the council in May 1976 would lead to educational chaos or undue disruption, the Secretary of State's judgment can be challenged.

C (2) The section is framed in a "subjective" form—if the Secretary of State "is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v. ASLEF* (No. 2) [1972] 2 Q.B. 455, per Lord Denning M.R., at p. 493.

E (3) The section has to be considered within the structure of the Act. F In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. This Act, of 1944, is quite different from those which simply create a ministerial discretion. The Secretary of State, under section 68, is not merely exercising a discretion: he is reviewing the action of another public body which itself has discretionary powers and duties. He, by contrast with the courts in the normal case, may substitute his opinion for that of the authority: this is what the section allows, but he must take account of what the authority, under the statute, is entitled to do. The authority—this is vital—is itself elected, and is given specific powers as to the kind of schools it wants in its area. Therefore two

situations may arise. One is that there may be a difference of policy between the Secretary of State (under Parliament) and the local authority: the section gives no power to the Secretary of State to make his policy prevail. The other is that, owing to the democratic process involving periodic elections, abrupt reversals of policy may take place, particularly where there are only two parties and the winner takes all. Any reversal of policy if at all substantial must cause some administrative disruption—this was as true of the 1975 proposals as of those of the respondents. So the mere possibility, or probability, of disruption cannot be a ground for issuing a direction to abandon the policy. What the Secretary of State is entitled, by a direction if necessary, to ensure is that such disruptions are not “unreasonable,” i.e., greater than a body, elected to carry out a new programme, with which the Secretary of State may disagree, ought to impose upon those for whom it is responsible. After all, those who voted for the new programme, involving a change of course, must also be taken to have accepted some degree of disruption in implementing it.

The ultimate question in this case, in my opinion, is whether the Secretary of State has given sufficient, or any, weight to this particular factor in the exercise of his judgment.

I must now inquire what were the facts upon which the Secretary of State expressed himself as satisfied that the council were acting or proposing to act unreasonably. The Secretary of State did not give oral evidence in the courts, and the facts on which he acted must be taken from the department's letters at the relevant time—i.e., on or about June 11, 1976—and from affidavits sworn by its officers. These documents are to be read fairly and in bonam partem. If reasons are given in general terms, the court should not exclude reasons which fairly fall within them: allowance must be fairly made for difficulties in expression. The Secretary of State must be given credit for having the background to this actual situation well in mind, and must be taken to be properly and professionally informed as to educational practices used in the area, and as to resources available to the local education authority. His opinion, based, as it must be, upon that of a strong and expert department, is not to be lightly overridden.

The first letter from the department to the local education authority was dated May 26, 1976. This refers to “a great deal of educational and administrative planning” which had taken place since approval of the “comprehensive” plan in November 1975. Particular matters mentioned without details were (i) allocation of children to schools; (ii) progress in staffing arrangements including the offer and acceptance of contracts; (iii) planning of curricula and courses; (iv) some building work. Reference is also made to the “continuing absence of any precise alternative plans.” Tameside answered this on June 7, 1976, in a long letter. I must summarise it at some length because argument has tended to become concentrated on one or two narrow points rather than upon a balanced overall view of the council's plans. I have already commented on the general character and tone of this letter, which is moderate and appreciative of the difficulties, and which shows at least an intention and purpose to reduce them to the minimum.

The letter begins with a narrative section stating that no comprehensive

- A reorganisation in Tameside had yet taken place. The schools were not ready for their changed roles; building works were not completed, and not in most cases begun. Implementation (sc. of the 1975 proposals) in September 1976 would have caused grave disruption to the children's education. A particular case of this would be disruption of the education of 16-year-old pupils, who under the 1975 proposals would have been turned out of the sixth forms of three grammar schools and transferred to two non-selective sixth form colleges. I do not think that any of this is disputed. The authority's own plans were set out under 10 points, which involved continuation of the five grammar schools, continuation and completion of the three new purpose-built comprehensives and continuation of the remaining secondary schools. Their policy as regards allocation to schools is spelt out in five paragraphs. All allocations of pupils for the forthcoming year—about 3,000 in all—made by the old council would be honoured subject to agreement by the parents concerned. Ashton and Hyde grammar schools—by the old council destined to become sixth form colleges—would remain grammar schools and would be open to 11-year-old entry, thus making 240 selective places available. All parents of 11-year-olds were to be given the right to apply for reallocation of their children, but if they were satisfied with the existing allocations those allocations would stand. Then it is said (paragraph 7):

“If the number of applicants to the grammar schools exceeds the number of places available, as is likely, then those pupils most suitable and most likely to benefit from that type of education will be selected by a combination of reports, records and interviews. There will be no formal 11-plus examination.”

- E Finally, it was said that there would be a review of the first year entries, and a very flexible transfer system would be operated at the end of the first year, or earlier if required. I do not think that we need to consider this proposal since there is plenty of time for it to be reconsidered.

- F The letter also stated that, apart from these immediate plans, longer term proposals would have to be worked out and would need to comply with whatever terms might be contained in the pending Education Bill as and when enacted.

The proposals in this letter were explained, it is said, at a meeting held at the House of Commons on June 9.

- G On June 11, the direction under section 68 was given in a letter of that date. The letter stated that the Secretary of State was satisfied that the authority was proposing to act unreasonably according to the formula used in section 68 of the Act. A change of plan designed to come into effect in less than three months must, in the opinion of the Secretary of State, give rise to “considerable difficulties.” It pointed out that over 3,000 pupils transferring from primary schools had already been allocated and allotted places. Then followed this paragraph (which I shall call “paragraph A”):

- H “The authority's revised proposals *confront* the parents of children due to transfer in September *with the dilemma* of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else *submitting* to an improvised

selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational validity.” (My emphasis.)

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A further objection was taken to the proposed possible reallocation during or after the first year—I have commented on this above. The change of plan at this time in the educational year threatened to give rise to practical difficulties in relation to the appointments of staff already made and the construction of buildings for the new comprehensive schools and to create a degree of confusion and uncertainty which could impair the efficient working of the schools.

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These arguments were restated and expanded in the affidavit sworn on behalf of the Secretary of State in support of the application for mandamus. The affidavit stated three points.

C

Point (i): that 653 of the 802 transfers, promotions and other appointments (of teachers) required to implement the reorganisation had been made.

Point (ii): that contracts had been entered into for building work directly related to the change in character of two of the schools and work had started under the contracts. In the case of a third school, the authority had entered into commitments for such building work.

D

Point (iii): that preparations had been made for courses on the basis that the proposals communicated to the Secretary of State would be put into effect.

These points (i), (ii) and (iii) were dealt with fully by the authority and I need say no more about them than that they were completely exploded. They were held to have no substance in them by five of the six learned judges who have considered this matter: the sixth indicated general agreement without specific discussion and indeed point (ii) was criticised with some severity by one of the learned Lords Justices in the Court of Appeal.

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Some attempt was made to rehabilitate these points in this House, but learned counsel decided, no doubt wisely, to concentrate on the allocation issue. But these three points cannot just be discarded as if they had never been made. They form part of a composite set of facts relied upon as showing unreasonable conduct, and I am not at all sure that the disappearance of so many planks does not fatally weaken the stability of the platform. At the least—and I will give the department the benefit of this assumption—the remaining factual basis would need to be strong and clear if it alone were to be the basis for the Secretary of State’s “satisfaction” as to unreasonable conduct.

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So I come to the question of allocation, which was at the centre of the case as argued, and it can best be approached via “paragraph A” above, a paragraph which I regard as revealing. It shows a very strange attitude toward the decision taken by the authority. After the electorate, including no doubt a large number of parents, had voted the new council into office on the platform that some selective basis would be preserved, to say that this created “a dilemma” for the parents, with the undertone that this was something unreasonable, appears to me curious and para-

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- A doxical. Parents desired to have a chance of selective places. The new council was giving it to them. If they did not want selective places, they had no need and no obligation to apply for them. Unless the creation of freedom of choice, where no such freedom existed previously, is intrinsically an evil, it seems hard to understand how this so-called dilemma could be something unreasonably created. The impression which it gives of upsetting 3,000 places is entirely a false one since over 90 per cent. of these would remain unaltered. Then, to refer to "submitting to an improvised selection procedure" hardly does justice to the authority's plan. Some selection procedure was inherent in what the electorate had voted for, a choice which, if it meant anything, must involve some change in allocations for the forthcoming school year and, unless exactly 240 parents applied for the 240 places, some selection. It would seem likely that in voting for this change in May 1976 the electors must have accepted, if not favoured, some degree of improvisation. The whole paragraph forces the conclusion that the Secretary of State was operating under a misconception as to what would be reasonable for a newly elected council to do, and that he failed to take into account that it was entitled—indeed in a sense bound—to carry out the policy on which it was elected, and failed to give weight to the fact that the limited degree of selection (for 240 places out of some 3,000) which was involved, though less than perfect, was something which a reasonable authority might accept and which the parents concerned clearly did accept.

- What the Secretary of State was entitled to do, under his residual powers, was to say something to the effect: "the election has taken place; the new authority may be entitled to postpone the comprehensive scheme: this may involve some degree of selection and apparently the parents desire it. Nevertheless from an educational point of view, whatever some parents may think, I am satisfied that in the time available this, or some part of it, cannot be carried out, and that no reasonable authority would attempt to carry it out." Let us judge him by this test—though I do not think that this was the test he himself applied. Was the procedure to be followed for choosing which of the applicants were to be allotted the 240 selective places such that no reasonable authority could adopt it? The authority's letter of June 7 said that selection would be by "a combination of reports, records and interviews." They had about three months in which to carry it out. The plan was lacking in specification, but it must have conveyed sufficient to the experts at the department to enable them to understand what was proposed. Selection by 11-plus examination was not the only selection procedure available. Lancashire, part of which was taken over by Tameside, had evolved and operated a method of selection by head teacher recommendation, ranking of pupils, reports and records and standardised verbal reasoning tests. The Tameside authority had set up in May a panel of selection to operate a procedure of this kind, the chairman of which was experienced in the Lancashire method. He, as he deposed in an affidavit before the Court of Appeal, was of opinion that even though a verbal reasoning test might not be practicable in the time there would be no difficulty in selecting the number of pupils required. There were other opinions, expressed

with varying degrees of confidence by experts, and no doubt the procedure could not be said to be perfect, but I do not think that such defects as there were could possibly, in the circumstances, having regard to the comparatively small number of places involved, enable it to be said that the whole of the authority's programme of which this was a part was such that no reasonable authority would carry it out.

But there is a further complication. The authority's selection plans were opposed by a number of the teachers' unions, and there was the likelihood of non-cooperation by some of the head teachers in the primary schools in production of records and reports. The department letters and affidavits do not rely upon this matter, for understandable reasons, but they must be assumed to have had it in mind. Is this a fact upon which the Secretary of State might legitimately form the judgment that the authority was acting unreasonably?

To rephrase the question: on June 11, 1976 (this is the date of the direction, and we are not entitled to see what happened thereafter), could it be said that the authority was acting unreasonably in proceeding with a selection procedure which was otherwise workable in face of the possibility of persistent opposition by teachers' unions and individual teachers, or would *the only* (not "the more") reasonable course have been for the authority to abandon its plans? This is, I think, the ultimate factual question in the case. And I think that it must be answered in the negative—i.e., that it could not be unreasonable, in June 1976, and assuming that the Secretary of State did not interfere, for the authority to put forward a plan to act on its approved procedure. The teachers, after all, are public servants, with responsibility for their pupils. They were under a duty to produce reports. These reports and the records in the primary schools are public property. I do not think that it could be unreasonable (not "was unreasonable") for the authority to take the view that if the Secretary of State did not intervene under his statutory powers the teachers would cooperate in working the authority's procedure—a procedure which had, in similar form, been operated in part of this very area.

On the whole case, I come to the conclusion that the Secretary of State, real though his difficulties were, fundamentally misconceived and mis-directed himself as to the proper manner in which to regard the proposed action of the Tameside authority after the local election of May 1976: that if he had exercised his judgment on the basis of the factual situation in which this newly elected authority was placed—with a policy approved by its electorate, and massively supported by the parents—there was no ground—however much he might disagree with the new policy, and regret such administrative dislocation as was brought about by the change—upon which he could find that the authority was acting or proposing to act unreasonably. In my opinion the judgments in the Court of Appeal were right and the appeal must be dismissed.

VISCOUNT DILHORNE. My Lords, in this appeal the comparative merits of comprehensive education and the system it replaces have no relevance to the issues to be determined. All we have to decide is whether the

A.C. **Education Sec. v. Tameside B.C. (H.L.(E.)) Viscount Dilhorne**

A Secretary of State had power to direct the Tameside Metropolitan Borough Council on June 11, 1976, to implement the proposals which that council, when it had a Labour majority, had submitted to him on March 19, 1975, and which he had approved on November 11, 1975, for the reorganisation of secondary education in their area.

Section 1 (1) of the Education Act 1944 imposes on the Secretary of State the duty

B “ . . . to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area.”

C Section 6 (1) of that Act provides that the local education authority for each county borough shall be the council of the county borough, and section 8 (1) imposes on every local education authority the duty, *inter alia*, to secure that there shall be available for their area sufficient schools

D “ . . . (b) for providing secondary education, that is to say, full-time education suitable to the requirements of senior pupils, other than such full-time education as may be provided for senior pupils in pursuance of a scheme made under the provisions of this Act relating to further education . . . ; and the schools available for an area shall not be deemed to be sufficient unless they are sufficient in number, character and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, and of the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their respective needs.”

F In the discharge of this duty local education authorities are subject to the general supervision of the Secretary of State. Their relationship is not that of master and servant. He has to secure the effective execution of the national policy. They have to carry it out in their areas and they enjoy a considerable degree of autonomy. The Secretary of State is given power by section 68 of the Act to secure that they do so. That section reads as follows:

G “ If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . . ”

H Until the Secretary of State had approved the proposals submitted to him in March 1975, the council had no power to give effect to them, but the giving of that approval, while it gave them power, did not, the Secretary of State recognises, impose on them any duty to do so. Nevertheless, it is his contention that in deciding not to implement them fully but to

modify them the council had acted unreasonably and so he had power to direct them

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"... to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alteration to school premises and other matters as is required to give effect to the proposals."

B

It is not for the courts to usurp the functions of the Secretary of State. If the council had acted or were proposing to act unreasonably, he was entitled to give them these directions or any other directions he thought necessary in discharge of his duty under section 1 of the Act.

In this House it was common ground that the question whether a local authority was acting or was proposing to act unreasonably had to be viewed objectively. It did not suffice that in his opinion the conduct of the authority was unreasonable. For him to have power to give directions, the conduct had to be such that no reasonable authority would engage in it.

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The proposals submitted on March 19, 1975, and approved by the Secretary of State were as follows.

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Three of the five grammar schools in the area were to be made comprehensive and in the school year beginning on September 1, 1976, 11-year-old children from the primary schools would be admitted to them without being subjected to any test of their ability. So that year and for the next four years the pupils at these schools would consist of selected and non-selected children and it was only after that that these schools would be fully comprehensive.

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The remaining two grammar schools were to be converted into sixth form colleges to which pupils would be admitted on September 1, 1976. Those under 16 at this date would be transferred to comprehensive schools.

There was at this time one comprehensive school in existence and two others were being constructed.

The proposals submitted by the Tameside council to the department at the department's request on June 7, 1976, were to continue the five grammar schools as "11 to 18 academic high schools," to continue and complete the three comprehensive schools which, they said, formed "a valuable nucleus of any future scheme" and to continue the remaining 11 to 16 secondary schools.

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They proposed that all allocations to schools for 11-year-olds made by their predecessors immediately before the local elections should be honoured and maintained subject to the continued agreement and acceptance by the parents concerned but that parents of 11-year-olds could apply for reallocation if they were dissatisfied with their present allocation.

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As the two grammar schools which were to become sixth form colleges were to remain grammar schools and no allocations of 11-year-olds had been made to them under the approved proposals, there would be 240 school places in these schools to be filled; and if the number of applicants for these places exceeded the number of places available they proposed that the pupils most suitable and most likely to benefit from that type of

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A education should be selected in the light of "reports, records and interviews."

So the new Tameside council only proposed to disturb the allocation on a non-selective basis to secondary schools of the 3,200 or so 11-year-old children leaving primary schools to the extent of selecting 240 from those who applied for admission to the two grammar schools which were not to be made into sixth form colleges.

B It was not disputed before us that whether the approved proposals should be implemented was a major issue at the local government elections in 1976. Having gained control of the council on May 6, 1976, the Conservatives could claim to have obtained a mandate not to implement them in the same way as a party which has won a general election can claim to have a mandate to carry out the proposals in its manifesto.

C Shortly before polling day, May 6, and presumably because the question was a live issue, the Tameside Teachers Consultative Committee which consisted of representatives of the National Union of Teachers, the National Association of Head Teachers, the National Association of Schoolmasters/Union of Women Teachers and the "Joint Four," which I understand is the name given to four small unions or associations consisting mainly of grammar school teachers, published the following statement:

D "It" (the committee) "wishes it to be clearly known that in its wholly professional opinion, one which is devoid of any political bias, it considers the process of secondary reorganisation too far advanced for any postponement or modification of the present plans."

E In a letter dated June 4, 1976, to the department, this committee stated that immediately after this announcement the "Joint Four" had "declared its intention of supporting whatever new proposals might be made, as, indeed, did individual members within the other associations."

F Five days after polling day, on May 11, a member of the department wrote to the Tameside council saying that he was directed by the Secretary of State to ask whether it was the intention of the council to implement the approved proposals by September 1, 1976, and, if not, to ask that

"... full details of the arrangements made or proposed for the transfer of pupils to county secondary schools next September be forwarded ... as a matter of urgency."

G On May 12 solicitors acting for the National Association of Head Teachers and the Tameside Head Teachers Association wrote to the council referring to a resolution passed by those bodies in which it had been said that if their members were instructed to implement selection procedures they would invoke "collective disputes procedures" of which it was said that one of the cardinal features was that no action should be taken to implement decisions relating to the dispute until those procedures had been fully implemented.

H On May 19 the National Association of Head Teachers, the National Association of Schoolmasters/Union of Women Teachers and the National Union of Teachers (hereinafter referred to as "the unions") declared the dispute to be official.

On May 26, Mr. Jenkins of the department wrote to the council saying:

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"The Secretary of State is aware that since he approved the proposals in November a great deal of educational and administrative planning has taken place with the intention of putting them into effect in September 1976. Children have been allocated to schools, considerable progress has been made in staffing arrangements including, in many cases, the offer and acceptance of contracts and teachers have been planning curricula and courses for the new comprehensive schools. Some building work has also been put in hand.

B

"The Secretary of State is extremely concerned that the sudden cessation of this planned and orderly development and the continuing absence of any precise alternative plans is causing such uncertainty that the education service as a whole, and the educational provision for the age group about to transfer to secondary schools in particular, are being put in jeopardy. He has asked me, therefore, to request that the authority should provide him with a precise and detailed statement of the plans which it hopes to put into effect in September. This statement should reach him not later than Friday, June 4.

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"I am to add that if in the Secretary of State's judgment the authority's revised proposals would involve unwarrantable disruption, he would have to consider whether he should use his powers under section 68 of the Education Act 1944 to direct the authority to implement the original proposals."

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By letter dated June 4 the unions informed Mr. Jenkins of their attitude and commented on the council's new proposals which had been communicated to them. In the course of that letter it was said:

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"The corner-stone of our dispute would still be that in the time available it is impossible to do justice to even a straightforward process of assessment let alone one as complicated as this. Head teachers in particular would feel the burden of responsibility intolerable in what is now such an emotive issue."

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On June 7 the council wrote telling Mr. Jenkins what they proposed. They first drew attention to a number of matters which they felt had not received the consideration they deserved. They can be summarised as follows. 1. There was no question of a comprehensive reorganisation having taken place and being reversed. It had not yet taken place. 2. Even if the approved proposals met the wishes of the parents and the needs of the children, the schools were not yet ready for their proposed roles, building works had not been completed and in most cases not even begun and thus "... implementation in September 1976 would have caused great disruption to the children's education." 3. The planning that had gone on had been totally inadequate in the time available and had the marks of being a rushed job for political reasons. 4. While they regretted the precipitate action of their predecessors in attempting to appoint teachers and make contracts with them before the schools were ready, they would honour the obligations entered into. 5. The approved

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A proposals were not popular with the people of Tameside and not considered to be in the best interests of the children.

"... we must go back to the drawing board and try again with a more considered, well thought out scheme. At all costs the disruption in children's education which would have been caused by the implementation of the present proposals must be avoided in any future plan."

B 6. Insufficient attention had been paid to the plight of the 16-year-olds. They would have been turned out of the sixth forms of three grammar schools and have been forced to move to one of the two non-selective sixth form colleges with dislocation of their work and have to work "... in the far less academic atmosphere of an open entry sixth form college..."

C The council then said that their present plans might be summarised as being

"... the maintenance of the status quo with the least disturbance and disruption of the children's education pending any longer term, well thought out proposals."

D In addition to the proposals to which I have already referred, the council proposed that 16-year-olds from both the five grammar schools and all other secondary schools who applied and were accepted for "A" level courses might pursue them within the sixth forms of the five grammar schools and at the Tameside College of Technology and they anticipated that wherever possible pupils would wish to stay at their own school where it had a sixth form, but final choice would depend on the particular course chosen. They also proposed that there should be a review of the first year entries and that there would be a very flexible transfer system at the end of the first year (or earlier if required in certain circumstances) to assist pupils, following consultation and agreement with the parents and teachers concerned, to transfer to other schools within Tameside where the child's ability and aptitude during the course of the year had shown that

E the child would be happier and better suited to a school or course elsewhere. They did not however anticipate that widespread transfers would be necessary or requested.

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On June 9 there was a meeting at the House of Commons between the Secretary of State and his officials and Mr. Grantham, the leader of the council, and Mr. Thorpe, the chairman of the education services committee of the council. In affidavits Mr. Grantham and Mr. Thorpe said that at the meeting the Secretary of State appeared already to have made up his mind. Mr. Jenkins in an affidavit sworn on July 2 denied this and said that at the meeting the Tameside representatives were

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"... apparently unable to offer any satisfactory detailed explanation of how they proposed to assess, in a sound way from an educational point of view and in the very limited time then remaining to them, the large number of children whose parents had by then requested re-allocation for the school term beginning in September 1976."

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The large number was 783 applications by parents of 11-year-olds for

the 240 grammar school places in response to letters sent out to 3,200 parents. There were also 190 applications by fifth form pupils in secondary modern schools for grammar school places. Of these 178 had been provided by June 30 and Mr. Thorpe was confident that the remaining 12 applications could be granted.

A

On June 11 Mr. Jenkins by letter conveyed to the council the Secretary of State's decision to direct them to implement the proposals he had approved. He said, repeating what had been said in the letter of May 26, that since the proposals had been approved on November 11, 1975,

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"... extensive preparations have been made to put the proposals into effect. Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work directly related to changes in the character of some schools has been put in hand; and over 3,000 children due to transfer from primary schools this year have been allocated to secondary schools ..."

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The only interference with this allocation that the council proposed was the filling of 240 grammar school places.

In the penultimate paragraph of the letter, Mr. Jenkins stated the reasons for the Secretary of State's decision. That paragraph began with the sentence: "The Secretary of State has given the most careful consideration to the representations made to him." There was no other reference to the matters mentioned at the beginning of the council's letter of June 7 to which reference has been made. The council were given no indication of the result of the most careful consideration of those matters.

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The paragraph went on to say that the Secretary of State was satisfied that the authority were proposing to act unreasonably with respect to their statutory powers and duties

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"... regarding the provision of secondary education for their area and in particular ... regarding the admission of pupils to secondary schools ... at the beginning of the coming school year, i.e., on September 1, 1976."

This echoed what had been said in the letter of May 26 though then the Secretary of State did not know, as he did by June 11, that the only change the council proposed to make in the allocations already made was the selection of 240 11-year-old children for grammar school places.

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The paragraph went on to say that a change of plan at that time of year must in his opinion give rise to very considerable difficulties, and that the authority's revised proposals

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"... confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure ... carried out in circumstances and under a timetable which raise substantial doubts as to its educational validity."

H

This is an interesting and curious paragraph. Giving parents the choice of either adhering to the allocation already made or of applying for admission to a grammar school is called confronting them with a dilemma.

- A Implementation of the approved proposals in full meant that they would have no such choice—and a choice which the result of the election might indicate a large number of parents wished to have.

It was not said that in the time available a selection of 11-year-olds to fill the 240 places could not be made, only that the selection procedure would be of doubtful educational validity. It may strike some as curious that the Secretary of State should be so concerned about the validity of the selection procedure adopted to fill 240 places when under the proposals' he had approved there was to be no selection procedure at all.

- B The paragraph then went on to say that

“ . . . an abnormally high proportion of pupils might need to be reallocated to different secondary schools during, or at the end of, the educational year beginning in September 1976.”

- C No reasons were given for this opinion nor was it explained why this might result from the filling of 240 grammar school places when the other allocations of 11-year-olds were not affected.

Reference was then made to practical difficulties in relation to the appointments of staff already made, and the construction of buildings for the new comprehensive schools.

- D In their letter of June 7 the council did not refer to the attitude of the unions and no direct reference was made to that in the letters of May 11 and 26 and June 11 written by the department though in argument in this House it was contended on behalf of the Secretary of State that the reference to the circumstances in which the selection was to be made was a veiled reference to the attitude of the unions. What is clear beyond doubt is that the Secretary of State did not in the letter of June 11 base his decision
- E to give directions on the ground that the policy of non-cooperation by the unions meant that selection of the 240 could not be achieved. Indeed it was only in his second affidavit sworn on July 2 in reply to one sworn by Mr. Thorpe in which he referred to the unions that Mr. Jenkins mentioned them, exhibiting the letter of June 4 which they had sent to the department and saying that a formal dispute had been declared. He did not then assert that the unions' attitude meant that selection could not
- F be made.

As the council were not prepared to comply with the directions, the Secretary of State applied for an order of mandamus. The Divisional Court (Lord Widgery C.J., Cusack and May JJ.) granted his application giving judgment on July 12.

- G Lord Widgery C.J. did not base his conclusion on anything other than the allocation of the 240 grammar school places. The council's proposals with regard to the two grammar schools which were not to be converted into sixth form colleges were, he thought, “ . . . of the utmost importance because they really seem to me to be the core of the case against the local authority.” After referring to the contention that the council had not put forward any proper plan for the selection of pupils for these places, Lord
- H Widgery said:

“ To make matters worse—indeed really to clinch matters on this point—there is a difference of opinion of a substantial character between the new Tameside authority and the official organisation of the

teachers, and amongst the other results from that unhappy situation is the fact that the teachers are not prepared to help in devising some kind of selective entry test to take the place of the 11-plus examination which never materialised and the provision of which, in the view of anyone who accepts that the entry should be selective, is absolutely essential."

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He said that his opinion had wavered from time to time but that his was

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"... simply a conclusion that when the Secretary of State says there is no time to get this" (the selection) "done by September, I think he is right on that one point."

Cusack J. agreed entirely with Lord Widgery and May J. was of the opinion that shortness of time for the selection coupled with the lack of cooperation from some of the teachers entitled the Secretary of State to decide as he did. He went on to say:

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"... had the local authority had the cooperation of the teachers concerned, it would I think have been difficult for the Secretary of State to have contended that there was any relevant material before him upon which he could have reached the necessary conclusion under section 68 of the Act of 1944."

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So the Divisional Court's decision was based solely on the unions' non-cooperation making it not possible to select 240 pupils for the grammar school places by September 1—and that was not stated in the letter of June 11 to be a reason for the Secretary of State's decision.

Before the hearing in the Court of Appeal further affidavits were filed. In his second affidavit Mr. Thorpe said that when the unions made it clear that they were not prepared to cooperate the council decided to appoint a panel of experienced teachers to carry out a selection procedure which he said was well known, based on head teachers' assessments, pupils' reports and records. By the end of May, 20 senior grammar school teachers and one primary school teacher had said that they were willing to help in this process and 20 teachers were appointed to a selection panel. Mr. Beard, who had served on the selection panel for Lancashire Division 24 since the early 1960s, described this selection procedure in detail and said that it had been followed in that division since that time. In his opinion a fair, feasible and practical selection might be made by a panel of 20 teachers of children to fill the 240 places in one week. Mr. Potts, who had many years' experience of selection procedures, said that in the London Borough of Barnet eight panels of three heads would complete the selection of 850 pupils from approximately 3,000 in 10 working days. He entirely agreed with Mr. Beard and so did Mr. Gilyatt. They all disagreed with Mr. Milroy who had been chief education officer of Gloucester whose view was that such a selection procedure could only operate in term time and would take 12 weeks to operate and that even if the teachers had been prepared to cooperate there would have been insufficient time before September 1 to complete any proper selection and allocation process.

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This selection procedure, Mr. Thorpe said, had been that of which they had told the Secretary of State at their meeting on June 9. It is inconceivable

A.C. Education Sec. v. Tameside B.C. (H.L.(E.)) Viscount Dilhorne

A that, operated as it had been for many years in different parts of the country, it was unknown to the department.

It may be that views as to the efficacy of this procedure differ and that it is thought by some to be of doubtful "educational validity," but can it be said that the council in seeking before June 11—for that is the vital date—were acting in a way no reasonable council would in deciding to operate this long established procedure? Were it not for the attitude of the unions, I do not think that that possibly could be said.

B So the question to be determined comes down to this: should the council have abandoned the policy for which they had a mandate within just over a month from the election because of the unions' attitude? Were they, the elected body responsible for the education in their area, acting in a way no reasonable council would in not submitting before June 11 to the pressure applied to them? In the course of his excellent argument
C for the Secretary of State Mr. Bingham conceded that there would have been time to carry out proper tests if the teachers had been prepared to cooperate but it was his contention that before June 11 the council knew or ought to have known that on account of the unions' attitude the procedure they proposed would not work.

I see no grounds for saying that by June 11 the council knew or ought
D to have known that the selection procedures they proposed would not work. They may have thought it possible that they could persuade the unions to change their attitude and as not beyond the bounds of possibility that sufficient responsible teachers, recognising that the children might otherwise suffer, might cooperate. The unions admitted that some of their members did not agree with their policy. Once the Secretary of State had given his directions, there was no possibility of
E the unions reviewing their policy, but we have to consider the position not after those directions were given but before.

Further, in the letter of June 11 it was not said that the selection could not be made, only that it was of doubtful "educational validity." If the department was not then prepared to say that it would not work, what warrant was there for condemning the council as acting unreasonably
F in not recognising that it would not work and for seeking to carry out their policy?

In my opinion there is no ground for holding that because of the difficulties in selecting pupils to fill 240 grammar school places the council acted or were proposing to act prior to June 11 in a way no reasonable council would in deciding not to implement the approved proposals and to maintain the status quo for the time being.

G I am inclined to think that too much importance has been attached to this question of selection and insufficient to the disturbance and dislocation that would be caused by implementing the approved proposals by September 1.

The major difference between those proposals and the council's was that the two grammar schools would not be converted into sixth form
H colleges. The availability of the 240 places was a consequence of that.

One of the matters to which the council drew attention in their letter of June 7 was the plight of the 16-year-olds who would, they said, have been turned out of the sixth forms of three grammar schools and have had

to move to these colleges. Miss Mullenger, a school mistress for 20 years, deposed—and her affidavit sworn on June 30 was supported by many other teachers—that at one of the colleges only the footings for the necessary extension had been put in hand and at the other the necessary extensions and alterations had been delayed. She said it was within her knowledge

“ . . . that if the approved proposals take effect in September, pupils attending the two sixth form colleges would only receive education on a ‘part-time’ basis, that is to say that they would be able to attend at the school premises only when they had lessons. For private study, there would be no room to work in classrooms and they would have to work at home or in public libraries or wherever they could find room to do so.”

Miss Gabbat, a teacher at the Ashton Grammar School which was to be converted into a sixth form college, in her affidavit sworn on July 20 said that the foundations of the extension proposed there had been laid but that the building could not be completed by September 1976. The original library had been demolished and many of the books would have to be stored in cardboard boxes. Adequate library facilities would not be available until the gymnasium had been converted into a library and work on that had not been started.

In the light of this evidence there were valid grounds for the council thinking that implementation of the approved proposals by September 1 would cause grave disruption of the children’s education and they were entitled not unreasonably to conclude that as the sixth form colleges would not be ready for use by September 1 they should seek to maintain the status quo for the time being.

In all the circumstances it does not appear to me that on June 11 there were any valid grounds for concluding that the council were acting or were proposing to act in a way no reasonable council would. Like Lord Denning M.R. I do not find any evidence on which, applying the right test, the Secretary of State could properly have decided that the council proposed to act unreasonably. Either in deciding that he was entitled to give directions he applied the wrong test—and the letter of June 11 and those that preceded it show no indication that he applied the right one and the language of that of June 11 is consistent with the application of the wrong one—or, if he applied the right test, he must have misdirected himself and there is no indication that he attached any weight to the sixth form colleges not being ready for use as such by September 1.

In my opinion the Court of Appeal came to the right conclusion and for the reasons I have stated this appeal should be dismissed.

LORD DIPLOCK. My Lords, the principal Act of Parliament which confers upon the Secretary of State and the Tameside council respectively the cognate powers which each was claiming to exercise in the period between the local government elections on May 6 and the direction given by the Secretary of State on June 11, 1976, is the Education Act 1944. It had been promoted by a coalition government in which all political parties were then represented and at a time when, as I recollect, the social purpose which the system of public education was designed to serve was not, as it

A has since become, a matter of acute political controversy upon party lines. The minor amendments that have been made since 1944 do not affect the scheme of the Act.

The responsibility for carrying out the national policy for education is distributed by the Act between the Minister of Education (now the Secretary of State) and local education authorities, acting in partnership, as Lord Widgery C.J. aptly put it, and also governors and managers of the individual schools, with whose function this appeal is not concerned. To these three kinds of public authority concerned with education I would add, and not as junior partners only, the parents of children of school age upon whom by section 36 is placed the primary duty of causing their children to receive efficient full-time education suitable to their ages, abilities and aptitudes. Parental wishes as to the school to be attended by the child (see section 37) and what he is to be taught there are to prevail so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure (see section 76).

Under the Act the actual provision of public education services in each local government area is exclusively the function of the local education authority, i.e., the county or borough council representative of and elected by the inhabitants of the area served by the schools to be provided by the authority. The functions of the Secretary of State, apart from contributing to the cost of the provision of educational services (see section 100), are supervisory only. The execution by the local authorities of the national policy for education is described in section 1 as being under his control and direction; but the extent to which the Secretary of State is empowered to fetter a local authority's choice as to the method of implementing the national policy which it considers to be best suited to its own area is limited by the provisions of the Act. The only question for your Lordships in the instant appeal is whether in giving his direction of June 11, 1976, the Secretary of State trespassed beyond the statutory limits to his powers.

The Act does not leave the national policy for education to be determined from time to time by successive Secretaries of State. The Act itself says what the policy is. In section 1 its purpose is described as being for "providing a varied and comprehensive educational service in every area." In this context "comprehensive" bears its dictionary meaning and not the narrower connotation it has since acquired in the controversy between the rival educational and social merits of secondary schools to which entry is by selection according to ability and those to which it is not. What is to be provided by way of secondary education in accordance with the national policy is expanded in section 8. The number, *character* and equipment of the secondary schools provided by a local authority in its area must be such as

"... to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, ... including practical instruction and training appropriate to their respective needs."

H I pause here to draw attention to the underlying assumptions, as disclosed by the Act read as a whole, and in particular by sections 1, 7, 8 and 36, (a) that the contribution to be made by education towards "... the

spiritual, moral, mental, and physical development of the community . . .” (see section 7) is by developing the particular abilities and aptitudes of the individual pupil; (b) that individual pupils differ from one another in ability and aptitude; and (c) that these differences will call for different methods of teaching for pupils of differing ability or aptitude if the statutory policy for education is to be carried out. A

The Act leaves to local education authorities a broad discretion to choose what in their judgment are the means best suited to their areas for providing the variety of instruction called for by those provisions which I have mentioned. It is not necessary to discuss here what were the respective responsibilities of the minister and local education authorities in the formulation of the original development plans for primary and secondary education in each area under section 11 of the Act. In Tameside, as elsewhere, this was all in the distant past. It is now common ground that in the spring of 1976, as a result of the approval by the Secretary of State of the proposals of the Tameside council when controlled by a Labour majority, there were two courses lawfully open to the newly elected council. One was to carry out their predecessor's proposals for making entry to all the secondary schools non-selective; the other was to leave the character of all the secondary schools in the area the same as in the previous year, i.e., with selective entry to the five grammar schools according to the pupil's aptitude for academic learning and with non-selective entry to the remaining schools. As between these two courses the right to choose was *prima facie* that of the council alone. The Secretary of State's power to overrule their choice by giving them a direction under section 68 to act in some other way that he himself preferred and they did not was exercisable only if he had satisfied himself that the council were proposing to act “unreasonably.” B

My Lords, in public law “unreasonable” as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt. C

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. It has from beginning to end of these proceedings been properly conceded by counsel for the Secretary of State that his own strong preference and that of the government of which he is a member for non-selective entry to all secondary schools is not of itself a ground upon which he could be satisfied that the Tameside council would be acting unreasonably if they gave effect to their contrary preference for the retention of selective entry to the five grammar schools in their area. What he had to consider was whether the way in which they proposed to give effect to that preference would, in the light of the circumstances as they existed on June 11, 1976, involve such interference with the provision of efficient instruction and training in secondary schools in their area that no sensible authority acting with due appreciation of its responsibilities under the Act could have decided to adopt the course which the Tameside council were then proposing. D

It was for the Secretary of State to decide that. It is not for any court of E

- A law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, *per* Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

- There has never been the least suggestion in this case that the Secretary of State acted otherwise than in good faith. So one can take the reasons contained in his letter of June 11 as indicating with candour those matters which had influenced his mind in reaching his conclusion that the council proposed to act unreasonably. The material parts of that letter have been cited and the events to which it relates have been analysed in so many judgments in the courts below and speeches in this House that it would be tedious for me to repeat them here. The references in the letter to staffing arrangements, planning of curricula and courses and building work have not been relied upon in the proceedings for mandamus as capable of justifying the Secretary of State's decision. It seems likely that he had been inadequately informed of the facts. What is left then are his criticisms of the way in which the council proposed to allocate to grammar schools the pupils who would be leaving the primary schools in July 1976, at the end of the summer term. There were two aspects of this. First, there were pupils whose abilities and aptitudes suited them for a grammar school education, but who had been allocated to schools which were now to remain secondary modern schools. Secondly, there were pupils who had already been allocated to three of the five grammar schools, but whose abilities and aptitudes made them more suitable for the less academic training provided in secondary modern schools. This second category has not bulked large in the arguments before the courts below or in this House. The evidence discloses that in any system involving selective entry at the age of 11 plus some misfits manifest themselves as the educational year progresses and are transferred to more suitable schools. The council proposed that misfits resulting from the non-selective allocation of unsuitable pupils to grammar schools should be dealt with in this, the usual, way, though there would no doubt be more of them than if the original allocation had been selective.

- The argument has largely turned upon the council's proposals for allocating pupils to the 240 places which would be available for entry to the lower forms at Ashton and Hyde grammar schools. What was proposed by the council for these places was selection by a combination of reports, records and interviews. Selection based on reports and records obtained from the pupils' primary schools, together with the use of one of several alternative aids for evaluating possible differences in the standards of assessment adopted in reports from different primary schools, is a well tried system of selection which had been in use in areas as far apart as Lancashire and Barnet and had been adopted in Tameside itself as the selection process in the preceding year. A proposal to adopt it for the school year starting

in September 1976 in circumstances in which it could be carried out effectively could not be "unreasonable" in the sense required by section 13. A

It has not been seriously contended before your Lordships that the time available between June 11 and September 1, when the new term at secondary schools began, was insufficient to enable this method to be carried out effectively, if reasonable cooperation were obtainable from head teachers at the primary schools. However, three of the teachers' trade unions, including those to which the majority of head teachers of primary schools belonged, had threatened to withhold the cooperation of their members. So the question that the Secretary of State had to ask himself was: in face of the trade unions' threat that their members would refuse to cooperate was the council on June 11 acting unreasonably in not having abandoned by that date all plans for reintroducing selective entry to grammar schools in their area? B

The letter of June 11 contains no indication that the Secretary of State directed his mind to this question, let alone that he realised that it lay at the heart of what he had to decide. In the passage dealing with selection, on which my noble and learned friend, Lord Wilberforce, has already commented, the Secretary of State, despite the weight which the Act itself requires him to attach to parental choice, refers to the opportunity to be afforded to parents of having some choice in the kind of secondary school their children were to attend as confronting the parents with a dilemma. C D

The only passage capable of referring, even elliptically, to the unions' threat is the reference to the selection procedure being "... carried out in circumstances and under a timetable which raise substantial doubts about its educational validity."

A relevant question to which the Secretary of State should have directed his mind was the extent to which head teachers would be likely to persist in a policy of non-cooperation if he himself was known to have declined to stop the council from proceeding with their plan. There is no suggestion in the letter, nor in either of the affidavits sworn on his behalf by Mr. Jenkins, that the Secretary of State ever directed his mind to this particular question or formed any view about it. Indeed, it is not until the second affidavit that it is disclosed that the teachers' trade unions had been writing directly to the department on the matter at all. It is not for a court of law to speculate as to how the Secretary of State would have answered that question had he directed his mind to it, though like others of your Lordships and members of the Court of Appeal I find it difficult to believe that responsible head teachers, regardful of the interests of their pupils, would have persisted in a refusal to do their best to make the selection procedure work fairly and effectively if the Secretary of State had made it clear to them by his decision that he was not prepared himself to interfere with the council's proceeding with its plans. Assuming, however, that he had formed the view that cooperation by head teachers was likely to be only partial so that the selection process would be liable to greater possibility of error than where full cooperation could be obtained, the Secretary of State would have to consider whether the existence of such a degree of imperfection in the selection system as he thought would be involved was so great as to make it unreasonable conduct for the council to attempt to fulfil the mandate which they had so recently received from the electors. Again, there is no E F G H

A indication that the Secretary of State weighed these two considerations against one another.

Like all your Lordships, I would dismiss this appeal, although I prefer to put it on the ground that, in my view, the respondents have succeeded in establishing in these proceedings that the Secretary of State did not direct his mind to the right question; and so, since his good faith is not in question, he cannot have directed himself properly in law.

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LORD SALMON. My Lords, in 1975 Tameside had five grammar schools, 16 secondary modern schools, one completed comprehensive school and two others in the course of construction. In March 1975 the local education authority, the metropolitan borough council of Tameside (then under the control of the Labour party), put forward proposals to the Secretary of State for Education and Science under section 13 of the Education Act 1944 for introducing an entirely comprehensive system of education and abolishing all the grammar schools on September 1, 1976. The Secretary of State approved these proposals on November 11, 1975. This approval imposed no obligation on the authority to implement the proposals. They were free to change their mind without obtaining the Secretary of State's permission. It was however unlikely that they would have done so but for the result of the election held on May 6, 1976, when the control of the local authority passed from the Labour party to the Conservative party. One of the chief issues before the electorate of Tameside had been whether or not their grammar schools should be abolished. It is perhaps unfortunate that such an important educational question had become a party political issue, about which feelings ran high and a great deal of heat had been engendered. Broadly, the Labour party is for abolishing grammar schools and the Conservative party for preserving them. There are many impressive reasons which can be advanced by each side in favour of its own point of view. Certainly it is completely outside the province of the courts or this House in its judicial capacity to express any opinion upon the rights and wrongs of this dispute: moreover, it has nothing whatever to do with the determination of this appeal.

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The Conservative party having won the election in Tameside on May 6 the authority rightly considered that they had a mandate from the electors to preserve the Tameside grammar schools—the question as to whether or not the grammar schools were to be preserved having been one of the chief issues in the election. The Secretary of State not unnaturally foresaw that the local authority were likely to carry out their mandate and decide not to implement the proposals approved by him in the previous November. On May 11, 1976 (five days after the result of the election had been announced), he caused a letter to be written to the authority asking that

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“... full details of the arrangements made or proposed for the transfer of pupils to county secondary schools next September be forwarded to the Department [of Education] as a matter of urgency.”

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On May 26, 1976, the Secretary of State caused another letter to be written to the authority expressing his extreme concern that the proposals which he had approved were not being carried out and requesting the

authority to provide him with a "precise and detailed statement of the plans which [the authority] hopes to put into effect in September." The letter ends with a warning or threat that if the authority's plans would, in the Secretary of State's view, involve "unwarrantable disruption" the Secretary of State would have to consider whether he should use his powers under section 68 of the Education Act 1944 to direct the authority to implement the original proposals. A

In the meantime some of the trade unions concerned had advised their members (comprising most of the teachers and staff in the primary and secondary schools) not to cooperate with the authority in putting into effect any plans inconsistent with the 1975 proposals. If, as seems to me not improbable, the teachers were apprised of the contents of the letter of May 26 to which I have referred, this certainly would not have discouraged them from complying with the advice which they had received from the trade unions. It must have appeared likely to them that when the Secretary of State came to make his decision he would decide (as he in fact did) to give the authority directions to implement the original proposals and that any time or effort which, in the meantime, might have been spent on furthering the authority's plan would have been wasted. B C

On June 7, 1976, the authority wrote what I regard as a most courteous, sensible, full, fair and well reasoned reply to the letter of May 26 in which they explained with precision their plans for the future. This is an important letter and I am afraid that I must quote from it at some length: D

"In detail these immediate plans are as follows: 1. Continuation of the five grammar schools in Tameside as 11 to 18 academic high schools. 2. Continuation and completion of the three comprehensive schools as already agreed and for which money has already been spent. We believe that these *purpose-built* comprehensive schools form a valuable nucleus of any future scheme. 3. Continuation of the remaining 11 to 16 secondary schools. 4. All allocations to schools for 11-year-olds made by our predecessors immediately before the local elections to be honoured and maintained subject to the continued agreement and acceptance by the parents concerned. 5. Ashton and Hyde grammar schools now to be open for an 11-year-old entry. Since no 11-year-old allocations to these two schools had been made by our predecessors, this creates approximately 240 selective school places in addition to those already allocated. 6. All parents of 11-year-olds transferring to secondary schools have been invited to reapply for reallocation if they are dissatisfied with their present allocation. If they are satisfied, then of course they need not apply and no reallocation will be made. 7. If the number of applicants to the grammar schools exceeds the number of places available, as is likely, then those pupils most suitable and most likely to benefit from that type of education will be selected by a combination of reports, records and interviews. There will be no formal 11-plus examination. 8. Those not applying for grammar school places, or those unsuccessful in obtaining a grammar school place, will still be offered a reallocation to one of the other secondary schools in Tameside if the parent requests and provided the places are available. It is not intended to follow any neighbourhood E F G H

A zoning. 9. 16-year-olds from both the five grammar schools, and all other secondary schools, who apply, and are accepted for, "A" level courses may pursue these within the sixth forms of the five grammar schools, or at Tameside College of Technology. It is anticipated that wherever possible pupils will wish to stay at their own school where it has a sixth form, but final choice will of course depend upon the particular courses chosen. 10. A review of the first year entries will be made and there will be a very flexible transfer system at the end of the first year (or earlier if required in certain circumstances) to assist pupils, following consultation and agreement with the parents and teachers concerned, to transfer to other schools within Tameside where the child's ability and aptitude during the course of the year has shown that the child would be happier and better suited to a school or a course elsewhere. It is not anticipated that widespread transfers will be necessary or requested, but the facility to do so will be there.

C "I apologise for the length of this letter but I think it important that the Secretary of State should be fully informed of the present position and of our concern for the welfare of Tameside children. For his information I also enclose a copy of a letter which has been sent to all parents in Tameside setting out the position and inviting those who wish to to reapply for secondary school allocation. Whilst we have been advised that we might take action over the unreasonable behaviour of our predecessors in their precipitous action taken only days before the elections, we do not propose to pursue such a course. We believe that it would be in the best interests of Tameside, and of the children, to concentrate on matters of education and to work for the continuing, gentle, considered evolution of our schools to meet parental demands and pupils' needs."

On June 11, 1976, the Secretary of State made his decision and communicated it to the authority by letter of that date. The letter stated that:

F "[The Secretary of State] is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by . . . the Education Acts 1944-1976 [sic] . . . with respect to their . . . duties . . . under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools from primary schools at the beginning of the coming school year, i.e., on September 1, 1976."

G It then sets out the grounds on which the Secretary of State is so satisfied (to which I shall refer later) and concludes:

H "In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him . . . , the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to

school premises and other matters as is required to give effect to the proposals.”

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The question that arises in this appeal is one of considerable constitutional importance—was the Secretary of State acting lawfully or unlawfully when on June 11, 1976, he gave the authority the directions which I have recited? Under the Education Act 1944 the local education authorities have the duty imposed on them of securing the provision of primary and secondary schools in their respective areas, and they are invested with the powers necessary to carry out these duties—see sections 8 and 9. They cannot however establish a new county school or close an established one without putting their proposals for doing so before the minister and obtaining his consent—see section 13. Hence the reason for the Tameside authority in 1975 putting the proposals for closing their grammar schools before the Secretary of State. His acceptance of these proposals as I have already observed did not however of itself cast any obligation on the authority to carry them out.

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As the law stands at present, neither the Secretary of State nor any other member of the executive has any power, in ordinary circumstances, to order local authorities to close down their grammar schools or convert them into comprehensive schools. Accordingly the Secretary of State's directions given on June 11 are unlawful unless they can be brought within the powers conferred upon the Secretary of State by section 68 of the Act of 1944 which reads as follows:

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“If the Secretary of State is satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by . . . this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient.”

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In my opinion, section 68, on its true construction, means that before the Secretary of State can lawfully issue directions under it he must satisfy himself not only that he does not agree with the way in which the authority have acted or are proposing to act nor even that the authority is mistaken or wrong. The question he must ask himself is: “Could any reasonable local authority act in the way in which this authority has acted or is proposing to act?” If, but only if, he is satisfied on any material capable of satisfying a reasonable man that the answer to the crucial question is “No,” he may lawfully issue directions under section 68. I would adopt what Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700:

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“Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable.”

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A There is certainly no evidence as to how the Secretary of State construed section 68 nor as to the questions he asked himself before deciding to issue his directions set out in the letter of June 11. Neither of the affidavits sworn by Mr. Jenkins, an assistant secretary in the schools branch of the Department of Education and Science, throw any light upon this matter. It may be that the Secretary of State misconstrued section 68, asked himself the wrong question (e.g. "do I agree with the action proposed by the authority?") and therefore misdirected himself in law. On that assumption, the

B Secretary of State's directions to the authority on June 11, 1976, would have to be overruled on the grounds of their illegality. Assuming however that he asked himself the right questions and decided that no reasonable authority would act as this authority now proposed to act, I cannot discern any valid ground upon which such a decision could be justified. The grounds

C upon which the Secretary of State purported to act under section 68 are set out in the letter of June 11; there were five of them. Four of these, which I need not itemise, appeared to the Divisional Court and to the Court of Appeal to have no substance in them. They were not pressed in this House and I do not consider that they lend any support to the Secretary of State's case. Nor am I any more impressed by the fifth ground upon which the Secretary of State succeeded in the Divisional Court and upon which he

D chiefly relied thereafter. It was only hinted at in the letter of June 11. This was that no reasonable authority in the position of the Tameside authority could have concluded that it had time between June 11 and September 1, 1976, to make a fair and efficient selection on merit of 240 pupils out of the 783 applicants for the 240 places which would be available in the grammar schools on September 1, 1976. The Divisional Court with considerable hesitation decided this question in favour of the Secretary

E of State only, I think, because of an uncontradicted affidavit by a former chief education officer of Gloucestershire filed at a late stage on July 2 stating that the whole process of selection normally takes a full term of 12 weeks to complete and therefore there was no chance of the test being completed before September 1.

F The authority's letter of June 7 had pointed out (paragraph 7) that pupils most suitable and likely to benefit from the type of education would be selected by a combination of reports, records and interviews instead of by an 11-plus examination. The evidence of a number of distinguished educationalists, produced without objection before the Court of Appeal, showed that this alternative method of selection had been widely used since the 1960s in areas as far separated as Lancashire Division 24, close to Tameside, and the London Borough of Barnet and that it had proved

G entirely satisfactory. With a selection panel of 20 teachers (10 couples) the whole operation of making a fair and accurate selection of 240 from 783 applications could have been comfortably carried out in Tameside within one week. In the London Borough of Barnet for the period 1965 to 1970 eight panels—each consisting of three teachers—yearly completed a fair selection of 850 pupils from about 3,000 in 10 working days.

H It seems incredible to me that these facts were unknown to the Department of Education and not available to the Secretary of State on June 11, 1976. It follows that if the Secretary of State before making his decision had asked himself the right question—"could any reasonable authority in

the position of Tameside have reasonably come to the conclusion that a fair selection could have been made to fill the 240 vacancies before September 1, 1976? ”—the answer could only have been “yes.” It may be that some authorities might have preferred the views of the expert witness upon whose evidence the Secretary of State relied in the Divisional Court to the views of the witnesses upon whose evidence the Tameside authority relied in the Court of Appeal. I find it impossible however to accept that any reasonable man could have been satisfied that no reasonable authority on the evidence could take the view that a satisfactory selection of candidates for the 240 places in the grammar schools could have been made between June 11 and September 1, 1976. Therefore either the Secretary of State must have erred in law by misconstruing section 68 and failing to ask himself the right question or he asked himself that question and answered it “no” without any valid ground for doing so.

It has been argued that before June 11, 1976, the majority of the teachers had refused to cooperate with the authority and that without their cooperation no selection would have been possible. No doubt they were hoping and expecting that the Secretary of State would give directions to the authority to carry out the 1975 proposals—a hope and expectation which must have been fortified by the warning or threat at the end of the letter of May 26 which the Secretary of State caused to be sent to the authority. Even so, 20 of them were prepared to form a panel to carry out the selection under the chairmanship of Mr. Beard, the very experienced former headmaster of a junior county school who had served on the selection panel for Lancashire Division 24 since this type of selection began in the early 1960s.

The facts deposed to in the affidavits of Mr. Beard and Mr. Potts (also a most experienced educationalist) make it plain that in their view the panel of 20 would have plenty of time even between August 2 (the date when your Lordships’ decision was announced) and September 1 to make a reasonably accurate selection from amongst the 783 applicants to fill the 240 vacancies in the grammar schools for the beginning of the next term. On June 11 they would have had ample time to make the most meticulous selection well before September 1.

Towards the end of May 1976 the 49 head teachers of the primary schools were asked by the authority to make their records, reports and written personal assessments of the 783 candidates for the 240 vacancies in the grammar schools available to the selection panel appointed by the authority. Only three agreed to do so. The remainder refused on the ground that their trade unions had advised them not to comply with the authority’s request. As I have already said, it is, in my view, a fair inference that the trade unions and many of the teachers were hoping and expecting that the Secretary of State would soon be giving the directions threatened in the letter of May 26 and which he in fact gave on June 11. On the other hand, any reasonable authority could reasonably expect, for the reasons stated in their letter of July 7, that the Secretary of State would decide not to give the directions which he did in fact give on June 11 or that, if he gave them, they would be held by the courts to be unlawful either on the ground that the Secretary of State in giving such directions had

A misdirected himself in law or that there was no legal ground to support them.

If on June 11 the Secretary of State had, as in my view he should have done, decided, and announced his decision, against giving any directions under section 68 and had allowed the authority's plan for the grammar schools to go forward, I believe that the teachers would have changed the attitude which they had taken up when they were expecting a ministerial embargo. Like Geoffrey Lane L.J. (ante p. 1035E-F), I cannot believe that once they knew that there was to be no ministerial embargo they would have continued to be non-cooperative in an attempt to thwart the authority in carrying out the policy of preserving the grammar schools in Tameside in accordance with the mandate which the authority had been given by the inhabitants of Tameside in the recent democratically held election. I believe that the vast majority of the teachers including all the head teachers in the primary schools would have done their duty and loyally cooperated with the authority which employed them.

The teachers no more than the executive (as I am sure they both recognise) can lawfully impose a policy relating to grammar schools, namely, that of abolishing them, merely because they do not approve of the policy of preserving them which the authority has lawfully adopted.

D I am convinced that there are no valid grounds for holding that the authority acted or were proposing to act unreasonably within the meaning of section 68. The directions given by the Secretary of State on June 11, 1976, were in my view unlawful. Accordingly, there is no necessity for me to express any opinion on the point taken by Mr. Anthony Lloyd under section 99 of the Education Act 1944.

E My Lords, I would dismiss the appeal.

LORD RUSSELL OF KILLOWEN. My Lords, I would remark upon some matters introductory to consideration of this appeal.

1. In my judicial capacity I must have no preference for a particular system of state supported education, whether mixed or comprehensive. In my personal capacity I have in fact no preference for any particular system, and this fact, while it may disable me from arriving at a conclusion that a particular view is wrong, may assist me in arriving at a correct conclusion as to whether a proposed course of action, motivated in whole or part by a particular view, is "unreasonable." In this latter respect I may indeed, because of my very neutrality, or if you please indifference, be in a position of relative advantage in concluding what may be considered unreasonable, while at the same time (though not paradoxically) being at a disadvantage in concluding which system is the better.

2. There was no obligation whatever in law on the local authority to implement its 1975 proposals, albeit they had been approved by the Secretary of State. Prima facie the local authority was within its rights and duties to change its mind and continue the existing mixed system.

H 3: In concluding whether the local authority was truly proposing to act unreasonably, the Secretary of State was in a position of considerable disadvantage. His duty in approaching the question was to adopt a

posture of complete neutrality between the educational merits of the comprehensive and the mixed systems: but he was committed in view to the former—I speak here not at all of party politics—and his departmental advisers had deliberated and worked for many months before approving the detailed 1975 proposals which the local authority now proposed at least to defer. It is in that context that I have ventured to refer to a possible advantage, in reaching a true conclusion on the crucial question, of my own neutrality or indifference.

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I leave those general considerations to address myself to the particular question in the case: whether there were grounds upon which the Secretary of State on June 11 could properly be satisfied that the local authority was then proposing to act unreasonably. It is, my Lords, no doubt a most serious matter for the judiciary to upset a conclusion of a minister with overall responsibility in a field of such importance to the national welfare as education, when it is not suggested either that the conclusion was motivated by partly political considerations or that it involved bad faith. On the other hand it is not my understanding that the mere expression by the Secretary of State of his satisfaction that particular proposals are unreasonable deprives the court of the ability to decide that there were no sufficient grounds for that satisfaction and that consequently the Secretary of State must in some respect have misdirected himself in applying his mind to the problem. Further I would observe that it is equally a most serious matter for the organisation of education in an area, which is, under the statute (with exceptions), the province of the local authority, to be taken out of its hands by the central government on the ground that the former is proposing to act “unreasonably”—which I take to mean that the course that is proposed is one that in the circumstances no reasonable local authority, with the interests at heart of the education of the young in its area, would take.

The details of the documents leading up to the letter written for the Secretary of State on June 11, 1976, have been set out by my noble and learned friends, and I do not repeat them; nor do I rehearse in any detail the facts of the case, for that would involve tedious repetition. The letter from the newly constituted local authority, whose new constitution was based at least in part upon acceptance by the electorate of proposals to defer implementation of the 1975 scheme, cannot be said to bear the stamp of irrationality or unreasonableness. It stated in sober fashion the objections to implementation of the 1975 proposals in September 1976. It recognised the problems involved in applying the brake to those proposals which of course had acquired a degree of momentum. It arrived at a considered view on balance of disadvantages. From a neutral standpoint on systems of state education I find it quite impossible to conclude that this attitude was one of an unreasonable education authority. I have no doubt that the Secretary of State was satisfied that the local authority was *wrong* to put the brake on the 1975 proposals. Equally I have no doubt that the reconstituted local authority was satisfied that the previously constituted local authority and the Secretary of State were *wrong* to propose and approve the 1975 proposals for initial implementation in September 1976. But to my mind it is quite unacceptable in either case to

- A proceed from "wrong" to "unreasonable." If by statute comprehensive education is introduced throughout there will no doubt be many who will consider that it is wrong so to do: but it could not be objectively unreasonable, whatever the disruptions resulting from introduction into selected entry schools of non-selected entry primary school children, or the move of 16-year-old children to a different school, or any other change. Equally I apprehend that if in an area a fully comprehensive
- B system of education is established it would not be right to describe a proposed reversion to a mixed system as "unreasonable" as opposed to a view that it would be "wrong." History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. In summary, my Lords, "unreasonably" is a very strong word indeed, the strength of which
- C may easily fail to be recognised and which in my opinion has not been recognised in the instant case by the Secretary of State.

I have, my Lords, referred to the reasonable letter from the local authority. I now refer in slightly more detail to the letter of decision of June 11, 1976. As indicating grounds of unreasonableness on the part of the local authority it appears to me to be unsatisfactory. It does not grapple with the arguments or contentions of the local authority supporting its

D attitude: it refers only in general terms to consideration of points made. It states that a change of plan at this stage (June 11) "... must ... give rise to considerable difficulties." It refers (as such difficulties) to a number of features, none of them very dogmatically stated, as follows.

- (i) Parents of children are presented with a dilemma: this must refer to parents whose child has been allotted (under the 1975 proposals) to a comprehensive based school but who (under the new proposal) would like
- E the child to be considered for one of the 240 places available under the 1976 proposals at the two now retained grammar schools which were to become sixth form schools: the dilemma is either to retain the allocation at a comprehensive or secondary modern or to try for one of the newly available grammar school places. The dilemma suggested is that the parent (who ex hypothesi would prefer a grammar school placing if possible)
- F would in pursuit of that aim risk an unthorough vetting for the vacancies. I do not find it easy to understand this so-called dilemma. Half a loaf is better than no bread for one who seeks bread.

- (ii) The system of selection for the 240 grammar school places is to be "improvised" (the precise form of which has not been settled), "carried out in circumstances and under a timetable which raise substantial doubts about its educational validity." Assuming that this is
- G a delicate reference ("circumstances") to the fact that at that date a substantial number of teachers for various reasons were refusing to cooperate in tests for the 240 grammar school places, I find it hard to believe that if the Secretary of State had held his hand on June 11 (when there was ample time for a full vetting for the 240 grammar school places) the relevant teachers, who are after all professionals dedicated to the interests of child
- H education, would have refused to do their best for the children under them. The Secretary of State certainly says nothing to the contrary.

(iii) The letter of June 11 referred next to paragraph 10 of the local authority's representations. That paragraph (ante, p. 1069B-c) has

recognised that adherence to the non-selective allocations of the 3,000-odd primary school leavers, already made under the 1975 proposals on the assumption that all the secondary schools were ultimately to become fully comprehensive, might result in some square pegs in round holes under the revised system: for example, a child unsuited to a grammar school might find itself at one of the three. But the paragraph showed that in the view of the local authority a flexible system of interchange in such cases could be operated after or during the first term and that "widespread transfers" would be unnecessary. The department's letter of June 11 stressed that this "might" involve "... an abnormally high proportion of pupils [needing] to be reallocated to different secondary schools . . ." What is meant by "abnormally high" except more than usual? This was recognised by the local authority in its letter. And, supposing it to be so, how high is abnormal and what is its contribution to "unreasonably"?

In the end in argument the whole matter of "unreasonableness" came down to the question of the reliability of selection procedures for 240 grammar school places in the time available out of some 800 parental applications. This had to be considered on June 11 by the Secretary of State. Could it then have been described (as it was *not* by the letter of June 11) as unreasonable on the part of the local authority to suppose that the teachers would do their best for the children in this regard? I cannot think so.

Accordingly, my Lords, I am of opinion that the Secretary of State in his letter of June 11 exceeded his powers and this appeal fails.

I would add this. The question whether the Secretary of State was justified in his conclusion that the proposals of the local authority were unreasonable falls to be decided at the date of his conclusion, June 11: that is common ground. I would not however subscribe to the view that facts subsequently brought forward as then existing can properly be relied upon as showing that the proposals were not unreasonable unless those facts are of such a character that they can be taken to have been within the knowledge of the department.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor; Oswald Hickson, Collier & Co.*

M. G.

APPENDIX 9 – 2

A Constabulary or to the general public interest. I am therefore of the opinion that they must be made available in this litigation.

H. L. (E.)

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Their Lordships accordingly voted that the order of the District Registrar be restored,

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“ that the defendant do produce for inspection at his solicitor’s office to the plaintiff and his advisers on reasonable notice the five documents. . . . ”

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Solicitors: *Field, Roscoe & Co. for Berkson & Berkson, Birkenhead; Markbys for Wayman-Hayles, Chester; Treasury Solicitor.*

F. C.

C

[HOUSE OF LORDS]

PADFIELD AND OTHERS APPELLANTS

C. A.

D

AND

MINISTER OF AGRICULTURE,

1966

July 6, 7,
8, 27

FISHERIES AND FOOD AND OTHERS . . . RESPONDENTS

LORD
DENNING
M.R.DIPLOCK and
RUSSELL L.JJ.

Agriculture—Agricultural marketing—Milk marketing scheme—Complaint to Minister—Duty of Minister—Reference to committee of investigation—Agricultural Marketing Act, 1958 (6 & 7 Eliz. 2, c. 47), s. 19 (3).

E

Crown—Minister, determination by—Whether subject to review by courts—Marketing scheme—Complaint—Reference to committee of investigation—Discretion of Minister—Limitation—Public interest—Agricultural Marketing Act, 1958, s. 19.

*H. L. (E.)

1967
July 18, 19,
20;
Dec. 18, 19,
20;
1968
Feb. 14

The Agricultural Marketing Act, 1958, contained (inter alia) provisions relating to the milk marketing scheme. By section 19:

“(3) A committee of investigation shall— . . . (b) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any . . . complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers’ committee. . . . (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated products, or is contrary to the interests of any persons affected by the scheme and is not in the public

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* *Present:* LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD PEARCE AND LORD UPJOHN.

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interest, the Minister, if he thinks fit to do so after considering the report—(a) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (b) may by order revoke the scheme; (c) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order. . . .”

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Under the scheme, producers had to sell their milk to the Milk Marketing Board, which fixed the different prices paid for it in each of the eleven regions into which England and Wales were divided. The differentials reflected the varying costs of transporting the milk from the producers to the consumers, but they had been fixed several years ago, since when transport costs had altered. The South-Eastern Region producers contended that the differential between it and the Far-Western Region should be altered in a way which would incidentally have affected other regions. Since the constitution of the board, which consisted largely of members elected by the individual regions, made it impossible for the South-Eastern producers to obtain a majority for their proposals, they asked the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation and when he refused applied to the court for an order of mandamus.

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Held, (Lord Morris of Borth-y-Gest dissenting) that the order should be made, directing the Minister to consider the complaint according to law.

Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act; this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere.

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Julius v. Bishop of Oxford (1880) 5 App.Cas. 214, H.L.(E.) considered.

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Decision of the Court of Appeal, post, p. 1003E; [1968] 2 W.L.R. 924, C.A. reversed.

APPEAL from the Court of Appeal (Diplock and Russell L.JJ., Lord Denning M.R. dissenting).

The Minister of Agriculture, Fisheries and Food and the Milk Marketing Board (the present respondents) appealed from an order of the Divisional Court of the Queen's Bench Division dated February 3, 1966, whereby the court made an order of mandamus ordering the Minister to consider an application to him by George Padfield, Geoffrey Loveys Brock and Henry Steven (the present appellants), to refer a complaint by them to the committee of

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A investigation under the Agricultural Marketing Act, 1958, "according to law and upon relevant considerations to the exclusion of irrelevant considerations." The Court of Appeal having allowed the appeal,¹ the present appellants appealed to the House of Lords.

B Since 1933 the Milk Marketing Scheme (Approval) Order, 1933 (S.R. & O. 1933, No. 789), as amended by the Milk Marketing Scheme (Amendment) Orders, 1936, 1937, 1939, 1950 and 1955, had been in operation in England and Wales. Thereunder producers were bound to sell their milk to the Milk Marketing Board, which periodically fixed the prices to be paid to the producers. England and Wales was divided into eleven regions. All the producers in each region received the same price but the price varied from region to region. One reason for this was that the cost to the board of transporting milk from the producers' farms to the centres of consumption was greater in some regions than in others. The lowest price was paid to producers in the Far-Western Region the highest to those in the South-Eastern Region. In the other nine regions the prices varied between the two. The present differentials were fixed several years ago when transport costs were much lower. For about ten years the South-Eastern producers had been unsuccessfully urging the board to increase the differentials. The differential between the South-East and the Far-West was 1.19d. per gallon. South-Eastern producers contended that it should be 3½d. per gallon. Since the total sum available to the board to pay for milk bought in all regions was fixed each year, giving effect to the contention of the South-Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far-West and several other regions would get less.

F The board is composed of 12 members from the regions (two from the North-Western Region and one from each of the others), three members elected by all the producers and three appointed by the Minister. The board acts by a majority of its members. The experience of the past 10 years was said to show that the South-Eastern producers could not hope to get a majority on the board for their proposals. With a view to getting the Minister of Agriculture, Fisheries and Food to take action under section 19 of the Agricultural Marketing Act, 1958, the present appellants, who were office bearers of the South-Eastern regional committee, met officials of the Ministry on April 30, 1967.

G On May 1, 1964, John Henry Kirk, an Under Secretary at the Ministry, wrote to the appellant Padfield the following letter:

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¹ Post, p. 1003E; [1968] 2 W.L.R. 924.

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"My colleague Mr. Jones-Parry and I had the opportunity of discussing with you a day or two ago a matter which you first raised with the Ministry at the end of January, namely, what means the Ministry could suggest for investigating and remedying the grievance felt by your committee concerning the regional price of milk in the south-east.

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"2. We explained that, as it seemed to us, the only procedure available would be for a group of producers in the south-east to formulate a complaint within the terms of section 19 of the Agricultural Marketing Act 1958, and request the Minister to refer this to the committee of investigation. We made it clear, however, that the Minister is not bound so to refer any complaint and has discretion to decide whether to do so.

B

"3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable.

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"4. The reasons which led us to this conclusion were explained to you as follows: (a) The guarantee given to milk producers under the Agriculture Acts is a guarantee given to the board on behalf of all producers. The Minister owes no duty to producers in any particular region, and this is a principle that would be seriously called into question by the making of an Order concerned with a regional price; (b) Such action would also bring into question the status of the Milk Marketing Scheme as an instrument for the self-government of the industry and such doubt would also, by extension, affect the other Marketing Schemes as well; and (c) It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales.

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"5. I wish to point out that the statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

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On June 18, 1964, the solicitors of the Milk Marketing Board wrote to the solicitors of the present appellants the following letter:

"While your clients contend that they ought to have a bigger proportion of the available money, there are other producers elsewhere who contend that your clients ought to

- A have a smaller proportion. The proportions actually determined by the board are the result of collective decisions of the board and do not necessarily represent the view of any one producer or of the producers in any one county or region. . . . The board have the duty of determining prices and they have done so to the best of their ability. They consider that as they have acted within their powers and in good faith, an arbitrator appointed under paragraph 93 of the scheme has no power to substitute his view (if it differs from the board's) of what those prices should be. . . . Your clients cannot receive more unless some others receive less, and what is really involved is the whole determination of prices throughout the country. Paragraph 93 of the scheme is not intended to transfer the board's duty of determining prices to an arbitrator at the instance of a particular group of producers."
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A letter dated January 4, 1965, from the solicitors of the present appellants to the Minister of Agriculture, Fisheries and Food said:

- D "3. The complaint is of certain acts and/or omissions in prescribing (under paragraph 64 of the Scheme) the terms on which and the price at which milk shall be sold to the board, in that the board should, but do not, take fully into account variations as between producers in the costs of bringing their milk to a liquid market whether such costs are incurred or not.

- E "4. These acts and/or omissions of the board (a) are contrary to the proper and reasonable interests of the producers in the South-Eastern region and of other producers near large liquid markets, all of whom are persons affected by the scheme, and (b) are not in the public interest.

- F "5. At present producers' net prices show a range of 1·19d. per gallon between regions while the true marketing costs in 1961/2 had a range of 3·37d. per gallon between regions, the South-Eastern region having the lowest costs. Under the present arrangements the range of net prices is fixed and does not vary from year to year, whereas the trend is for the marketing costs to widen: the complainants calculate that the 1963/4 range was 3·66d. per gallon, the costs of the South-Eastern region still being the lowest. As between individual producers the range of true marketing costs is even greater.

"6. As to (a) in paragraph 4 above.

- G "It is contrary to the reasonable and proper interests of the producers referred to in paragraph 4 above that (in addition to the other contributions they properly make under the Scheme) they should make a contribution to the marketing costs of reaching the liquid markets from the more distant parts of the country which are properly attributable to producers in those more distant parts and which should be borne by such producers.

"7. As to (b) in paragraph 4 above.

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“(i) The cross-subsidy set out above has caused or contributed to and will cause or contribute to an unreasonable alteration in the balance of production, reducing growth in the nearer areas and increasing it in the more distant. This has tended and will tend to increase the total marketing costs to the public detriment. (ii) It is not in the public interest to continue a system of pricing which unduly favours one set of producers as against others.”

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In reply the private secretary to the Minister wrote on March 23, 1965, the following letter:

“The Minister has asked me to reply to your letter of January 4 in which you made a complaint on behalf of Messrs. G. Padfield, G. L. Brock and H. Steven, against the Milk Marketing Board, and requested that the complaint should be referred to the committee of investigation. The Minister’s main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients’ request that this complaint be referred to the committee of investigation under section 19 of the Act.”

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In reply to a further letter the following letter from the Ministry dated May 3, 1965, and signed by A. L. Irving stated:

“I am directed to reply to your letter of April 9 addressed to the Minister’s private secretary. You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the Milk Marketing Scheme, in which all registered producers participate and which governs the operations of the board.”

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On June 18, 1965, the present appellants applied by motion for the leave of a Divisional Court of the Queen’s Bench Division to apply for an order of mandamus commanding the Minister (1) to refer the complaint to the committee of investigation or (2) to deal effectively with the complaint on relevant considerations only to

A the exclusion of irrelevant considerations. In an affirmation dated January 19, 1966, the Minister stated as follows:

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“3. In considering the applicants’ application I read among other papers the letter signed by Mr. J. H. Kirk and dated May 1, 1964, . . .

B “4. Before reaching my decision not to refer the applicants’ complaint to the committee of investigation I considered all the matters put before me on behalf of the applicants in support of their application.

C “5. I came to my decision for the reasons indicated in the letters dated March 23, 1965, and May 3, 1965, . . . namely, that I considered that the issue raised by the applicants’ complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation.”

The Minister and the board appealed from the order of the Divisional Court of February 3, 1966.

D *Sir Dingle Foot, Q.C., S.-G. and Peter Langdon-Davies* for the Minister of Agriculture, Fisheries and Food.

David Kemp for the Milk Marketing Board.

D. A. Grant Q.C. and Alistair Dawson for the applicants, George Padfield, Geoffrey Lowey, Brock and Henry Steven.

July 27, 1966. The following judgments were read.

E LORD DENNING M.R. We are here concerned with the marketing of milk. It is regulated by the Milk Marketing Scheme and administered by the Milk Marketing Board. The dairy farmers of England and Wales sell their milk to the Milk Marketing Board. The lorries of the board pick up the churns of milk at the farm gate and carry it to depots. The price is fixed by the board for milk delivered at the farm gate. In order to fix the price, England and Wales are divided into eleven regions. The price varies from region to region. But all the farmers in any one region are paid the same price per gallon at the farm gate.

F The dairy farmers in the South-Eastern region are paid a higher price for their milk than the dairy farmers in the Far-Western region. The reason is because they are much nearer to the great population of London. If they were free of control, they would be selling their milk to London at a price delivered in London, and would have to bear their own costs of transport. The costs of the Sussex farmers in transporting their milk to the London market would be much less than the costs of the Cornish farmers,

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and their net receipts would be correspondingly higher. The board recognise this by paying a "differential" to the South-Eastern farmers to compensate them.

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The South-Eastern farmers, nearly 5,000 of them, complain that the existing "differential" is too low. It was fixed long ago by the Minister during the war under the regulations then in force. It was then fixed at 1·19d. per gallon, and has remained the same ever since. The value of money has altered and costs have increased. The actual difference in costs is 3½d. per gallon. The South-Eastern farmers claim that the differential should be increased to recognise this increase. They pray in aid the report of two committees. First, the Cutforth Committee, which was set up by the Minister, and reported in 1936:

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"It seems to us essential as a governing principle that transport charges should be allocated among producers in such a way as to secure differentials in net returns which are related to actual proximity to liquid milk consuming centres."

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Second, the Davis Committee, which was set up by the board itself and reported in 1963: "We recommend that under present conditions the total range of prices at the farm gate should be 2·4d. per gallon as against 1·19d. as at present." The Davis Committee divided the country into five zones, stepping up the differentials in five stages by 0·6d. per gallon. For instance, Cornwall and Devon should get the basic price; Somerset 0·6d. more; Wiltshire and Dorset 1·2d. more; Hampshire and Berkshire 1·8d. more; Kent and Sussex and the Home Counties 2·4d. more per gallon than the basic price.

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In view of these favourable reports, the South-Eastern dairy farmers have pressed the Milk Marketing Board to increase the prices payable to them. But the Milk Marketing Board have refused. All the moneys received for milk go into one pool. If the South-Eastern farmers got more, the Far-Western farmers would get less. An increase in differential would benefit the South-Eastern farmers and some of the nearby regions, but would harm the Far-Western and other remote regions. Under the Milk Marketing Scheme, the board consists of 17 or 18 members, 12 being regional members, three being special members elected by all producers, and two or three appointed by the Minister. It looks as if those pressing for an increase in differential can always be out-voted by those who desire no change.

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Seeing that they could not persuade the board to make a change in the differential, the South-Eastern farmers complained to the

- A** Minister under section 19 (3) of the Agricultural Marketing Act, 1958. Under that section the Minister has power to direct that a complaint be considered by the committee of investigation. The committee of investigation is a standing statutory committee under a legal chairman, which is set up especially to consider complaints affecting the milk industry. The Minister refused to refer the complaint to the committee. The South-Eastern farmers now come to the court complaining of the conduct of the Minister. They say that in refusing he took extraneous matters into consideration which he ought not to have done.
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The key words of section 19 (3) are that

- C** "A committee of investigation shall . . . be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any complaint made to the Minister as to the operation of any scheme."

- If the Minister does refer a matter to the committee, its task is shown by section 19 (6). It has to consider whether any provision of the Milk Marketing Scheme, or any act or omission of the Milk Marketing Board, is "contrary to the interests of any persons affected by the scheme and is not in the public interest." The rest of the section and the regulations under it show that once a matter is referred to a committee of investigation, it is to be investigated in a fair and impartial manner. The committee can hear witnesses. It can call for accounts and information from the board. It can hear other witnesses not called by the party. It must hear not only the complaint but also the board. The committee has then to make its report: and its conclusions have to be published. If the committee report that the board ought to take steps to remedy the matters of complaint, the board can themselves take those steps: and if they do not do so, the Minister can order them to rectify the matter.
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- Applying these provisions to the present case, the South-Eastern dairy farmers are clearly "persons affected by the scheme." They have made a complaint to the Minister "as to the operation of the scheme." The Minister therefore has power to refer it to a committee of investigation. Suppose he did so and that the committee reported that the present price differential is contrary to the interests of the South-Eastern dairy farmers, and is not in the public interest. The report would no doubt be considered by the board. If the board did not take steps to remedy the position, the Minister could step in and order them to rectify it.
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It is plain to me that by these provisions Parliament has provided machinery by which complaints of farmers can be investigated by a committee which is independent of the board and by which those complaints, if justified, can be remedied. No other machinery is provided. This case raises the important question: How far can the Minister reject the complaint out of hand? Is the Minister at liberty in his unfettered discretion to withhold the matter from the committee of investigation and thus refuse the farmers a hearing by the committee? And by refusing a hearing, refuse a remedy? Mr. Kemp, who appeared for the Milk Marketing Board, contended that the Minister need not consider the complaint at all. He could throw it into the waste paper-basket without looking at it. The Solicitor-General did not support this argument. It is clearly untenable. The Minister is under a duty to consider every complaint so as to see whether it should be referred to the committee of investigation. I can well see that he may quite properly reject some of the complaints without more ado. They may be frivolous or wrong-headed: or they may be repetitive of old complaints already disposed of. But there are others which he cannot properly reject. In my opinion every genuine complaint which is worthy of investigation by the committee of investigation should be referred to that committee. The Minister is not at liberty to refuse it on grounds which are arbitrary or capricious. Nor because he has a personal antipathy to the complainant or does not like his political views. Nor on any other irrelevant ground.

It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason.

But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives bad reasons? I do not agree. This is the only remedy available to a person aggrieved. Save, of course, for questions in the House which Parliament itself did not consider suitable. Else why did it set up a committee of investigation? If the Minister is to deny the com-

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A plainant a hearing—and a remedy—he should at least have good reasons for his refusal: and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that the Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him—or, conversely, has failed, or must have failed, to take into account considerations which ought to have influenced him—the court has power to interfere. It can issue a mandamus to compel him to consider the complaint properly. That was laid down by two of my predecessors in this place: Lord Esher M.R. in *Reg. v. Vestry of St. Pancras*,¹ said of a body who were entrusted with a discretion:

C “... they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.”

D Lord Greene M.R., in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*² said³:

E “... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.”

That passage has been repeatedly cited with approval in the House of Lords: see *Smith v. East Elloe Rural District Council*,⁴ by Lord Reid⁵; *Fawcett Properties Ltd. v. Buckingham County Council*.⁶

F Applying these principles to this case, the Lord Chief Justice held that this was a case where the courts should interfere. He said that the complaint by the South-Eastern farmers was

“a bona fide complaint and one which would be likely in the light of past history to be found to be justified and further that the conduct of the board in this regard would be likely to be held to be one which is not in the public interest.”

G The Solicitor-General criticised that passage as not being

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¹ (1890) 24 Q.B.D. 371, 375–376;
6 T.L.R. 175, C.A.

² [1948] 1 K.B. 223; 63 T.L.R.
623; [1947] 2 All E.R. 680, C.A.

³ [1948] 1 K.B. 223, 229.

⁴ [1956] A.C. 736; [1956] 2
W.L.R. 888; [1956] 1 All E.R. 855,
H.L.(E.).

⁵ [1956] A.C. 736, 762.

⁶ [1961] A.C. 636, 660; [1960] 3
W.L.R. 831; [1960] 3 All E.R. 503,
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warranted by the evidence. It may be that the Lord Chief Justice put it a little too high in using the word "likely." But the evidence at least discloses this. It shows that this complaint by the South-Eastern farmers was a genuine complaint which was worthy of investigation by the committee of investigation. It has the support of a committee set up by the board itself. And yet the Minister has not referred it to the statutory committee. Why not? The reason was disclosed at a meeting which the South-Eastern farmers had with the officials of the Ministry on April 28, 1964. The officials said that, if a complaint was made, the Minister would refuse to refer it to the committee of investigation. They set out their reasons in a letter of May 1, 1964, which had been carefully prepared in advance:

"In considering how to exercise his discretion, the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred, and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration . . . that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable. . . . The statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

The one reason disclosed by that letter is that, if the committee were to uphold the complaint, the Minister would be expected to give effect to the committee's recommendations, and that he was unwilling to do. By whom would he be expected? I presume he means by Parliament or, at any rate, by public opinion. See what this comes to! The Minister does not want an inquiry lest Parliament, or the public, would expect him to act on the report. It means this: Even though the complaint was justified on the merits, and even though the committee recommended that it be rectified, the Minister was not prepared to rectify it.

I do not think that was a proper approach to the complaint. The Minister ought not to make up his mind in advance. He could not tell what evidence the committee might have before them, or what reasons might lead to their recommendations. He ought at least to be prepared to consider their report with an open mind. He ought not to shut down an investigation simply because he might be expected to act on the recommendations.

A Following on that letter, the South-Eastern farmers on January 4, 1965, made an official complaint to the Minister. On March 23, 1965, the Minister refused to refer it to the committee of investigation. He said:

B "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is, of course, one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event, the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself."

C Following on that reply, the complainants' solicitor pressed the Minister further. In particular, by a letter of November 4, 1965, he asked the Minister if he had excluded from his mind the considerations set out in the 1964 letter. The Minister never gave a direct answer to that question. He never said he had excluded those considerations from his mind. All he did was to make an affidavit on January 19, 1966, in which he said: "I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

E In view of the Minister's failure to reply to the specific question asked by the complainant's solicitor, I am prepared to infer, and do infer, that he was influenced by the considerations set out in the letter of May 1, 1964, as well as those in his later letter and affidavit.

F Taking the reasons which the Minister has given for his refusal, I take first the consideration in the letter of May 1, 1964, that if the complaint were upheld, he would be expected to make a statutory order. That was a bad reason which ought not to have influenced him. Second, I take the consideration that the complaint raised wide issues as a ground for refusing an investigation. That was a bad reason. The width of the issue would be a ground for holding an investigation, not for refusing it. The committee could hear the views of the producers in other regions. Third, I take the Minister's statement that it was a matter for the decision of the Milk Marketing Board, and not for him. I think he was thereby mistaking his powers. He has the ultimate word on prices. If the board regulates prices in a way which is contrary

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20 (2). Likewise, when a committee of investigation reports that the board is fixing prices in a way which is contrary to the interests of farmers, and not in the public interest, the Minister has power to make an order to rectify this position: see section 19 (6) (c).

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19 (b) (c).

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In my opinion, therefore, the Minister has been influenced by reasons which ought not to have weighed with him. He has, therefore, not properly exercised his discretion. An order of mandamus should go to direct him to exercise it properly. I agree with the Lord Chief Justice and would dismiss this appeal.

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DIPLOCK L.J. (read by Russell L.J.): The Solicitor-General concedes that the words in section 19 (3) of the Act: "if the Minister in any case so directs" impose upon the Minister a duty to consider any complaint made to him as to the operation of any scheme, but contends that it leaves him with complete discretion to decide whether he will refer the complaint to a committee of investigation for consideration and report.

The concession as to the Minister's duty to consider a complaint was, in my view, rightly made. Counsel for the Milk Marketing Board, however, whose locus standi in the matter has not been made clear to me, argues that the Minister is entitled to put any complaint into his wastepaper basket unread for he is under no duty to consider it. Consequently the High Court has no jurisdiction to order him by mandamus to do so. The imposition of a duty by a statute does not require any particular form of words. It is perhaps unusual for a duty to be imposed in respect of an act mentioned in a mere protatic phrase such as that under consideration in the present statute. But even such a phrase can do so if the subject matter with which it deals compels the conclusion that Parliament must have intended to impose a duty in respect of the doing of that act. Here the subject matter is a complaint as to the operation of a scheme for which subsection (3) and the subsequent subsections are intended to provide a remedy. The obtaining of a direction by the Minister is a condition precedent to the complainant's access to that remedy. In my view it is a necessary implication that the Minister is under a duty to make up his mind "in any case" whether the complaint is such that the complainant ought to have access to that remedy and is consequently under a duty to consider the complaint for that purpose.

- A** But it is important to bear in mind first that the sole purpose of his consideration is to decide whether the complaint is one which he thinks ought to be dealt with by the procedure of a committee of investigation under the section, and secondly that it is to his discretion and not that of anyone else that Parliament has entrusted the decision whether or not any particular complaint should be so dealt with. His decision is administrative, not judicial, and in reaching it he may lawfully take into consideration its possible effects on general policy and other people. He need not confine himself to the merits of the particular case made by the complainant. Indeed, save in so far as may be necessary to satisfy himself that there is something in the case to be investigated, he is not at this stage concerned with the merits of the case at all. Those will be for the committee of investigation to consider if he decides to refer the case to them.
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- The Minister need give no reasons for his refusal to refer a complaint for consideration by a committee of investigation. One would expect him as a matter of courtesy to give some reason for his decision whenever, as in the present case, a bona fide complaint came from a responsible source. But, since he need give none, he need not give all—a matter to be borne steadfastly in mind if his decision is attacked in the High Court for failing to have regard to some relevant matter. For the High Court would only discourage such courtesy and so would stultify its own function as guardian of the rule of law in the administrative field if it were to treat the reasons given by the Minister for his decision as if they were the written award of an arbitrator to be meticulously examined for some mistake or omission which might lend colour to a suggestion that he had erred in law. Again, since the decision is administrative, the language used for communicating the Minister's reason for it is not lawyer's jargon but Civil Servicese. And we must so read it, asking ourselves what would ordinary laymen, in this case dairy farmers, understand to be the reasons why their request had been turned down.
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- And so it is in this spirit that I turn to the reasons which were given by the Minister in the present case. The grounds upon which the High Court is justified in interfering by prerogative order or by declaration in an administrative decision are now well settled. I do not find it necessary to refer to any other authority than that of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*⁷ which has already been cited by the Master of the
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⁷ [1948] 1 K.B. 223, 228.

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⁸ [1910] 2 K.B. 165, C.A.

A board, undermine its authority and put the Minister himself under pressure to exercise control over a matter which he thinks is best left to the board.

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In his leading judgment in the Divisional Court, the Lord Chief Justice has dissected the reasons given in the letters into three. In the reverse order to that in which they are dealt with in his judgment, they are: (a) that the question of regional price structure raised by the complaint was one to be dealt with by the marketing board itself; (b) that the complaint raised wide issues going beyond the immediate concern of the complainants, and (c) that the Minister himself would not take action on the report of the committee of investigation if it were adverse to the board.

As regards (a), a stress is laid by the Lord Chief Justice and by Sachs J. on the fact that the South-Eastern region, whom the complainants represent, have only a minority representation on the board. Like any other region, they can be outvoted upon matters where their interests conflict with those of the majority. That is how "normal democratic machinery" works. Whether it is good machinery or not, it is one which Parliament has approved as suitable for the nation as well as for marketing boards, and, with great respect, I cannot accept that the Minister, by referring to the operations of the board as being governed by the normal democratic machinery, was overlooking the fact that the complainants had only a minority representation on the board and minorities can be outvoted.

As regards (b), the Divisional Court have inferred, from the Minister's reference to the complaint as raising wide issues which affect the interests of other regions and the regional price structure as a whole, that he had misconstrued the Act in that he must have thought that the Act prohibited the reference to a committee of investigation of complaints which raised wide issues and affected other persons, and likewise prohibited him from making statutory orders about the regional price structure. Again, and with respect, I can see no good ground for these inferences. It is one thing to think that you have no power to refer a complaint because it raises wide issues and affects other persons; it is another thing to regard that as one reason why it may be impolitic to refer a particular complaint. It is one thing to think that you have no power to make statutory orders about regional prices; it is another to think it impolitic to do so. The former are mistakes of law; the latter are decisions of policy. The letter of May 1, 1964, makes it clear that the Minister, as one would expect, knew quite well

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that he had the necessary powers but that as a matter of policy he did not intend to exercise them in respect of the particular complaint of the South-Eastern region. And policy is for him, not for the court.

It is reason (c) that has given me most pause. The Divisional Court pointed out that where a complaint is made about an act or omission of the board, section 19 confers upon the Minister two discretions, first, a discretion whether or not to refer the complaint to a committee of investigation and, secondly, but only if the committee report that the act or omission is contrary to the interests of any persons affected by the scheme and not in the public interest, a discretion to order the board to take such steps to rectify the matter as may be specified in the order. As the letter of May 1, 1964, shows, the Minister, in deciding how to exercise his first discretion whether to refer the complaint to a committee of investigation, took into account the fact that he would be unwilling to exercise his second discretion by making an order on the board if the occasion for the exercise of that discretion should arise as a result of the committee's report. In so doing the Divisional Court held that he erred in law because: "The exercise of the first discretion . . . is . . . wholly independent of what view the Minister may take if and when he comes to exercise the second discretion." This seems to me to be applying judicial concepts to administrative decisions. Such decisions must take account of consequences remote as well as immediate, of risks as well as certainties. The Minister is certainly entitled and, as I think, ought, to ask himself: "If I refer this complaint to a committee of investigation, what may that lead to?" One possibility is that it will lead to a report upholding the complaint and critical of the board's action in a sphere in which the Minister thinks it should be left to make its own decisions with which he should not interfere. And if he does not intend in any event to interfere, that is, to exercise his second discretion by making an order on the board, this is, in my view, a relevant consideration for him to take into account when deciding whether or not to refer the complaint to a committee of investigation at all.

What has given me most concern is the phrase in the letter of May 1, 1964: "... if a complaint were so referred and the committee were to uphold it, he [the Minister] in turn would be expected to make a statutory order to give effect to the committee's recommendations." If this really meant expected by Parliament, I think

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A it would disclose a basic mistake of constitutional law, for it would avow an attempt to elude Parliamentary control of policy. But the phrase does not identify the contemplated holders of the expectations. It may have been intended to refer to the complainants, the opposition in Parliament or the press, and it would not be right to put the worst construction on it.

B It follows that I do not think that any of the reasons which have been advanced would justify this court in ordering the Minister to reconsider the complaint. It has not, in my view, been shown either that he did not exercise his discretion, or that in doing so he misconstrued his powers or duties under the Act, or that he took into his consideration any irrelevant matters or omitted to consider any relevant matters. It seems to me that the unexpressed major premise of the Divisional Court's judgment is that the Act confers upon persons affected by a marketing scheme a right to have any bona fide complaint as to the operation of the scheme considered by a committee of investigation. But this the Act does not do. The only right is to have referred to the committee such complaints as the Minister in his discretion thinks should be so referred. He did not think that this one should, and, since it has not been shown that in so thinking he erred in law, there is an end of the matter.

E For my part I would allow this appeal.

F RUSSELL L.J. I had prepared in outline a judgment arriving at the same conclusion as that of Diplock L.J. and for the same reasons. Ordinarily, since we differ from the Master of the Rolls and the Divisional Court, I would deliver a separate judgment; but I do not think I would express my opinions on this case better or more cogently than has Diplock L.J., and therefore content myself with agreeing that the appeal should be allowed.

G *Appeal allowed with costs in the
Court of Appeal and in the
Divisional Court.
Leave to appeal.*

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Solicitors: Solicitor, Ministry of Agriculture, Fisheries and Food; Ellis & Fairbairn; Biddle, Thorne, Welsford & Barnes.

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The applicants appealed.

The hearing of the appeal before the Appellate Committee proceeded on July 18, 19 and 20, 1967. On the last day it was adjourned to a date to be fixed to enable the appellants to raise in addition to the questions set out in their printed case the following question for decision in this appeal:

“Whether on the true construction of section 19 of the Agricultural Marketing Act, 1958, the first respondent [the Minister] was under a duty to refer the appellants’ complaint dated January 4, 1965, to the committee of investigation appointed by the Minister under that section.”

Supplemental cases were filed on behalf of the appellants and the respondent Minister and the hearing of the appeal proceeded on December 18, 19 and 20, 1967.

T. M. Eastham Q.C. and *Alistair Dawson* for the appellants. Three questions arise here: (1) Was the Minister bound to refer the complaint to the committee of investigation under section 19 (3) of the Agricultural Marketing Act, 1958? (2) Can the court intervene to control the exercise by the Minister of the power conferred on him by the statute? (3) Should the court intervene in the present case?

The appellants say here that the acts or omissions of the board were contrary to the interests of persons affected by the Milk Marketing Scheme within section 19 (6) of the Act.

The words “if the Minister in any case so directs” in section 19 (3) (b) in relation to the reference of a complaint to the committee of investigation are admittedly permissive only and, if section 19 is to be construed as imposing a duty on the Minister, that duty must be derived aliunde. In some cases a duty exists to exercise a power, as distinguished from a complete discretion. Here a duty can be spelt out of the Act.

In *Julius v. Bishop of Oxford*¹ Lord Selborne said in relation to the words “it shall be lawful” that their meaning is the same whether or not there is a duty to use the power and that they never in themselves confer an obligation. Lord Cairns L.C.² laid down the tests to determine whether discretionary words imposed such a duty, so that the enabling words are compulsory: (1) The power has to be deposited with a public officer, (2) to be used for the benefit of persons (3) who are specifically pointed out and

¹ (1880) 5 App.Cas. 214, 235. ² Ibid. 225.
H.L.(E.).

- A** (4) with regard to whom a definition is given of the circumstances in which its exercise can be called for.

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- In the present case the Minister is a public officer, on whom a duty of supervision has been placed. The power is not conferred for his own benefit. The persons pointed out are the persons affected by the Scheme. The power is to be exercised when a complaint is made which could not be considered by a consumers' committee (see section 19 (3) (b)). The present case fulfils all these conditions and a duty is imposed on the Minister to refer such a complaint. See also in the *Julius* case³ Lord Cairns, Lord Penzance and Lord Selborne. Reliance is placed (1) on the compulsory nature of the Scheme; (2) that section 19 is designed for the redress of grievances and (3) that it is the sole means of obtaining redress: see what Lord Denning M.R. said in the Court of Appeal.⁴ It is plain from section 30 that the Minister has considerable responsibilities under the Act. There is a duty on the Minister to refer every genuine and substantial complaint, (i.e., one which is not trivial, frivolous or repetitive). The appellants have a right to have it referred.

- D** In the case of *Julius*⁵ only some words of Lord Blackburn create some difficulty, but the cases on which he was relying show that he was using the word "right" in an unusual way, e.g., *Alderman Backwell's Case*.⁶ The right in the present case is that of a private individual whose rights are affected.

- E** *Rex v. Steward of Havering Atte Bower*⁷ is slightly analogous to the present case. The only two fairly recent cases are *Rex v. Mitchell*⁸ and *In re Shuter*.⁹

- F** Section 20 of the Act is wholly different from section 19, which envisages a complaint by someone whose rights are being adversely affected by the Scheme. He must go before the committee of investigation to establish that he is so affected and that it is not in the public interest that the Scheme should continue in its present form. The only provision in the Act under which the appellants can have their complaints investigated is section 19. Under section 20 they have no right at all to make the Minister move. In the circumstances the Minister cannot say that he will not consider the merits or allow anyone else to do so. Mandamus should issue.

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³ 5 App.Cas. 214, 222-223, 227, 229-230, 235.

⁴ Ante, p. 1006A.

⁵ 5 App.Cas. 214, 241, 244.

⁶ (1683) 1 Vern. 152.

⁷ (1822) 5 B. & Ald. 691.

⁸ [1913] 1 K.B. 561, 567-568; 29 T.L.R. 157, D.C.

⁹ [1960] 1 K.B. 142; [1959] 3 W.L.R. 652; [1959] 3 All E.R. 481, D.C.

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If the House of Lords holds that this is not a case of a discretion coupled with a duty, the question arises in what circumstances can the court intervene to control the exercise of a pure discretion. Reliance is placed on what Lord Denning M.R. said in the Court of Appeal¹⁰; see also Diplock L.J.¹¹ The court can intervene if the Minister has been influenced by extraneous considerations or has failed to take into account considerations which should have influenced him. On this question there is no real difference between the parties.

A

B

As to the third question, the Minister has misdirected himself as to the true construction of section 19, which must include complaints made by producers. On the documents it is clear that the Minister took into account irrelevant considerations. In the circumstances there is no hope of the complaint being dealt with by the board under the normal democratic procedure, which here produced a situation not only unfair to the appellants but contrary to the public interest.

C

The Minister failed to exercise his discretion according to law because his refusal to refer the complaint was caused or influenced by his having misdirected himself in law and taken into account erroneous and irrelevant considerations.

D

Paragraph 3 of the letter of May 1, 1964, sets out irrelevant matters to which, it is said, the Minister would address his mind. In the letter of March 23, 1965, an objection to referring the complaint is said to be that it "raises wide issues." That is not a proper consideration. It is also stated that the issue is of a kind "which properly falls to be resolved through the arrangements . . . within the framework of the Scheme itself." But this approach ignores the Minister's powers under section 19 (6) (c) and section 20 (2).

E

Alistair Dawson following. In references to "the public interest" there is a difference of phrasing between section 19 (6) and section 20 (2). In the latter case what must be considered is whether the matter is harmful to the public interest; in the former case what is being considered is something which is not actively required by the public interest. As to "public benefit," see *In re Coats' Trusts*,¹² affirmed in the House of Lords (*Gilmour v. Coats*¹³). The difference indicates that the complainant will succeed if he shows that his interests are detrimentally affected.

F

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¹⁰ Ante, p. 1007A.¹¹ Ante, p. 1011G.

¹² [1948] Ch. 340, 344-345; 64 T.L.R. 193; [1948] 1 All E.R. 221, C.A.

¹³ [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848, H.L.(E.).

A The Milk Marketing Board are always parties to such proceedings as this. If a general direction were given to them they would be able to work out the proper payments on the new principles.

Section 30 of the Act gives the Minister a general power of supervision. He cannot say that in respect of one class of operations he will not interfere with the board on pricing, no matter how unjust the situation may be. That would deprive producers of the protection which the Act gives them.

B

Sir Dingle Foot Q.C. and *Peter Langdon-Davies* for the respondents. The first question is whether on the true construction of section 19 the Minister was under a duty to refer this complaint to a committee of investigation.

C The submissions for the appellants represent a complete misconception of the Minister's duties in relation to the board.

The statutory regulation of agricultural marketing starts with the Agricultural Marketing Acts, 1931 and 1933. These Acts give a considerable degree of self government to the producers who elect the marketing boards. The boards are given extensive powers to regulate sales and determine prices to farmers and even to impose penalties. The Minister has very limited powers of intervention: see section 1 (1) of the Act of 1958. The first move must come from the producers themselves; see also section 2 (2), (3) and (7), section 4, section 6 and section 8 (1) (b), which gives an aggrieved producer the remedy of arbitration.

E It is common ground that arbitration would not have been appropriate in the present case. Even under section 20 of the Act, where the Minister is given certain powers of intervention, those powers are limited (see subsection (2)). It is only when one goes back to section 19, where there has been a reference to a committee of investigation, that the Minister himself is the final judge of what is in the public interest. Under section 19 he cannot act to give directions to the board until the committee has reported. Under that section also his powers are very limited; see also section 24. Section 30 does not give the Minister a power of general supervision; he is under no form of parliamentary accountability for the actions of the board; see also sections 34 and 36.

G The Milk Marketing Board is an elected body given very wide powers and, among other things, it is clearly intended by Parliament that it should determine the price of milk and how it is to be sold. All decisions must be taken by the board itself. Only residual powers are left to the Minister, who cannot take any action of his own motion. This falls far short of any general

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power of supervision. He is only given certain limited powers of intervention and has no general responsibility to Parliament for the decisions of the board. Decisions as to price differentials and the like should be decisions of the board. The Minister must not try to supersede the board, because he would then be defeating the intentions of Parliament.

A

There is no duty on the Minister to order a hearing by the committee of investigation. His only duty is to consider a complaint fairly, and with regard to every complaint he has an unfettered discretion whether or not to refer it to the committee. In the *Julius* case¹⁴ there is no contradiction between the speeches of Lord Cairns L.C. and Lord Blackburn.

B

Here the Minister is given certain functions as the guardian of the public interest. The Act is designed to safeguard consumers, dairymen and distributors, who have no vote on the board and it is to that that the Minister must direct his mind. But no one in the class of persons affected by the Act is given by section 19 (2) any enforceable right under section 19 (3). That is not the effect of section 19 (6), the wording of which is different.

C

In all the cases cited in the *Julius* case¹⁵ there was something in the nature of a legal right. In the present case one is dealing, not with persons with specific legal rights, but with something much wider. Every member of the public is affected by a marketing scheme and has an interest in its operation, and so have the distributors, but it cannot be maintained that everyone with a grievance is entitled to have it investigated.

D

E

The Minister does not occupy a position analogous to that of a judge. His function is entirely different. He is there in the last resort to consider questions of public interest, not the grievances of particular individuals. He has a duty to apply his mind to the complaint which is made and to decide whether or not it should go to the committee of investigation. He could not disregard a complaint and throw it unread into the waste paper basket nor make a decision never to send any cases to the committee on the ground that the investigation of complaints would have a disruptive effect on the Scheme and on balance cause more trouble than it was worth. But, on the other hand, he is not bound to exercise his discretion in favour of a complainant and order an investigation.

F

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The appellants are seeking to read into the Act words which are not there. The legislature has given the Minister a completely unfettered discretion. He must apply his mind to the particular

¹⁴ 5 App.Cas 214, 222, 243-244.¹⁵ 5 App.Cas. 214.

- A grievance, to which he must have regard at all stages. Admittedly he has a discretion to refuse to refer unsubstantial complaints and he must also have an unfettered discretion to refuse to refer a substantial complaint if the public interest is involved. He can refuse to act on a complaint without giving any reasons and in such a case the complainant would have no remedy and his decision cannot be questioned. Accordingly the reasons which he has given in the present case should not be examined too closely.
- B The Minister has two decisions to make: (1) whether to refer a complaint to the committee of investigation and (2) if he does so, whether to give effect to its report.

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- C On the first question he may say that he does not think there is a suitable case for investigation because the complaint strikes at the very root of the Scheme. He must consider at all stages what it is in the national interest for him to do.

- D The *Julius* case¹⁵ was referred to in *In re Baker*,¹⁶ *Rex v. Mitchell*,¹⁷ *Sheffield Corporation v. Luxford*¹⁸ and *de Keyser v. British Railway Traffic & Electric Co. Ltd.*¹⁹ From these it appears that unless the duty is coupled with a legal right its exercise is discretionary. The appellants can derive no help from the *Julius* case,²⁰ which is entirely in favour of the respondents.

- E As to the question whether the court can intervene to control the exercise by the Minister of the discretion conferred on him by statute, it is salutary that, when Ministers have misconceived their powers, they should be subject to judicial correction. But it is equally important that the courts should not substitute their own views for those of the Minister or trespass on the field of policy. The authorities show how far the courts have gone in this form of judicial control: see Halsbury's Laws of England, 3rd ed., Vol. 11 (1955), pp. 103–104, para. 192; *Reg. v. St. Pancras Vestry*²¹; *Rex v. Board of Education*²²; *Rex v. Port of London Authority*²³ and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.²⁴
- F The authorities amount to this: (1) Where there is, as here, an unfettered discretion, the only right of the applicant is to have his application considered. (2) The courts will only intervene if the

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¹⁵ 5 App.Cas. 214.
¹⁶ (1890) 44 Ch.D. 262, 273; 6 T.L.R. 273, C.A.

¹⁷ [1913] 1 K.B. 561, 566, 569.

¹⁸ [1929] 2 K.B. 180, 183; 45 T.L.R. 491, D.C.

¹⁹ [1936] 1 K.B. 224, 229; 52 T.L.R. 73, D.C.

²⁰ 5 App.Cas. 214.

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²¹ (1890) 24 Q.B.D. 371, 375, 377; 6 T.L.R. 175, C.A.

²² [1910] 2 K.B. 165, 174, 175, 178, 180; 26 T.L.R. 422, C.A.

²³ [1919] 1 K.B. 176, 183, 184, 186–187; 35 T.L.R. 143, C.A.

²⁴ [1948] 1 K.B. 223, 228, 229; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

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Minister or the authority is acting unlawfully. (3) The Minister or the authority acts unlawfully if he or it refuses to consider the application. There may be (a) an outright refusal or (b) a misdirection on a point of law, or (c) an irrelevant or extraneous consideration taken into account.

A

When the courts are considering the exercise of an administrative discretion they will be reluctant to hold that the Minister or the authority has considered something wholly outside the ambit of that discretion.

B

As to the question whether the court should intervene in the present case, the court cannot proceed on the view that the reasons of the Minister are contained in the letter of May 1, 1964. It is the letters of March 23, 1965, and May 3, 1965, which show his reasons. These express his final refusal to refer the complaint. These are the authoritative documents, and one should not attach too much weight to the earlier letter.

C

It cannot be maintained that the Minister has exercised his discretion on a wrong view of the law or taken into account any irrelevant or extraneous considerations.

D

At the end of the day one is entitled to say that this was a case to be dealt with by the board and not by the committee of investigation.

Peter Langdon-Davies following. On the facts it is not true that the other regions were benefiting to the detriment of the South-Eastern region, the producers in which are not an oppressed minority. The interests of the different regions may vary. Though some may have a vested interest in favour of the present prices, others are neutral. It cannot be maintained that every hand is against the South-Eastern region.

E

The question whether the present case fulfils the test laid down in the *Julius* case²⁵ is purely one of construction. In some parts of the Act the mandatory word "shall" is used, e.g., in sections 2 (3), 19 (2) and 20 (3), but in section 19 (3) the expression "if the Minister in any case so directs" confers an unfettered discretion. When a power is given by mere empowering words, it would be strange if it was one which there was no obligation to exercise: see *In re Neath & Brecon Railway Co.*²⁶ In this Act the legislature used the word "shall" when it thought good and proper to do so and there is no reason to think that when it did not do so that was not deliberate too. The Minister's only duty under this

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²⁵ 5 App.Cas. 214.

²⁶ (1874) 9 Ch.App. 263, 264, C.A.

- A section is to consider whether the complaint is suitable for investigation by the committee and in that his discretion is unfettered.

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- The court can only interfere if the Minister acted unlawfully: see the case of *Associated Provincial Picture Houses*.²⁷ The Minister is subject to two controls, (1) Parliament and (2) the courts, whose function is only to keep him within the law and to see that he goes no further. If he wrongly refused to refer a case, he could be brought to book by Parliament. The court may think he is wrong, stubborn or acting unfairly, but it should not interfere unless he is acting unlawfully. It is not always easy to draw the line. It is agreed that Lord Denning M.R. was right when he said in the court below²⁸ that the Minister must not brush aside the machinery provided for remedying grievances. He must not refuse without good reason to have a complaint investigated but he is the judge of the question whether or not to refer a complaint and in so deciding he is subject to the control of Parliament. Lord Denning M.R.²⁸ was introducing a new concept into the law in requiring that the Minister must give a good reason for refusing to exercise his discretionary power, thereby making the court the judge. The Minister is under no duty to explain why he exercises his discretion. This whole passage of Lord Denning's judgment proceeds from a misconception of the relative control functions of the court and of Parliament. The majority judgment²⁹ sets out the law as it is.
- D
- E

- If a court decides to interfere with the exercise of a discretionary power it will have to make an order. When it is so interfering the normal form of order is a direction "to determine the matter according to law" and it is always made clear what the error of law is: see the *St. Pancras* case,³⁰ *Rex v. Board of Education*³¹ and *Rex v. London County Council*.³²
- F

- The Minister should not be required to disregard the suitability of the complaint for investigation by the committee because that is really a matter for him. The Minister is entitled to have a policy and to make it known and to consider any application to him in the light of that policy (see *Rex v. London County Council*³²) though he would not be allowed to have a policy that in no case would he exercise his power: see also *Rex v. Torquay*
- G

²⁷ [1948] 1 K.B. 223, 234.

²⁸ Ante, p. 1006F.

²⁹ Ibid. 1006G.

³⁰ 24 Q.B.D. 371, 380.

³¹ [1910] 2 K.B. 165.

³² [1918] 1 K.B. 68; 34 T.L.R. 21, D.C.

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Licensing Justices.³³ If licensing justices are entitled to have a policy so, a fortiori, is the Minister.

A

Eastham Q.C. in reply. By their notice of motion the present appellants asked for a *Julius* ³⁴ order or alternatively for an order in the terms which the court subsequently made. If they are successful in the House of Lords, they are content with an order that the Minister should consider the complaint "according to law."

B

It is common ground that the cases since *Julius* ³⁴ do not help much in the solution of the first question. On its true analysis that case points to the first question here being answered in the appellants' favour: see Lord Cairns L.C.³⁵ and Lord Penzance.³⁶

If the report of the consumers' committee is against a complainant, section 19 (3) enables the Minister to cut the matter short. But if the report is in favour of the complainant, the subsection gives him the right to go before the investigating committee. In the case of a "busybody" frivolous complaint the Minister has a discretion not to send it to the investigating committee. What is conferred on him is a discretion coupled with a duty. But, even if it be held that subsection (3) confers on him an unfettered discretion so far as consumers are concerned, it does not follow that that is so in the case of persons affected by the Scheme.

C

D

The respondents relied on the provision for arbitration in section 8 (1) (b) of the Act, but that is not an appropriate remedy or an alternative to a reference to the committee of investigation.

E

The Minister is a watchdog to ensure that the board shall act in the public interest, whereas here he is trying to pursue a policy of refusing to control the board at all on the ground that it should be self-governing. But that is not a policy which he is entitled to follow in deciding whether or not to refer a complaint to the investigating committee. The board's action in fixing prices as they have is injurious to the South-Eastern farmers, who are persons affected, and is contrary to the public interest.

F

It is the wrong approach to treat the Act as if it were designed for the protection of dairymen and distributors who have no vote on the board and so does not visualise the settlement of disputes between the board and a body of producers. Although distributors have no vote on the board, they are not without protection: see paragraph 66 of the Milk Marketing Scheme, 1933, as amended.

G

³³ [1951] 2 K.B. 784; [1951] 2 T.L.R. 652; [1951] 2 All E.R. 656, D.C.

³⁴ 5 App.Cas. 214.

³⁵ Ibid. 225.

³⁶ Ibid. 229-230.

A The proper test is that of Lord Blackburn in the *Julius* case³⁷ and reliance is placed on *Rex v. Mitchell*,³⁸ where the word "may" in the Act under consideration was held to be an enabling word and that the court of summary jurisdiction was bound to give effect to the right of the accused.

B Under section 19 (2) (b) of the Act consumers have a legal right to have their complaints heard by a consumers' committee. Under section 19 (3) the Minister has power to refer to a committee of investigation any report by a consumers' committee and any complaint as to the operation of any scheme. That is a power clearly within the decision in *Rex v. Mitchell*.³⁸ Unless there is a reference to the committee of investigation the consumers' rights under section 19 (2) (b) are wholly ineffectual. There is a duty on the Minister to exercise his power. If that be so in relation to consumers, it is so in relation to persons affected by the Scheme.

C As to the question whether the court can intervene to control the exercise by the Minister of the powers conferred on him, it is accepted that the court can only interfere if the Minister acts unlawfully. But the qualifications put on that by the respondents are irrelevant.

D As to the third question, in order to see what was in the Minister's mind, the court can look at the letter of May 1, 1964. In paragraph 3 of his affirmation dated January 19, 1966, the Minister referred to that letter as a paper which he had read. The proper inference is that he was influenced by the considerations set out in the letter: see what was said in the Court of Appeal.³⁹

E Paragraph 3 of the letter is a plain misdirection, saying in effect that, if the Minister referred the complaint, he might be placed in an embarrassing situation. In paragraph 4 reason (a) is erroneous in law in its statement of the Minister's duty; reason (b) wrongly asserts a policy not to take action under section 19 on the ground that the self-government of the industry is paramount, and reason (c) is erroneous, since the Minister can fix the differential, and under sections 19 and 20 the Minister has a responsibility for the matters which affect the interests of the appellants.

F As to the letters of March 23 and May 3, 1965, altering prices is not an overriding of the Scheme but only an adjustment.

G If the appellants are successful in this appeal, a special provision as to costs may have to be made in respect of the Supplemental Cases filed in this appeal. Perhaps a day may have been added to the hearing.

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³⁷ 5 App.Cas. 214, 241.

³⁸ [1913] 1 K.B. 561.

³⁹ Ante, pp. 1009C-D, 1012A.

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Sir Dingle Foot Q.C. If the appellants succeed on either of the grounds they have relied on, there should be a special order as to costs. It is for the House to decide how much the hearing has been lengthened. In any event, the appellants should pay the costs of the Supplemental Cases. The respondents should be given two-thirds of the costs of the adjourned hearing.

A

Their Lordships took time for consideration.

B

Feb. 14, 1968. LORD REID. My Lords, since 1933 there has been in operation a Milk Marketing Scheme for England and Wales made under statutory provisions now contained in the consolidating Agricultural Marketing Act, 1958. Under that scheme producers are bound to sell their milk to the Milk Marketing Board and that board periodically fixes the prices to be paid to the producers. England and Wales is divided into eleven regions. In each region producers receive the same price but there is a different price for each region. One reason for this is that the cost to the board of transporting milk from the producers' farms to centres of consumption is considerably greater for some regions than for others. The lowest price is paid to producers in the Far-Western Region and the highest is paid to producers in the South-Eastern Region: prices paid in the other nine regions vary but fall between these two extremes. The present differentials between the regions were fixed many years ago when costs of transport were much lower. For the last ten years or so South-Eastern producers have been urging the board to increase these differentials but without success. It appears that the present differential between the South-East and the Far-West is 1·19 pence per gallon: South-Eastern producers contend that the figure should be in the region of 3½ pence per gallon. As the total sum available to the board to pay for the milk they buy in all the regions is fixed each year, giving effect to the contention of the South-Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far-West and several other regions would get less.

C

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This matter has been considered by two independent committees and their recommendations would, at least to some extent, favour the contention of the South-Eastern producers. I only mention this fact because it shows that their contention cannot be dismissed as wholly unreasonable or inconsistent with the general scheme.

G

- A** The Milk Marketing Board is composed of twelve members from the regions, three elected by all producers in the country and three appointed by the Minister. The board, of course, acts by a majority of its members. It is said that members each have in mind, quite properly, the interests of their constituents, that the adoption of the proposals of the South-Eastern producers would
- B** be against the financial interests of the constituents of most of the members, and that the experience of the last ten years shows that the South-Eastern producers cannot hope to get a majority on the board for their proposals.

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- The Act of 1958 provides two methods by which persons aggrieved by the board's actions can seek a remedy. The first is
- C** arbitration. The South-Eastern producers attempted to invoke that remedy but it is now common ground that arbitration would be inappropriate. To give effect to their contention would require a readjustment of the price structure all over the country and this could not be achieved by arbitration.

- D** The other possible remedy is that provided by section 19 of the Act of 1958 which is in these terms:

- “(1) The Minister shall appoint two committees (hereafter in this Act referred to as a ‘consumers’ committee’ and a ‘committee of investigation’) for Great Britain, for England and Wales and for Scotland respectively. (2) A consumers’ committee shall—(a) consist of a chairman and of not less than six other members, who shall be such persons as appear
- E** to the Minister, after consultation as to one member with the Co-operative Union, to represent the interests of the consumers of all the products the marketing of which is for the time being regulated by schemes approved by the Minister; and (b) be charged with the duty of considering and reporting to the Minister on—(i) the effect of any scheme approved by the Minister, which is for the time being in force, on consumers of the regulated product; and (ii) any complaints
- F** made to the committee as to the effect of any such scheme on consumers of the regulated product. (3) A committee of investigation shall—(a) consist of a chairman and either four or five other members; and (b) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumers’ committee and any complaint made to the Minister as
- G** to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers’ committee under the last foregoing subsection. (4) On receiving the report of a committee of investigation under this section the Minister shall forthwith publish the conclusions of the committee in such manner as he thinks fit. (5) For the purpose of enabling any committee appointed under this section to

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consider any matter which it is their duty under this section to consider, the board administering the scheme to which the matter relates shall furnish the committee with such accounts and other information relating to the affairs of the board as the committee may reasonably require, and shall be entitled to make representations to the committee with respect to the matter in such manner as may be prescribed by regulations made by the Minister under this Part of this Act with respect to the procedure of the committee. (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated product, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit so to do after considering the report— (a) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (b) may by order revoke the scheme; (c) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order, and thereupon it shall be the duty of the board forthwith to comply with the order. Before taking any action under this subsection the Minister shall give the board notice of the action which he proposes to take and shall consider any representations made by the board within fourteen days after the date of the notice. . . . (8) Any order made under paragraph (a) of subsection (6) of this section, under paragraph (c) of that subsection or under the last foregoing subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament, and any order made under paragraph (b) of the said subsection (6) shall not take effect unless it has been approved by a resolution of each House of Parliament.”

With a view to getting the Minister to take action under this section the present appellants, who are office bearers of the South-Eastern regional committee of the board, approached the Minister and met officials of the Ministry on April 30, 1964. The outcome of that meeting was unsatisfactory to them and on January 4, 1965, their solicitors wrote to the Minister making a formal complaint and asking that the complaint be referred to the committee of investigation. The nature of the complaint was stated thus:

“4. These acts and/or omissions of the board (a) are contrary to the proper and reasonable interests of producers in the South-Eastern region and of other producers near large liquid markets, all of whom are persons affected by the scheme, and (b) are not in the public interest. . . .

“6. As to (a) in para. 4 above

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A "It is contrary to the reasonable and proper interests of the producers referred to in para. 4 above that (in addition to the other contributions they properly make under the scheme) they should make a contribution to the marketing costs of reaching the liquid markets from the more distant parts of the country which are properly attributable to producers in those more distant parts and which should be borne by such producers.

B "7. *As to (b) in para. 4 above*

C "(i) the cross-subsidy set out above has caused or contributed to and will cause or contribute to an unreasonable alteration in the balance of production, reducing growth in the nearer areas and increasing it in the more distant. This has tended and will tend to increase the total marketing costs to the public detriment. (ii) it is not in the public interest to continue a system of pricing which unduly favours one set of producers as against others."

To this letter the Minister's private secretary replied on March 23, 1965: [His Lordship read the letter and continued]:

D And in reply to a further letter an official of the Minister replied on May 3, 1965: [His Lordship read the letter and continued]:

Thereafter the appellants applied to the court for an order of mandamus commanding the Minister to refer this complaint to the committee of investigation.

E On February 3, 1966, a Divisional Court (Lord Parker C.J., and Sachs and Nield JJ.) made an order against the Minister but on July 27, 1966 this order was set aside by the Court of Appeal by a majority (Diplock and Russell L.JJ., Lord Denning M.R. dissenting).

F The question at issue in this appeal is the nature and extent of the Minister's duty under section 19 (3) (b) of the Act of 1958 in deciding whether to refer to the committee of investigation, a complaint as to the operation of any scheme made by persons adversely affected by the scheme. The respondent contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The appellants contend that it is his duty to refer every genuine and substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant considerations.

G In my view, the appellants' first contention goes too far. There are a number of reasons which would justify the Minister in

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refusing to refer a complaint. For example, he might consider it more suitable for arbitration, or he might consider that in an earlier case the committee of investigation had already rejected a substantially similar complaint, or he might think the complaint to be frivolous or vexatious. So he must have at least some measure of discretion. But is it unfettered?

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It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

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When these provisions were first enacted in 1931 it was unusual for Parliament to compel people to sell their commodities in a way to which they objected and it was easily foreseeable that any such scheme would cause loss to some producers. Moreover, if the operation of the scheme was put in the hands of the majority of the producers, it was obvious that they might use their power to the detriment of consumers, distributors or a minority of the producers. So it is not surprising that Parliament enacted safeguards.

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The approval of Parliament shows that this scheme was thought to be in the public interest, and in so far as it necessarily involved detriment to some persons, it must have been thought to be in the public interest that they should suffer it. But in sections 19 and 20 Parliament drew a line. They provide machinery for investigating and determining whether the scheme is operating or the board is acting in a manner contrary to the public interest.

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The effect of these sections is that if, but only if, the Minister and the committee of investigation concur in the view that something is being done contrary to the public interest the Minister can step in. Section 20 enables the Minister to take the initiative. Section 19 deals with complaints by individuals who are aggrieved.

- A I need not deal with the provisions which apply to consumers. We are concerned with other persons who may be distributors or producers. If the Minister directs that a complaint by any of them shall be referred to the committee of investigation, that committee will make a report which must be published. If they report that any provision of this scheme or any act or omission of the board is contrary to the interests of the complainers *and* is not in the public interest, then the Minister is empowered to take action, but not otherwise. He may disagree with the view of the committee as to public interest, and, if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable in Parliament but the court cannot interfere.
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- I must now examine the Minister's reasons for refusing to refer the appellants' complaint to the committee. I have already set out the letters of March 23 and May 3, 1965. I think it is right also to refer to a letter sent from the Ministry on May 1, 1964, because in his affidavit the Minister says he has read this letter and there is no indication that he disagrees with any part of it. It is as follows: [His Lordship read the letter and continued]:
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- The first reason which the Minister gave in his letter of March 23, 1965, was that this complaint was unsuitable for investigation because it raised wide issues. Here it appears to me that the Minister has clearly misdirected himself. Section 19 (6) contemplates the raising of issues so wide that it may be necessary for the Minister to amend a scheme or even to revoke it. Narrower issues may be suitable for arbitration but section 19 affords the only method of investigating wide issues. In my view it is plainly the intention of the Act that even the widest issues should be investigated if the complaint is genuine and substantial, as this complaint certainly is.
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- Then it is said that this issue should be "resolved through the arrangements available to producers and the board within the framework of the scheme itself." This re-states in a condensed form the reasons given in paragraph 4 of the letter of May 1, 1964, where it is said "the Minister owes no duty to producers in any particular region," and reference is made to the "status of the Milk Marketing Scheme as an instrument for the self-government of the industry," and to the Minister "assuming an inappropriate degree of responsibility." But, as I have already pointed out, the
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It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not

- A to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.

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- A number of authorities were cited in the course of the argument but none appears to me to be at all close to the present case.
- B I must, however, notice *Julius v. Bishop of Oxford*¹ because it was largely relied on. There the statute enacted that with regard to certain charges against any Clerk in Holy Orders it "shall be lawful" for the Bishop of the diocese "on the application of any party complaining thereof" to issue a commission for inquiry.

- C It was held that the words "it shall be lawful" merely conferred a power.

- D "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person on whom the power is reposed, to exercise that power when called upon to do so" (*per* Lord Cairns L.C.²).

- E Lord Penzance said that the true question was whether regard being had to the person enabled, to the subject-matter, to be general objects of the statute and to the person or class of persons for whose benefit the power was intended to be conferred, the words do or do not create a duty,³ and Lord Selborne said that the question was whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty.⁴ So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended.

- F In *Julius'* case⁵ no question was raised whether there could be a discretion, but a discretion so limited that it must not be used to frustrate the object of the Act which conferred it; and I have found no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. Here the words "if the Minister in any case so directs" are sufficient to show that he has some discretion
- G but they give no guide as to its nature or extent. That must be inferred from a construction of the Act read as a whole, and for

¹ (1880) 5 App.Cas. 214, H.L.(E.).⁴ Ibid. 235.² Ibid. 222-223.⁵ 5 App.Cas. 214.³ Ibid. 229-230.

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the reasons I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it.

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As the Minister's discretion has never been properly exercised according to law, I would allow this appeal. It appears to me that the case should now be remitted to the Queen's Bench Division with a direction to require the Minister to consider the complaint of the appellants according to law. The order for costs in the Divisional Court should stand. The appellants should have their costs in the Court of Appeal but, as extra expense was caused in this House by an adjournment of the hearing at their motion, they should only have two-thirds of their costs in this House.

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LORD MORRIS OF BORTH-Y-GEST. My Lords, pursuant to decisions of policy which have been the basis of Agricultural Marketing Acts since 1931 there have been various marketing schemes. The producers of an agricultural product are themselves entitled to submit a scheme to the Minister of Agriculture for the regulation and marketing of a product. There may be a board to administer the scheme. Subject to compliance with certain conditions, the Minister may approve such a scheme. A scheme is to be one for regulating the marketing of a product "by the producers thereof." The present case concerns one such scheme, namely, the Milk Marketing Scheme. There has been a scheme in operation since 1933. It was then approved by the Minister and has since from time to time been amended. It is manifest that a scheme will be more acceptable to some producers of milk than to others. The advantage of having a buyer for all the milk which a producer produces will appeal to those who otherwise would have produced more than they could sell. There will be no such advantage for those so placed that they could have a sure and ready market for all that they could produce. If prices are fixed regionally, and are fixed having regard to the average of transport and marketing costs within the region, there will be some within the region who could assert that their costs if they had been left to themselves would have been less than those of others. If in fixing prices regionally it is not deemed advisable fully to reflect the variations as between regions of transport and marketing costs, then it follows that encouragement to production is being given to certain regions at the expense of others. Within the regions, therefore, as well as

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- A within the industry, the interests of some producers are being advantaged at the expense of other producers. The less fortunate are being helped by the more fortunate.

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- B they are in substance contributing to a subsidy to others. Yet all this may be one of the results of having a scheme.

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- C The Milk Marketing Scheme is administered by a board. It has twelve regional representatives (one for each of ten regions and two for the eleventh region). Those regional members of the board are elected by the registered producers (paragraph 16 of the scheme). In addition there are three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister. The scheme provides (by paragraph 24) that questions arising at any meeting of the board are to be decided by a majority of the votes of members present. There are regional committees whose duty it is to report to or to make representations to the board on the operation of the scheme in relation to the producers in the region (paragraph 31). On the coming into force of the scheme, a poll of registered producers had to be taken on the question whether the scheme was to remain in force (paragraph 44). Under the statutory provisions (section 1 (8) of the Act of 1931, now section 2 (7) of the Act of 1958) the scheme had to be laid before Parliament. The board has wide powers to regulate marketing (paragraph 60). If the board requires registered producers to sell any milk only to the board then

- F “the board shall from time to time prescribe the terms on which and the price at which such milk shall be sold to the board and may also prescribe the form in which contracts for the sale of such milk to the board shall be made” (paragraph 64).

- G The board may prescribe different terms, prices and forms of contract for different classes of producers or classes of sale or descriptions of milk.

Two things are apparent. One is that the scheme provides for government of the industry by the industry. The second is that no machinery is provided whereby the work of the board could be over-ruled by some reviewing body in regard to such matters as terms of sale and price fixation.

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The appellants are three producers in one region (the South-Eastern Region). They have the support of most, or nearly all, of the other producers in that region. In substance they say that the price being paid to them should be higher. They complain of the operation of the scheme. They asked (by a letter of January 4, 1965) that their complaint should be referred to the committee of investigation which has been appointed under the Act. It is important to note their complaint. It was

“ of certain acts and/or omissions in prescribing (under paragraph 64 of the scheme) the terms on which and the price at which milk shall be sold to the board, in that the board should, but do not, take fully into account variations as between producers in the costs of bringing their milk to a liquid market whether such costs are incurred or not.”

They set out figures showing that the range of variation (between regions) of producers' net prices is 1·19 pence per gallon, whereas the range of variation (between regions) of true marketing costs is considerably higher (3·37 pence per gallon in 1961–62 and probably 3·66 pence per gallon in 1963–64). The costs in the South-Eastern Region are the lowest.

The cost of transporting milk is naturally at its lowest in regions where the producers are near to centres of population and the Milk Marketing Board pay a higher price at the farm gate to producers in those regions than to producers in other regions. This is known as a differential. Producers in the South-Eastern Region receive a higher regional differential than do producers in any of the other regions.

The complaint as formulated would imply that there should be varying differentials as between all producers, but the case proceeded on the basis that there should be no variation in the differential as between the producers in a particular region.

It would seem probable that the essential facts and figures relating to the complaint are either well known or are readily ascertainable. It is quite clear that in the fixing of prices it must have been decided by the board that they would not take regional variations of transport costs “ fully ” into account. That decision, if taken in good faith, must have been a policy decision. It must also be the case that the members of the board who fixed the prices must have been fully aware of the contentions of the appellants. Every member of the board must have heard the competing contentions for and against the board's policy advanced and recited over and over again. They have been canvassed over the

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- A years. It has been for the board to decide as a matter of policy whether regional prices should or should not "take fully into account variations as between producers in the costs of bringing their milk to a liquid market." Wider issues of policy are, in turn, involved. The appellants in their letter to the Minister have suggested that the price fixations of the board will have the result of "reducing growth in the nearer areas and increasing it in the more distant" and they suggest that this will tend to increase the total marketing costs to the public detriment. It may or it may not be a good thing to increase production in the more distant areas. It may or it may not be in the public interest to encourage such production. It is no part of our province to attempt to assess the weight of the competing public interests which are involved or to consider whether the policy decisions of the board will or will not in the long run enure to the public advantage. The board may or may not have reached the wisest decision. It is, however, manifest that the board's decisions have been deliberate. There is no suggestion that the board have not acted in entire good faith. Nor is it said that they have exceeded their powers under the scheme as approved. When in 1964 the appellants made a suggestion to the board that there should be an arbitration the board, through their solicitors in a letter (dated June 18, 1964) to the appellants' solicitors, stated: [His Lordship read the letter and continued:]
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The appellants do not now suggest that arbitration would be appropriate but in asking that their complaint should be referred to the committee of investigation appointed under the Act they are in effect asking for an arbitration in another form. They are asking that the determination of prices should be made by the committee. The committee could only recommend that the appellants should receive a higher price on the basis that other producers should receive a lower price. The position of all those others would be affected. The committee would be acting as an appellate body from the decision of the board. It may have to be decided as a matter of policy and judgment whether the committee of investigation (which could be concerned with any one of the marketing schemes coming into existence under the Act and was not appointed to be concerned with any particular scheme such as the Milk Marketing Scheme) would be the appropriate body to perform the function. The committee of investigation is, however, in existence and it certainly would be open to the

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Minister if he deemed it desirable to refer a complaint of the present kind to the committee.

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Before your Lordships it was in the first place submitted that the appellants had a right to have their complaint referred to the committee and that accordingly an order of mandamus should be directed to the respondent positively commanding him to refer the complaint. This contention was rejected by the Divisional Court and was not even advanced in the Court of Appeal. I, also, would reject it. In my view, the respondent is endowed with a discretion. It is for him to decide whether to ask the committee to report on any complaint made as to the operation of any scheme made under the Act. A duty will only devolve upon the committee "if the Minister in any case so directs."

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These words are in sharp contrast to those which are employed in the Act when a positive duty is imposed upon the Minister. Thus in section 2 (3) are the words "shall direct a public enquiry to be held." In section 19 (4) are the words "the Minister shall forthwith publish." In section 20 (3) are the words "the Minister shall refer." If Parliament had intended to impose a duty on the Minister to refer any and every complaint, or even any and every complaint of a particular nature, it would have been so easy to impose such a duty in plain terms. I cannot read the words in section 19 (3) as imposing a positive duty on the Minister to refer every complaint as to the operation of every scheme. Such was the appellant's contention though they modified it by suggesting that the duty would not exist in the case of trivial or frivolous or repetitive complaints. In support of their revived contention the appellants submitted that in some circumstances a duty exists to exercise a power. So in the present case it was argued that a power was deposited in the Minister, that the power was given for the benefit of particular persons, that in the Act they were specifically designated (for example, persons complaining as to the operation of a scheme) and that in the Act the circumstances in which there is entitlement to the exercise of the power are defined (that is, that there should be a complaint to the Minister as to the operation of the scheme being a complaint which could not be considered by a consumers' committee). Reliance was placed upon a passage in the speech of Lord Cairns L.C. in *Julius v. Bishop of Oxford*.⁶ Lord Cairns said⁷ that the cases decided

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⁶ 5 App.Cas. 214.

⁷ Ibid. 225.

A "that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

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B In my view, this passage does not avail the appellants. I can see no provision in the Act showing that the appellants or others who might make a complaint similar to theirs were "entitled" to call upon the Minister to exercise the power given to him. At most their entitlement was that the Minister should consider and should decide whether or not in the exercise of his discretion he would refer a complaint. It would have to be shown that the Act gave the appellants a "right" to have their complaint sent to the committee before the power in the Minister could be held to be one that he was bound to exercise. Thus in his speech in *Julius v. Bishop of Oxford*⁸ Lord Blackburn said that

D "if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf."

So also Lord Blackburn said⁹:

E "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

F Where some legal right or entitlement is conferred or enjoyed, and for the purpose of effectuating such right or entitlement a power is conferred upon someone, then words which are permissive in character will sometimes be construed as involving a duty to exercise the power. The purpose and the language of any particular enactment must be considered. Thus in *Rex v. Mitchell*¹⁰ consideration was given to the words of section 9 of the Conspiracy and Protection of Property Act, 1875, namely:

G "Where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with

⁸ 5 App.Cas. 214, 241.

⁹ Ibid. 244.

¹⁰ [1913] 1 K.B. 561; 29 T.L.R. 157, D.C.

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an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly."

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A declaration of objection to being tried by a court of summary jurisdiction was duly made by a person accused of an offence made punishable by the Act who was entitled to object. It was held that accordingly he had a right to trial by jury and that the justices were bound to give effect to his claim and had no jurisdiction to try the case.

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On the principles laid down in *Julius'* case ¹¹ it becomes necessary to consider the language used in the Agricultural Marketing Act and the purposes of the Act. A consumers' committee under section 19 (2) is charged with the duty of considering and reporting to the Minister on the effect of a scheme on consumers and also on "any complaints made to the committee as to the effect of any such scheme on consumers of the regulated product." The words in section 19 (3) are in marked contrast. A committee of investigation is only charged with the duty of considering and reporting "if the Minister in any case so directs." The Minister may refer to them a report of a consumers' committee. He may refer to them a complaint which has been made to him and which in his view could not have gone to a consumers' committee. The language here is, in my view, purely permissive. The Minister is endowed with discretionary powers. If he did decide to refer a complaint he is endowed with further discretionary powers after receiving a report (see section 19 (6)).

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I cannot, therefore, accept the contention of the appellants that they had a right to have their complaint referred to the committee and that the Minister had a positive duty to refer it. The Minister, in my view, had a discretion. It was urged on behalf of the respondent that his discretion was in one sense an unfettered one, though it was not said that he could disregard the complaint. The case proceeded on an acceptance by the respondent that he was bound to consider the complaint and then, in the exercise of his judgment, to decide whether or not to refer it to the committee.

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If the respondent proceeded properly to exercise his judgment then, in my view, it is no part of the duty of any court to act as a Court of Appeal from his decision or to express any opinion as to whether it was wise or unwise. The Minister was given an executive discretion. In speaking of a power given by statute to a local authority to grant certain licences Lord Greene M.R. said

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¹¹ 5 App.Cas. 214.

A in his judgment in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*¹²:

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“When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law.”

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I think it follows that an order of mandamus could only be made against the Minister if it is shown that in some way he acted unlawfully. A court could make an order if it were shown (a) that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or (b) that he misinterpreted the law or proceeded on an erroneous view of the law or (c) that he based his decision on some wholly extraneous consideration or (d) that he failed to have regard to matters which he should have taken into account. I propose to consider whether any one of these is established. The order that was made by the Divisional Court commanded the respondent

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“to consider the said complaint of the applicants according to law and upon relevant consideration to the exclusion of irrelevant considerations.”

As to (a) it cannot be asserted that the respondent failed to consider the appellants' complaint. In his affirmation the respondent states that he considered the complaint and all the matters put before him by the appellants. He states that he came to his decision for the reasons indicated in the letters of March 23 and May 3, 1965, namely that he

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“considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation.”

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As to (b) I do not consider that the respondent is shown to have misinterpreted the law unless it could be said that any of the considerations recorded in the letters from the Ministry were so inadmissible as to involve that the respondent took a wrong view of the law or misdirected himself in law. I turn therefore to consider the letters. They formed the foundation for the submission that on the basis of (c) and (d) above the order of the Divisional Court was appropriately made.

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As the respondent states in his affirmation that he came to his decision for the reasons indicated in the two letters, it is primarily

¹² [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

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those letters that are to be studied. As, however, he states that in deciding as to the application he had read a letter dated May 1, 1964, written by a Ministry representative and as he has not stated that he excluded from his mind the considerations therein recorded, I think that it is a reasonable inference that they had, or may have had, some influence. It is fair, I think, to regard all three letters as revealing what was in the mind of the respondent. His decision was that the complaint was not one that in his view was suitable for investigation by means of the particular procedure of a reference to the committee of investigation. That decision was essentially a policy decision. It concerned a situation that was known and understood in the industry. The main facts in regard to it were known. The differential, or the range between producers' net prices, stands at 1·19 pence per gallon. It has stood at that figure for some years. It was a figure that was first fixed during the war. That fact was known to all concerned. So also must it have been known to all concerned that if true marketing costs were taken "fully" into account the range would be much higher. The question must therefore have been a perennial one as to whether the differential should be varied. If it were, then producers in some regions would get more and producers in other regions would get less. A constant major policy problem must have been whether it is desirable to encourage production in those regions where, if there were no scheme, producers would not fare very well. So also it must have been widely known that two committees had made suggestions relating to this long-standing problem. One of them (the Cutforth Committee) had reported as far back as 1936. Another (the Davis Committee) had in 1963 suggested that the country should be divided into five price zones each with a different differential and that the total range of the prices at the farm gate should be the figure of 2·4 pence per gallon instead of the figure of 1·19 pence per gallon. But all these facts and considerations must have been well known.

I know of no reason to assume or to suggest that the members of the board in the discharge of their duties have acted irresponsibly. Because a policy decision under a national scheme results in a measure of advantage to some and a measure of disadvantage to others it does not follow that the members of the board have been guided, not by considerations of the national interest or of the general interest of their industry, but solely by considerations as to how the pockets of their colleagues would be affected.

At any time during the sequence of the past years it would

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A have been open to a Minister, had he considered it desirable and politic, to take the initiative under section 20 subsection (2) of the Act and to give directions to the board concerning prices. It was at all time a question of policy for successive Ministers, whether or not they should take such action. For any decision or for any inaction a Minister would be answerable in Parliament.

B It was against all this background that the respondent had to consider the appellants' request in the early part of 1965. In agreement with Diplock and Russell L.JJ. I do not consider that it has been shown that he failed to exercise his discretion: nor has it been shown that he was guided by irrelevant considerations or that he failed to consider relevant matters. A study of the letters
C leads me to the view that the respondent considered it desirable that the milk industry should, in accordance with its own scheme, be self-governing and that it would not be good policy for him to over-rule decisions of the Milk Marketing Board which fixed the price to be paid in a particular region or to particular persons. I do not find in the letters any statement that the respondent considered that he had no power to refer the appellants' complaint
D to the committee: nor any statement that the respondent considered that he was compelled to leave price fixing to the Milk Marketing Board. Rightly or wrongly he considered it best to do so.

E As a result of the meticulous scrutiny to which the three letters have been subjected the appellants contend that irrelevant or inadmissible considerations were taken into account by the respondent.

1. Criticism is made of the passage in the letter of March 23 to the effect that the complaint of the appellants was "one that raises wide issues going beyond the immediate concern of your clients which is presumably the prices they themselves receive."
F In the following sentence it is pointed out that the complaint would also affect the interests of other regions and involve the regional price structure as a whole. I do not read that passage as involving that the complaint ought not to go to the committee merely because it raised wide issues. What I think was being
G pointed out was that the appellants' complaint would necessarily involve a complete review of the prices in all the regions as fixed by the board. I see no reason to think that the respondent was unaware of his powers as, for example, under section 20 (2). What I think is revealed is that the respondent as a matter of policy considered it undesirable or inappropriate for him to over-rule the

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H. L. (E.) board in regard to price fixation. This is shown by the letter of
1968 May 1, 1964, where it said:

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"It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales."

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2. Criticism is made of the passage in which it is said that the Minister considered that the issue was of a kind which properly fell to be resolved within the framework of the scheme. It is said that he was mistaking his powers and was being unmindful of the courses of action open to him either under section 20 (2) or after a report from a committee under section 19 (6) (c). I see no reason to deduce that the respondent was oblivious of his powers: nor that he was not appreciating that under the machinery of the scheme a majority vote could result in disadvantages for some districts. If the respondent nevertheless decided that the self-governing machinery should operate, his decision could be attacked as being impolitic, but I do not think it could be attacked as being made on inadmissible considerations.

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3. Criticism is further made of the sentence in the letter of May 1, 1964, which reads:

"In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory Order to give effect to the committee's recommendations."

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This sentence may be obscure and imprecise but I doubt whether we ought to put the most unfavourable construction upon it. If there was a reference to the committee and if the committee reported that some act of the board was contrary to the interests of consumers or "of any persons affected by the scheme" and was not in the public interest, then the Minister would himself have a discretion as to whether or not to take any course of action designated in section 19 (6).

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There may be cases where from a knowledge of the problem and all its aspects and because of his own firm view as to what course the public interest demands, a Minister could see that a reference could lead to no useful result. A Minister might conclude that whatever report a committee might make a reference to them

A would only produce needless confusion and disappointment and would not prompt him to follow a course of action that he considered undesirable. Though the 1964 letter is not very explicit, it is for the appellant to show that the respondent was guided by irrelevant considerations. In agreement with Diplock and Russell L.JJ. I consider that the appellants have failed to show this.

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B For the reasons which I have set out I would dismiss the appeal.

LORD HODSON. My Lords, the appellants say in the first place that this is a case which satisfies the test, propounded in *Julius v. Bishop of Oxford*,¹³ drawing the distinction between a power coupled with a duty and a complete discretion. In the former case

C enabling words are said to be compulsory when they are words to effectuate a legal right.

It is argued that the Minister is subject to mandamus here, for he is given a power to be exercised in favour of persons who are defined and accordingly are given a right to have their claim submitted to a committee of investigation under the provisions of section 19 of the Agricultural Marketing Act, 1958. This argument was abandoned before the Divisional Court, not put forward in the Court of Appeal but was resurrected before your Lordships by way of Supplemental Case. Section 19 (3), so far as material, reads:

E “A committee of investigation shall— . . . (b) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumer’s committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers’ committee under the last foregoing subsection.”

F Schemes for regulating the marketing of agricultural products were introduced by the Agricultural Marketing Act, 1931, and are compulsory in their operation upon consumers, who are protected as to price and supply, upon distributors and upon producers, who get the advantage of having no milk left on their hands unsold.

G The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection introduced by the words “if the Minister in any case so directs” nor in the context of the Act and earlier legislation to support the view that an absolute right to an

¹³ 5 App.Cas. 214.

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enquiry is given to an aggrieved person. The argument of the appellants is undermined, in my opinion, by their concession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case. True that the scheme is of a compulsory nature and section 19 is designed for the redress of grievances but this is not to exclude the Minister's discretion to reject a complaint if he exercises his discretion according to law. The succeeding section, section 20 of the Act, indicates the position of the Minister as responsible for giving directions to a board as to its acts or omissions as he considers necessary or expedient in the public interest and his directions have to be complied with so far as the board is not required to do anything which it has no power to do.

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If the Minister has a complete discretion under the Act, as in my opinion he has, the only question remaining is whether he has exercised it lawfully.

It is upon this issue that much difference of judicial opinion has emerged although there is no divergence of opinion as to the relevant law. As Lord Denning M.R. said, citing Lord Greene M.R. in the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*¹⁴:

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"... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

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In another part of this judgment¹⁵ Lord Greene drew attention to that which I have mentioned above, namely, the necessity to have regard to matters to which the statute conferring the discretion shows that the authority exercising the discretion ought to have regard. The authority must not, as it has been said, allow itself to be influenced by something extraneous and extrajudicial which ought not to have affected its decision.

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I come now to the facts of the present case. In 1933 the Milk Marketing Scheme (amended in 1955) came into operation. The members of the board consist of 12 regional members elected for the several regions by the registered producers and three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister (see Part II of the scheme, paragraph 9). Questions arising at a

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¹⁴ [1948] 1 K.B. 223, 229.

¹⁵ Ibid. 228.

A meeting of the board are decided by a majority of the votes of the members present (see Part II, paragraph 24). The price of milk is fixed by the board for milk delivered at the farm gate.

The South-Eastern farmers being much nearer to the great population of London are paid what is called a differential to compensate them for the loss of the advantage they would otherwise have over most other districts in consequence of their proximity to a large market. The differential was fixed many years ago at 1·19d. per gallon and the South-Eastern farmers have long complained that it is too low and sought without success to obtain redress of their grievance from the board. They have been outvoted since, in the interests of their own pockets, so it is said, a majority of the other regions opposed them. This decision has been reached notwithstanding the recommendations of two committees set up at different times who have recognised the justice of their claim. On the Davis Committee, set up in 1963, making its report without any benefit to the South-Eastern farmers ensuing, and the board having rejected their claim, the first named appellant approached the Minister at the end of January, 1964, asking what means the Ministry could suggest for investigating and remedying the grievance felt by his committee concerning the regional price of milk in the south-east.

E Correspondence ensued to which it will be necessary to refer and the decision of the Minister refusing to refer the complaint to the investigating committee was contained in a letter of March 23, 1965. The letter reads, so far as material:

F "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

In response to a further letter from the appellants' solicitors a letter dated May 3, 1965, was received referring to the Minister's unfettered discretion and adding that in reaching his decision

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he had had in mind the normal democratic machinery of the Milk Marketing Scheme in which all registered producers participated and which governs the operations of the board.

Upon the appellants' solicitors enquiring whether it would be asserted that the letters of 1965 were the only matters present to the Minister's mind at the time of his decision, to the exclusion of the considerations set out in the letters which had passed in the year 1964, the Minister affirmed on November 4, 1965, he having been appointed on October 19, 1964 (after the 1964 letters had passed):

"3. In considering the applicants' application I read among other papers the letter signed by Mr. J. H. Kirk and dated May 1, 1964. . . .

"4. Before reaching my decision not to refer the applicants' complaint to the committee of investigation I considered all the matters put before me on behalf of the applicants in support of their application.

"5. I came to my decision for the reasons indicated in the letters dated March 23, 1965, and May 3, 1965, . . . namely that I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

If the letter of May 1, 1964, be looked at, and it was not disowned by the Minister in his affirmation or at all, it throws further light on the refusal of the Minister to exercise his discretion by referring the complaint to the investigating committee. This letter contains the following :

"3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a Statutory Order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable.

"4. The reasons which led us to this conclusion were explained to you as follows: (a) The guarantee given to milk producers under the Agriculture Acts is a guarantee given to the board on behalf of all producers. The Minister owes no duty to producers in any particular region, and this is a principle that would be seriously called into question by the making of an Order concerned with a regional price; (b) Such action would also bring into question the status of the Milk

- A** Marketing Scheme as an instrument for the self-government of the industry and such doubt would also, by extension, affect the other marketing schemes as well; and (c) It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales.
- B** "5. I wish to point out that the statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

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- C** The reasons disclosed are not, in my opinion, good reasons for refusing to refer the complaint seeing that they leave out of account altogether the merits of the complaint itself. The complaint is, as the Lord Chief Justice pointed out, made by persons affected by the scheme and is not one for the consumer committee as opposed to the committee of investigation and it was eligible for reference to the latter. It has never been suggested that the complaint was not a genuine one. It is no objection to the exercise of the discretion to refer that wide issues will be raised and the interests of other regions and the regional price structure as a whole would be affected. It is likely that the removal of a grievance will, in any event, have a wide effect and the Minister cannot lawfully say in advance that he will not refer the matter to the committee to ascertain the facts because, as he says in effect, although not in so many words, "I would not regard it as right to give effect to the report if it were favourable to the appellants."
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- It has been suggested that the reasons given by the Minister need not and should not be examined closely for he need give no reason at all in the exercise of his discretion. True it is that the
- F** Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner, but when, as here, the circumstances indicate a genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation.
- G** As the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest.

I would allow the appeal accordingly and remit the matter to the Queen's Bench Division so as to require the Minister to consider the complaint of the appellants according to law. I agree

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with the order for costs proposed by my noble and learned friend,
Lord Reid.

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LORD PEARCE. My Lords, prima facie the appellants have a complaint of substance. They are "persons affected by the scheme." The "act or omission of the board" in not paying them a higher price differential is "contrary to their interests." And apparently reasonable prima facie arguments have been advanced to show that this "is not in the public interest." The appellants' complaint is therefore prima facie suitable to be considered by the committee of investigation.

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The outline of their complaint is simple. They farm in the more populous South-Eastern Region. In a more populous region milk is more valuable. The consumer is near at hand. The cost of transport is less. And milk which is drunk fetches higher prices than that which is used for manufacture. As against this the overheads of production are, generally speaking, somewhat higher than in some more rural regions. For instance, the land in the more populous region is almost inevitably more expensive. It seems to follow that if the producer of milk in a populous region is paid precisely the same price as the producer in a sparsely populated rural region, the former is not being fairly treated. Some acknowledgment of this fact is made in a differential of 1·19 pence per gallon which was, we are told, fixed by the Minister during the war. Of this figure ·71 of a penny related to the cost of transport. With rising prices the present differential cost in respect of transport has risen to over 3d. No acknowledgment of this increase in cost has ever been made in the price paid to the farmers in the South-Eastern Region. Yet, unless the figure fixed by the Minister in the war was too large, which has not been suggested, it would seem that in view of increased costs it must now be too small. Prima facie this would seem unfair. Two committees, one in 1956 and one in 1963, have, on investigation, lent weight to the appellants' contention. But the gain of the South Eastern would mean some loss in some regions elsewhere. The South-Eastern Region is in a minority on the board. They have been unable, in spite of fifteen attempts, to persuade the majority to do anything about it. The appellants contend that the present situation is not only unfair to them but also it is not in the public interest. They argue, for instance, that the present situation discourages the production of milk in the region where it is most valuable. Against this, of course, may be set the benefit of

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- A encouraging milk production in more sparsely populated regions. Any final conclusion on this matter obviously needs close consideration of all its relevant detail. One may sum it up superficially by saying that there is *prima facie* a complaint of some substance, that it has had support from two committees, and that there seems little likelihood of the majority of the board doing anything to remedy it.
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- This is not a criticism of the majority. Most of them are elected to represent their own regions. One can hardly expect them to vote in favour of something that will injure their own regions. Nor would it be very conducive to the success of the scheme if a region felt that its representative was pursuing altruistic policies in favour of other regions at the expense of those whom he is elected to represent. If justice to a minority is to be imposed at the expense of a majority, it is probably more convenient that it should be imposed aliunde.
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- This fact was, in my opinion, recognised by Parliament. It was obvious that the scheme and the Act created a monopoly and imposed severe restrictions on individuals' liberty of action. With the aim of general betterment Parliament was interfering with the individual farmer's method of earning a livelihood and subjecting him to the mercies of the majority rule of the board. But (no doubt with these considerations in mind) Parliament deliberately imposed certain safeguards. Two independent committees must be appointed (section 19). First there is the "consumers' committee" to deal with consumers' complaints. The findings of this committee do not, however, produce any effective result, unless and until they have been considered by the more important committee of investigation. That committee is
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- F "charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumers' committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee."

- G The Minister is bound to publish that report.

"If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated product, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit so to do after considering the report,"

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may either amend the scheme so as to rectify the matter, or revoke the whole scheme, or direct the board to take steps to rectify the matter (after hearing any representations from the board). By section 20 the Minister has a right of his own motion, independently of the investigation committee, to impose his will on the board. But in that case the board can ask to have the matter heard by the committee of investigation, and if the committee's report is in the board's favour the Minister cannot impose his will on them.

Thus the independent committee of investigation was a cornerstone in the structure of the Act. It was a deliberate safeguard against injustices that might arise from the operation of the scheme. There is provision for arbitration between individual producers and the board. But this is clearly not intended to deal with a case such as the present; and the board has rightly refused arbitration on this matter.

The appellants have therefore no avenue for their complaint except through section 19. And that section makes access to the committee of investigation dependent on a direction of the Minister to the committee of investigation. There is no provision as to what are the duties of a Minister in this respect. Has he a duty to further complaints of substance which have no other outlet? Or can he refuse them any outlet at all if he so chooses? Need he have any valid reason for doing so? Or if he refuses without any apparent justification, is he exempt from any interference by the courts provided that he either gives no reasons which are demonstrably bad or gives no reasons at all? No express answer to these questions is given in the Act. The intention of Parliament, therefore, must be implied from its provisions and its structure.

Both sides placed some reliance on the case of *Julius v. Bishop of Oxford*.¹⁶ This dealt with a somewhat analogous problem under an Act which said "it shall be lawful" for the bishop to issue a commission. It was held that the words gave the bishop a complete discretion to issue or decline to issue a commission. That decision rested on the construction of the particular Act and it made clear that in the context of an Act is to be found the answer to the question how a power given by it is to be exercised. Lord Cairns L.C. said ¹⁷:

"... the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit

¹⁶ 5 App.Cas. 214.

¹⁷ Ibid. 225.

of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

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Lord Penzance said ¹⁸:

"The words 'it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it."

And Lord Selborne said ¹⁹:

"The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

It is quite clear from the Act in question that the Minister is intended to have *some* duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) "I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation." To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely, that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no

¹⁸ 5 App.Cas. 214, 229–230.

¹⁹ Ibid. 235.

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good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act.

In the present case it is clear that Parliament attached considerable importance to the independent committee of investigation as a means to ensure that injustices were not caused by the operation of a compulsory scheme. It provided no other means by which an injustice could be ventilated. It was not content to leave the matter wholly in the power of a majority of the board. Nor was it content that the removal of injustice should be left to the power of the Minister. It wished to have the published views of an independent committee of investigation (with wide power to explore the matter fully). It also wished that committee to consider and weigh the public interest—a fact that makes it clear that the question of public interest was not at that stage being left to the Minister. When the report is published then the Minister may and must make up his own mind on the subject. He has power to do what he thinks best and decide whether or not to implement the report. He is then answerable only to Parliament, which will have the advantage of being able to understand the pros and cons of the matter from the published report of an independent committee. Until that is published nobody can effectively criticise his action, since nobody will have a balanced view of the strength of the grievance and its impact on the public interest.

It is clear, however, as a matter of common sense, that Parliament did not intend that frivolous or repetitive or insubstantial complaints or those which were more apt for arbitration should be examined by the committee of investigation. And, no doubt, the Minister was intended to use his discretion not to direct the committee to investigate those. It is argued that, if he has a discretion to *that* extent, he must also have an unfettered discretion to suppress a complaint of substance involving the public interest which has no other outlet. I cannot see why this should be so. Parliament intended that certain substantial complaints (involving the public interest) under the compulsory scheme should be considered by the investigation committee. It was for the Minister to use his discretion to promote Parliament's intention. If the court had doubt as to whether the appellants' complaint was frivolous or repetitive, or not genuine, or not substantial, or unsuitable for investigation or more apt for arbitration, it would

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A not interfere. But nothing which has been said in this case leads one to doubt that it is a complaint of some substance which should properly be investigated by the independent committee with a view to pronouncing on the weight of the complaint and the public interest involved.

B The fact that the complaint raises wide issues and affects other regions was not a good ground for denying it an investigation by the committee. It is a matter which makes it very suitable for the committee of investigation, with its duty to report on the public interest, and its capacity to hear representatives of all the regions.

C Moreover the Minister was mistaken in thinking that "normal democratic machinery of the Milk Marketing Scheme" was a ground for refusal to have the complaint investigated. It is alleged that the normal democratic machinery of the board is acting contrary to the public interest. The investigation under section 19 and the Minister's powers under section 20 were intended to correct, where necessary, the normal democratic machinery of the scheme. Parliament had put into the hands of D the Minister and those of the committee of investigation the power and duty where necessary to intervene. A general abdication of that power and duty would not be in accord with Parliament's intentions.

I would allow the appeal.

E LORD UPJOHN. My Lords, this appeal is of great importance to the milk producing industry and therefore to the country in general, for it is concerned with the refusal of the respondent Minister to order an inquiry into the complaint of the appellants representing the milk producing farmers of the South-Eastern Region.

F In 1931 Parliament, in order to produce better conditions within the agricultural industry and more efficient and economical methods of production and distribution, enacted the Agricultural Marketing Act, 1931, which provided for schemes to be prepared for the control of various sections of the industry. In 1933 pursuant to the provisions of the Act, the Milk Marketing Scheme, G 1933, for England and Wales was prepared and approved by Parliament and is, subject to many subsequent amendments, still in force; I shall refer to it as "the scheme." Many other schemes relating to the control of other sections of the industry have been prepared and approved and the Act now controlling these schemes is the Agricultural Marketing Act, 1958, an Act consolidating the

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Act of 1931 and later amending Acts. For all relevant purposes schemes have statutory force.

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As was intended by Parliament, the scheme was prepared by the industry itself, a circumstance much relied upon in argument on behalf of the Minister; but of course that does not mean that it received the unanimous approval of all milk producers; that would be impossible to expect of any scheme. The scheme provided for a board to administer it consisting of members elected by the eleven regions into which the country was for the purposes of the scheme divided, one of them being the South-Eastern Region. It provided for the registration of producers of milk and in those days when compulsory powers were less familiar than today, went so far as to provide that no unregistered producer should sell any milk. Furthermore the scheme empowered the board (a power quickly exercised and still in force) to resolve that registered producers should sell only to the board and then only at the price and upon the terms prescribed by the board. No one doubts that these provisions were greatly to the advantage of the industry as a whole, but a scheme which put the milk industry into such a straight jacket may produce anomalies and individual discontent. In my opinion it was with this (inter alia) in view and in the realisation that such matters should receive review at ministerial level that Parliament enacted the provision now to be found in section 19 of the Act of 1958.

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That section provided that the Minister should appoint two committees, a consumers' committee and a committee of investigation. The former committee is bound to consider and report to the Minister upon any approved scheme and any complaints made to them as to the effect of the scheme on consumers, a matter with which this appeal is not concerned.

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The committee of investigation is by section 19 (3) (b)

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"charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any complaint made to the Minister as to the operation of any scheme which . . . could not be considered by a consumers' committee . . ."

These committees are by the Act permanent committees and have been set up by the Minister to receive and deal with, from time to time, matters referred to them, another indication that Parliament realised that schemes might require inquiry and review in operation as time went on and circumstances changed.

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The South-Eastern region contend that for many years they have received too low a price for their products for the reasons I

- A shall not discuss, for they are set out fully in the speech of my noble and learned friend, Lord Reid. Further, it is perfectly clear upon the facts that this question, having been considered by two independent committees (with results on the whole favourable to the South-Eastern Region) and having been raised on no less than fifteen occasions at board meetings by the South-Eastern regional representative since 1958, cannot be dismissed as frivolous, vexatious or trivial. In fairness to the Minister and his advisers let it be said that this has never been suggested.
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- C At first sight, therefore, I should suppose that this was precisely the type of matter which Parliament had envisaged would be fit for investigation by the committee of investigation and report to the Minister, but the Minister has declined either to investigate the complaint himself, as of course he was perfectly entitled to do, or to refer it to the committee of investigation.

- D Section 19 (3) as a matter of language confers a discretion upon the Minister as to whether any complaint made to him should be referred to the committee of investigation, the relevant words being "if the Minister in any case so directs," plainly words of discretion and not of duty. But it was argued before your Lordships, perhaps more strenuously at the first hearing than at the second after Supplemental Cases had been delivered, that the case was governed by the principle established by the well known case of *Julius v. Bishop of Oxford*²⁰ where it was held
- E that words of permission such as "it shall be lawful" might in some cases in fact call for its exercise and create a duty upon the donee of the power or permission to exercise it. It was held not to do so in that case where Parliament had conferred upon the bishop a power to issue a commission, but, like so many cases in our law where it was held that the principle did not apply, it is the
- F leading authority for the proposition that there may be, as it is so often said, "a power coupled with a duty." In other words, as was so succinctly stated by the court in *Rex v. Steward of Havering Atte Bower*,²¹ "the words of permission . . . are obligatory"; briefly they create a duty, not a power.

- G But, in my opinion, that principle can have no application to the present where it is clear that Parliament would have used different words if it had intended that the Minister was under a duty to refer every complaint to the committee of investigation; in fact Parliament would have adopted precisely the same language as in section 19 (2) where consumers are empowered to make their

²⁰ 5 App.Cas. 214.²¹ (1822) 5 B. & Ald. 691, 692.

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complaints direct to the consumers' committee without any intermediate reference to the Minister.

A

So it is clear that the Minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.

My Lords, upon the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case.

B

The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker C.J., in the Divisional Court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration.

C

There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings I have mentioned.

D

In the circumstances of this case, which I have sufficiently detailed for this purpose, it seems to me quite clear that prima facie there seems a case for investigation by the committee of investigation. As I have said already, it seems just the type of situation for which the machinery of section 19 was set up, but that is a matter for the Minister.

E

He may have good reasons for refusing an investigation, he may have, indeed, good policy reasons for refusing it, though that policy must not be based on political considerations which as Farwell L.J. said in *Rex v. Board of Education*²² are pre-eminently extraneous. So I must examine the reasons given by the Minister, including any policy upon which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or, as it is frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so, the court has no jurisdiction to interfere. It is not a Court

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²² [1910] 2 K.B. 165, 181; 26 T.L.R. 422, C.A.

- A of Appeal and has no jurisdiction to correct the decision of the Minister acting lawfully within his discretion, however much the court may disagree with its exercise.

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- B In his affidavit filed in opposition to the appellants' application for the order of mandamus the Minister, after referring to the fact that he had read the letter dated May 1, 1964, of Mr. Kirk, an Under Secretary of the Ministry, stated that he reached his decision for refusing a reference to the investigating committee for the reasons given in his private secretary's letters of March 23 and May 3, 1965, all addressed to the respondents or their solicitors. So to these letters I must turn to see whether his reasons are open to challenge on the ground of being unlawful.

- C The first letter, that of March 23, 1965, in which the Minister gave his reasons was, so far as relevant, in these terms:

- D "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

- E This letter seems to me to show an entirely wrong approach to the complaint. The Minister's main duty is not to consider its suitability for investigation; he is putting the cart before the horse.
- F He might reach that conclusion after weighing all the facts but not until he has done so; but perhaps this is the least of the criticisms (arising out of his letter) to be directed at the Minister. But I have dealt with it as in argument it was seriously pressed upon your Lordships as a conclusive consideration in answer to any challenge to his powers.

- G His next statement—that it raises wide issues, etc.—shows a complete misapprehension of his duties, for it indicates quite clearly that he has completely misunderstood the scope and object of section 19. It is when wide issues are raised and when the complaint of one region raises matters which may affect other regions and the regional price structure as a whole, that the

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Minister should consider it as a most powerful (though not conclusive) element in favour of referring the complaint instead of the reverse. Then, again, in his final paragraph of this letter the Minister reveals the same misconception. It was just because it was realised that the board structure might produce within its framework matters for complaint by those vitally affected that the machinery of section 19 was set up. This letter shows that the Minister was entirely misdirecting himself in law based upon a misunderstanding of the basic reasons for the conferment upon him of the powers of section 19.

I will turn to his second letter, that of May 3, 1965, which so far as relevant was in these terms:

"You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the Milk Marketing Scheme, in which all registered producers participate and which governs the operations of the board."

This introduces the idea, much pressed upon your Lordships in argument, that he had an "unfettered" discretion in this matter; this, it was argued, means that, provided the Minister considered the complaint bona fide, that was an end of the matter. Here let it be said at once, he and his advisers have obviously given a bona fide and painstaking consideration to the complaints addressed to him; the question is whether the consideration given was sufficient in law.

My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in section 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.

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A The second sentence of this letter again only shows what I have earlier pointed out, that the Minister has failed to understand that it may be his duty to intervene where there is a serious complaint that the "democratic machinery" of the board is producing unfairness among its members.

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B Those are the reasons relied upon by the Minister for refusing a reference. Summing up the matter shortly, in my opinion every reason given shows that the Minister has failed to understand the object and scope of section 19 and of his functions and duties thereunder which he has misinterpreted and so misdirected himself in law.

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C The matter, however, does not end there, for in his affidavit the Minister referred, as I have already mentioned, to Mr. Kirk's letter of May 1, 1964, without disapproval. That letter contained this paragraph:

D "3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable."

E This fear of parliamentary trouble (for, in my opinion, this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament if a statute has cast upon him an obligation in the proper exercise of a discretion conferred upon him to order a reference to the committee of investigation.

F My Lords, I would only add this: that without throwing any doubt upon what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for

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reaching that conclusion and order a prerogative writ to issue accordingly. A

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The Minister in my opinion has not given a single valid reason for refusing to order an inquiry into the legitimate complaint (be it well founded or not) of the South-Eastern Region; all his disclosed reasons for refusing to do so are bad in law. I would allow this appeal in the terms proposed by my noble and learned friend, Lord Reid.

Appeal allowed.

The House of Lords ordered that the cause be remitted to the Divisional Court of the Queen's Bench Division to require the respondent, the Minister of Agriculture, Fisheries and Food, to consider the complaint of the appellants according to law. It further ordered that the respondents do pay to the appellants the costs incurred by them in the courts below and also two-thirds of the costs incurred by them in respect of the appeal to the House of Lords.

Solicitors: *Biddle & Co.; The Solicitor, Ministry of Agriculture, Fisheries and Food.*

F. C.

[PRIVY COUNCIL]

P. C.*
1967
Nov. 27, 28;
1968
Jan. 22

KULAMMA v. MANADAN

Fiji—Native land—Unlawful “dealing” with—Share farming agreement—Agreement of purely contractual and personal character—Whether agreement an “alienation” of the farmer’s interest—Whether a “dealing with the land”—Native Land Trust Ordinance, Cap. 104 (Laws of Fiji, 1955 Rev.), s. 12.

A share farming agreement made between the appellant's late husband, S., and his brother, the respondent, M., relating to native land, provided:

“ 1. The owner S. will employ the farmer M. to farm and the farmer will farm the said land to the best of his skill and ability. 2. This agreement shall enure until all moneys owing by the owner to M.H.S. are fully paid. 3. The farmer will at all times . . . cultivate and farm . . . according to

* *Present*: LORD GUEST, LORD WILBERFORCE and LORD PEARSON.

APPENDIX 9 – 3

James Stanley Prest and Michael Ian Bowstead Straker (Trustees of the Felin Isaf Trust and Miskin Village Trust) and Sir Brandon Meredith RHYS Williams and Brinley Edmunds v The Secretary of State for Wales v The Welsh Water Authority



Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

1 January 1983

In the Supreme Court of Judicature

Court of Appeal

On Appeal from the High Court of Justice

Queen's Bench Division

1983 WL 215478

The Master of the Rolls (Lord Denning) Lord Justice Watkins Lord Justice Fox

Friday, 24th September, 1982

Representation

LORD HOOSON Q.C. and MR. J. HOWELL (instructed by Messrs. Roche Hardcastle) appeared on behalf of the Appellants.

MR. SIMON BROWN (instructed by The Treasury Solicitor) appeared on behalf of the Secretary of State.

MR. M. T. PILL Q.C. and KISS A. J. BOOTH (instructed by the Area Solicitor, Welsh Water Authority) appeared on behalf of the Welsh Water Authority.

JUDGMENT

THE MASTER OF THE ROLLS:

Sir Brandon Rhys Williams is a doughty fighter. He is under attack in his own homeland. It is in the Vale of Glamorgan. You pass by it if you go by the main line from Cardiff to Bridgend. Also if you go by car along the new M4 motorway near the Miskin interchange. He and his forebears have been in those parts for over 300 years. They have a considerable estate there which they let out to tenant farmers. Yet now they are under threat. The Welsh Water Authority are about to seize 30 or so acres of their land. It is agricultural land on a site next the railway line. The Welsh Water Authority have made a compulsory purchase order on it: and it has been confirmed by the Minister. It is now under appeal to this court.

The reason for this imminent seizure is to make a new sewage works for the neighbouring towns and villages. It is urgent. The existing sewage works are grossly over-loaded. It is anticipated – and hoped – that the district may be developed for industrial use. So that more facilities are needed for the disposal of sewage.

Sir Brandon and his children's trustees all recognise the need for a *new* sewage works and the urgency of it. They are just as keen as the Welsh Water Authority. But they do not agree to the site seized •0 or about to be seized by that Authority. They offer an alternative site: or rather one of two alternative sites. Each of them is about 30 or 40 acres. Each of them is close by in the same area. One is 60 yards away from the railway line. The other is 160 yards away. Each is very convenient for the new sewage works.

The contest in the case is this: Which of the sites should be used for the new sewage works? Should it be the site proposed by the Authority? or one of the two alternative sites offered by Sir Brandon?

In November and December 1977 there was a long public inquiry as to the comparative merits of the sites. It took twelve days. The long and short of it is that there is nothing to choose *between* the sites – save as to cost. Everything was considered at the inquiry. Such as the means of access, the *interference* with agriculture, the effect on the amenities, the impact of floodtag, and so forth. In no material respect was any one site to be preferred to the others – save as to cost.

Now the cost was the rub. At the inquiry there was much evidence as to the cost of constructing the plant for treating the sewage. The total cost, as at 1976 prices, would be £7,616,900 on the site proposed by the Authority. But as to the alternative sites, *Nos. 1 and 2*, offered by Sir Brandon

“the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2.”

Those were of course, only estimates at that time. Like all estimates they are often falsified in execution. They are certainly out of date by this time. Even so, the saving of £230,000 or even £300,000 would seem to be marginal in relation to a figure of nearly £8,000,000.

Yet that saving seems to have *been* the determining factor with the Inspector. *He made his report* on 20th April 1978. It *covered* sixty-four closely-typed pages. He said in it:

“The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar ... the applications (by Sir Brandon for sites Nos. 1 and 2) should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds.”

In recent letters the Welsh Water Authority have made it clear that the determining factor has been one of cost. On 23rd April 1982 they said that the proposals of Sir Brandon “impose an unacceptable cost-penalty on its proposed sewage disposal scheme” : and on 14th May 1982 that the alternative site “has been considered and rejected because of the additional cost involved” .

The offer by Sir Brandon

Now I come to the crucial point in the appeal. Both at the inquiry and ever since, Sir Brandon and his children’s trustees have offered to convey either of the alternative sites offered by them at “existing use value” . That is, at its value as agricultural land. But if the Welsh Water Authority insist on the site proposed by the Authority itself, then Sir Brandon and his children’s trustees will require the Authority to pay its full compensation allowed by law. That is its value, not as agricultural land, but as land with a potential for development for industrial purposes. This will be much higher than the agricultural value. It would far more than outweigh the saving of £230,000 to £300,000 on construction costs.

The point that was omitted

Here is the strangething. The Inspector did not take any account of that offer. He recorded it among his findings in paragraph 264(9), but he did not take it into account in assessing the cost of the whole project. He only took into account the cost of constructing the sewage treatment works. He did not take into account the cost of acquiring the land itself. That is a most significant omission. Both sides agree that it was omitted. Neither side adduced any evidence before the Inspector about it. So *he did* not take it into account.

The letter of 20th October 1978

Whilst the Inspector's report was with the Minister – and before he gave his decision – the trustees and Sir Brandon wrote a letter of 20th October 1978. They asked for the inquiry to be re-opened. They pointed out that the site proposed by the Authority had much potential for industrial purposes: so the cost of acquiring it would be much greater than that of the site offered by Sir Brandon which was being offered at agricultural value. This was clear enough in the somewhat clumsy language of the letter:

“This obvious potential of the CPO site (the site proposed by the Authority) for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry.”

The planning applications

Whilst all these things were going on, the trustees and Sir Brandon were making planning applications for the development of much of their land in the area for industrial purposes. These were called in by the Minister so that he could determine them himself. They had not been determined at the date of the decision letter in November 1978. A local inquiry was held into them by a different Inspector. He recommended that the applications should be allowed. But, on 7th August, 1980, the Minister turned them down at that stage. He said:

“While not disputing the Inspector's view that there is a need for industrial land in the general area, the Secretary of State notes that other industrial sites are available and he is not convinced that the industrial need would justify a major intrusion into this attractive part of the Vale of Glamorgan.”

Nevertheless, the trustees and Sir Brandon made another application. It was called in by the Minister again for his determination. Another Inspector, Miss Ellis, held another local inquiry. It is believed that she reported in favour of industrial development. In a letter of 12th March 1982 the Minister indicated his willingness to permit industrial development, subject to certain conditions.

It is quite clear, therefore, that by this time it is very probable that (if it were not acquired

compulsorily) the site proposed by the Authority would be developed for industrial purposes and would command a very high price. The cost of the whole project would be far greater than it would be if the Authority accepted the alternative site offered by Sir Brandon.

These findings give rise to several points of law.

The use of compulsory powers

The first is fundamental. To what extent is the Secretary of State entitled to *use* compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition with the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see *Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508*. If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in *Brown v. Secretary of State for the Environment* (1978) P. & C.R. 285, where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

“It seems to me that there is a very long and respectable tradition for the view that an authority that *seeks* to dispossess a citizen of his land must do so by showing that it is necessary ... If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose.”

The facts to be considered

The second point is this: When a case reaches the courts, is it to be decided on the facts as they appeared to the Minister at the date of his decision? or, can the courts look at subsequent facts? In this very case the Inspector took the view that, at the time of his inquiry, it was a matter for “speculation” whether or not there would be an industrial use of the site proposed by the Authority. But, by the time that the case reached the courts, or at any rate reached this court, it was no longer speculative. It was highly probable that the landowner would get permission for development for industrial purposes. If these had been proceedings in a court of law, this

subsequent evidence would have been regarded as so material that it would have been admitted in the Court of Appeal, see *Murphy v. Stone-Wallwork* (1969) 1 W.L.R. 1025 ; *Mulholland v. Mitchell* (1971) A.C. 666 . So here it seems to me that, when the decision of the Minister was under challenge in the courts, it was not final. It was sub judice. So far as I am aware, the acquiring authority does not act on it until the court proceedings are finally disposed of. Rarely indeed would fresh facts be admitted to counteract the decision: but I think that in a proper case they should be. Take this very case. The Welsh Water Authority are not bound to take up the compulsory purchase order. If they exercise it, the price will not *be assessed* at the date of the order. It will *be assessed* at the time when they actually take the land, see *West Midland Baptist (Trust) Association (Inc) v. Birmingham Corporation* (1970) A.C. 874 . That would be much higher than at the date of the Inspector's inquiry. If the Authority can wait till after the Court of Appeal order – to see what prices are, it is only fair that the landowner should be able to have his case – against compulsory purchase – also determined at that date.

Test it this way: Take a case where the Minister has confirmed the compulsory purchase order. But after the confirmation the acquiring authority alters its proposals radically, or abandons them, or decides to use the land for a different purpose from that which it originally intended. In that case the compulsory purchase order would no longer be available to it. The court would restrain the acquiring authority from going on with the purchase. That is shown by *Grice & anr. v. Dudley Corporation* (1958) 1 Ch. 329 , where Mr. Justice Upjohn said (at page 344);

“... what are the corporation doing? They seem to me to be endeavouring to acquire the plaintiffs' property for some purpose other than that for which they were authorised to exercise compulsory powers by the compulsory purchase order ... they are going entirely outside the order and, if that be so, then they must be restrained from doing so.”

If that can be done by the court – after the order has been confirmed – surely it can be done where there is an application to the court to set aside the order under the statutory powers available. I am aware that this would need fresh evidence over and above that which was before the Inspector and the Minister. But there is power to receive it. Not usually. Only rarely. As I said in *Ashbridge Investments Ltd. v. Minister of Housing & Local Government* (1965) 1 W.L.R. 1320 at page 1327:

“Fresh evidence should not be admitted save in exceptional circumstances.”

Those exceptional circumstances need not be closely defined. I would suggest that fresh evidence can and should be admitted on similar grounds to that in the courts of law – in those cases where it has arisen since and would in all probability have an important influence on the

result.

The matters to be taken into account

The third principle asks this question: What matters is the Secretary of State to take into account? Is he limited to those canvassed before the Inspector? or should he go beyond them and consider other matters, if they are relevant?

This was one of the principal points made by the Minister and by the Water Authority. They said that the trustees and Sir Brandon never raised the point about the cost of acquisition of the land, nor did they give any evidence upon it. So they should be shut out from canvassing it now.

To my mind this is a mistake. It treats a public inquiry – and the Minister’s decision – as if it were a *lis inter partes*. That it certainly is not. It is a public inquiry at which the acquiring authority and the objectors are present and put forward their cases – but there is an unseen party who is vitally interested and is not represented. It is the public at large. It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers’ money or the ratepayers’ money. The Minister ought to see that they are not made to pay too much for the land – especially where there is an alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account, cf. *Hanks & ors. v. Minister of Housing & Local Government* (1963) 1 Q.B. 999. The principle was implicit in the decision of the House of Lords in *Board of Education v. Rice* (1911) A.C. 179. It was expressed by Lord Greene, M.R., in a single sentence in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223 at page 229:

“He must call his own attention to the matters which he is bound to consider.”

This was put a little more fully by Lord Diplock in *Education Secretary v. Tameside* (1977) A.C. 1014 at page 1065:

“Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

The power of the court

The fourth principle is the power of the court to intervene. Often we are referred to the classic judgment of Lord *Greene*, M.R., in the *Wednesbury* case (1948) 1 K.B. 223, but I ventured to restate it in my own words in *Ashbridge Investments v. Minister of Housing* (1965) 1 W.L.R. 1320 at page 1326, which has been repeatedly applied. This was in relation to the very statutory words applicable here:

“Seeing that that decision is entrusted to the Minister, we have to consider the power of the court to interfere with his decision. It is given in [Schedule 4, para. 2 \(of the Housing Act 1957\)](#)). The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister’s decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law.”

I went on to say that in some cases fresh evidence might be admitted:

“We have to apply this to the *modern* procedure whereby the inspector makes his report and the Minister gives his letter of decision, and they are made available to the parties. It seems to me that the court should look at the material which the Inspector and the Minister had before them, just as it looks at the material before an inferior court, and see whether on that material the Minister has gone wrong in law ... Fresh evidence should not be admitted save in exceptional circumstances.”

Conclusion

It remains to apply these principles.

In the first place, we have fresh evidence which shows that the present proposals of the acquiring authority are radically different from those which were considered by the Inspector at the inquiry. The main differences are these:

- (i) Modern methods of treating sewage have reduced the whole scale of the project so that the area required for the actual works has been halved in size.
- (ii) It is very probable that planning permission be given for the development of the order land for industrial purposes (that is the CPO site): so that it would command a very

considerable “hope” value far in excess of agricultural land, cf. *Camrose (Viscount) & anr. v. Basingstoke Corporation* (1966) 1 W.L.R. 1100 .

(iii) The trustees and Sir Brandon have made it clear that they will make the alternative site available at existing use value, that is, its agricultural value.

In view of the fresh evidence it would be quite unreasonable for the acquiring authority to proceed with the compulsory purchase order. Yet on 18th May 1981, they gave notice to treat and have only held their hand pending these proceedings.

In the second place, even if the fresh evidence be disregarded, when the Minister wrote the decision letter confirming the compulsory purchase order, he failed to take into account the cost of acquiring the site proposed by the Authority (the CPO site) as against the cost of acquiring the alternative site offered by Sir Brandon. This was a most relevant consideration. It would probably have made a crucial difference because, even at that date in 1978, there was a potential of development for industrial use which would have given a considerable “hope” value to the order land (the CPO site). The Minister ought to have had regard to this point – in the public interest – even though it was not canvassed by the parties at the inquiry. In any event he ought to have considered it – after receiving the letter of 20th October 1978 – and asked for evidence of values before coming to his decisions. If he had considered its the only reasonable conclusion would be that the compulsory purchase order would not have been confirmed.

I would, therefore, allow the appeal and set aside the compulsory purchase order. Everyone must regret the long delay in making the new sewage works. But I think that the responsibility must rest primarily with the Welsh Water Authority. All could have *been* avoided if they had not insisted on their own site, but had accepted the offer made by Sir Brandon and his children’s trustees long ago. If they had done so, the sewage works could have been completed by this time – at much less cost than they will be now. It is, I understand, still open to them to accept the offer. They should do so and get on with the work at once. I would allow the appeal accordingly.

LORD JUSTICE WATKINS:

The attempted acquisition of land by compulsory purchase is when strongly resisted by the owners of it, likely to give rise to a protracted and sometimes bitter contest fought in the forum of public inquiry and thereafter in the courts. Seldom, however, can there have been such a long drawn out struggle to preserve for himself and his family a part of their land at Miskin in the heart of Glamorgan as that waged by Sir Brandon Rhys Williams and the Trustees of the family Trusts.

Sir Brandon’s family have lived in Miskin Manor for a century. They have been associated with the lands thereabouts for three centuries or more. He has set ideas of his own as to how his land should be developed in the interests of good and profitable estate management. He has not for

many years been averse to selling some part of his land, at agricultural value, initially to the Local Authority and later on to the Welsh Water Authority when this was created in 1944 so that a sewage disposal plant could be constructed upon it and a suitable access road provided to that.

But he insists upon making available for this purpose a site which in extent and in every other way is, in his estimation, suitable for this purpose and he will not, in any circumstance, treat with the Welsh Water Authority in respect of another part of his land, which is their considered choice for the construction of a plant which is to be provided for the benefit of the inhabitants of Miskin, Llantrisant and other villages nearby.

But the construction of this is, after a decade of strife concerning its location, still not imminent. Indeed, local inhabitants could be excused for thinking that it never will be, seeing that the Welsh Water Authority is, it could be said, inexcusably obdurate in pursuing its objective and Sir Brandon is at least equally determined and resourceful in thwarting them.

There have been from time to time substantial changes in the schemes or proposals put before the Secretary of State for Wales by both sides. The Welsh Water Authority has made fundamental changes in its conception of the kind of plant designed to be constructed, which has meant, among other things, that the amount of land sought to be acquired has diminished in size and Sir Brandon has changed the location of the alternative site he is willing voluntarily to sell at agricultural value to accommodate the plant.

A sensible and reasonably expeditious resolution to this dispute has also been affected by other factors outside the control of both the Welsh Water Authority and Sir Brandon. Notable among these has been the planning and construction of the M4 motorway, which passes through the Miskin Estate, and various proposals, some of which have been the subject of planning applications, for industrial development of this part of Glamorgan which lies immediately to the south of the Rhondda Valley, wherein coal mining has been for years a declining industry – just as in other valleys in Glamorgan and Gwent has the manufacture of steel. These two heavy industries were the economic bedrock of South Wales.

For many years now, since the end of the second world war especially, the local industrial scene has gradually moved from the valleys to the agricultural coastal plain where lie the ports and through which run the railway line and now the motorway. New industries hitherto alien to this part of Wales have been placed near or not very far away from these essential facilities for transporting people and material.

Some of the land around Llantrisant has already been used for this purpose. During the last 15 years a much more extensive industrial development there has been envisaged by planners, including Professor Buchanan, in a specially commissioned report. These proposals have included, among other things, the creation of a new town. Today the approach to development there is much less grandiose, but the determination to bring some new industry to the area

appears to be in some quarters as firm as ever.

Accordingly, it can with justification, so it is argued, be said that the area has a potential for industrial use. The Welsh Land Authority, which is answerable to the Secretary of State, has been and seemingly remains very conscious of this. Various provisions of the [Community Land Act 1975](#) remain available to this Authority. Armed with these it seeks to acquire land for industrial use near Llantrisant, including a part of the Miskin Estate. It has not yet succeeded in obtaining the requisite consents with which to implement its proposals for land acquisition, but there is no sign that its resolve to acquire a reserve of land in this neighbourhood is weakening.

Furthermore, the Local and County Authorities, which themselves have undergone convulsive changes in recent times, have advanced proposals for development so as to bring in new industry.

So the long endured pressures imposed upon the Secretary of State for Wales and his predecessors to grant planning permissions and approve the purchase of land by compulsory acquisition have been many and various.

It would not be in the least surprising, therefore, if the Secretary of State and those who advise him, in a mood of desperation if not exasperation, resolved to put an end to the battle over the siting of the sewage plant by as he has done, giving the Welsh Water Authority the powers of land acquisition it seeks accompanied by planning permission to construct the plant which he stipulated was to begin by 30th November 1983.

In the decisive decision letter of 14th November 1978, after describing outstanding applications for planning permission for industrial use by Sir Brandon and the Welsh Land Authority, it was stated:

“Whilst it would not be for the Secretary of State to prejudge the issue regarding the siting of industry south east of the Miskin Interchange, he is satisfied on the evidence that the construction of a sewage disposal works on the site proposed by the Authority or on either of the two sites advanced by Sir Brandon Rhys Williams would not jeopardise the development of an industrial estate in the area. Accordingly, he considers he would not be justified in withholding his decisions in relation to the sewage disposal works”.

It was contended on behalf of the appellants that in this passage the Secretary of State revealed that he had reached a decision in advance of detailed appraisals of the planning applications which, if successful, would inevitably have seriously affected the cost of compulsory acquisition of the Welsh Water Authority site. The decision to confirm the order was swayed against Sir Brandon solely by the costs factor, a full and proper appreciation of which could not be gained

without regard to the user present or prospective of adjoining parts of his lands.

As subsequent events have shown, so it is argued, this cost factor viewed in that way will involve the Welsh Water Authority in a sum for the acquisition of the site which is the subject of the compulsory purchase order, which will not be based on agricultural value but upon a valuation which takes account of at least the hope of planning permission being granted for use for industrial purposes of the site and of adjoining lands as a composite whole or for adjoining lands excluding the site. In this context, it is of interest to learn of the Secretary of State's recent indication that he is quite likely to regard favourably a recommendation made by an inspector in 1981 that conditional planning permission be granted to Sir Brandon and the trustees upon their applications therefor for the use for industrial purposes of a very considerable area of land which includes the compulsory purchase order site.

In her report following the enquiry into the applications, the inspector somewhat significantly concluded, upon the need for land for industrial use, that, if it was necessary urgently to attract large prestige firms with exacting requirements which can serve the Rhondda, then Miskin was the only site she was shown which meets the criteria of accessibility, availability and attractiveness.

In March 1982 the Secretary of State informed Sir Brandon and the Trustees that the existence of an acceptable agreement with the local planning authority under the provisions of [section 52 of the Town and Country Planning Act 1971](#) – apparently such an agreement is in being – would be an important factor in his consideration of the applications. And he enquired whether, in view of the areas of land covered by the agreement, account could be taken of any possible requirements which might arise for alternative sites for a sewage disposal works.

What is one to make of all that, save, it seems inevitable, that a large part of the Miskin lands, the CPO site included, will soon be the subject of planning permission for industrial use. And the cost of acquisition of the CPO site, if the order is to remain confirmed, will not be based on agricultural land value but upon the much higher value attributed to land used for industrial purposes.

This is obviously in the public interest a very important consideration, especially when it is borne in mind that, in the present case, land can still be acquired by the Welsh Water Authority without the use of compulsory powers at agricultural value which is, so it is submitted by Lord Hooson, as suitable as the compulsory purchase order site for the construction of a sewage plant.

Looking at the whole situation as it appears now, that is, I think, a valid and powerful argument. Despite attempts made on behalf of the Secretary of State and the Welsh Water Authority to demonstrate that his decision to confirm the compulsory purchase order was not exclusively founded on the difference between the cost of construction of the CPO site and the alternative site, I am persuaded, for reasons which I shall later explain and which arise out of the contents

of the several reports and decision letters which are summarised in the decision letter of 14th November 1978, that this was the sole factor which caused the Secretary of State to prefer the CPO site.

Accordingly, seeing nothing has happened to change the character of either of the two sites during the last three-and-a-half years, if it were permissible to regard the situation as it appears now for the purpose of fairly disposing of the appeal, I would unhesitatingly allow the appeal. The cost factor is altogether different now. Land values are a powerful, if not overwhelming, ingredient of it, whereas it was absent from the Secretary of State's consideration in the autumn of 1978.

But is it lawful and otherwise proper to look at the Secretary of State's decision taking account of subsequent events so as with hindsight, to adjudge it right or wrong? It is very tempting to do so, especially when what is at stake is the right of a man to retain his land or to dispose of it when and how and to whom he chooses. There are instances in recent times when this court has, notably in claims for personal injury, looked at an event or events subsequent to judgment in order to decide whether a plaintiff or a defendant has been justly treated, but I regard them as an exception to the general rule, which is that a decision appealed against can only be regarded within the circumstances from which it was derived. Generally to conduct the appellate process otherwise would *be* to introduce into it an undesirable combination of re-hearing and fresh evidence which would put at peril the imperative need for judgments or orders or decisions to be final unless they are wrong in law or because, for example, the principles explained in the well-known *Wednesbury* case have not been followed.

I did not understand Lord Hooson to invite us to resolve this appeal other-wise than in the conventional way. This I propose to do, firmly believing it to be wrong to proceed differently. The most he asks of us with regard to the post decision history is to pay regard to it as an unfolding of events, the main effect of which the Secretary of State could reasonably have anticipated as likely to occur sometime soon in the future when he made his decision in November 1978. In other words, it demonstrates what it was the Secretary of State might have anticipated if he had given thought to it, namely that there was hope value in the CPO site and adjoining lands which inevitably would markedly affect the cost of acquisition under the CPO and, therefore, the cost factor which he acted upon.

So regarded, reception of evidence of that kind is, I think, unobjectionable but otherwise it must be ignored. Even when acted upon in that context it may prove to be of little or no value. This is especially so in long drawn out planning disputes during which time all manner of conditions and needs may change so as radically to alter a pre-existing situation.

In the present appeal I do not find the subsequent events helpful, having regard to the vast bulk of the past history, every detail of which must have been known to the Welsh office and, therefore, to the Secretary of State if he had wished to acquaint himself of it. His role in making

planning decisions and confirming or otherwise compulsory purchase orders is, if not inquisitorial, which Mr. Simon Brown submits that it is not, surely investigatory, especially when he is given notice of a relevant matter which might affect his decision by a person likely to be affected by it. He must acquaint himself, from the formidable amount of assistance available to him in his department and from public inquiry, with all the information which is indispensable to the making of a just and equitable decision in the making of which he is entrusted with a broad discretionary power. The proper use of a discretionary power is in peril if less than the information essential for its exercise is available to him. If proper use involves him in “routing around” – see *Rhodes v. Minister of Housing and Local Government* (1963) 1 W.L.R. 208 at 213 – relied upon by Mr. Pill – he must either cause that to be done or resolve the issue in favour of the land owner.

So long as all those persons who are going to be affected by his decision are aware of the information he expects to take account of, so that they are given full opportunity to make representations to him about it at public inquiry or through correspondence either before or after public inquiry, he is not restricted in his sources of gathering relevant information. A public inquiry is the best known, most used and most useful means at his disposal to ensure that he is fully equipped to decide the matter in hand.

There are times, however, when a vital point, as it *seems* to him later has either been insufficiently ventilated or not touched upon at all at an inquiry. In either of these circumstances, if he is going to allow the point to affect him, he must cause enquiries to be made into it even to the extent of re-opening the public inquiry. Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 K.B. 223 at page 229 said:

“He must call his own attention to the matters which he is bound to consider.”

What he may not do is to proceed to exercise his discretion and allow it to be swayed by a factor which is inadequately presented to him. It matters not, so it seems to me, that he could reasonably have expected an objector or a supporter of his ultimate decision to have fully exposed for him that factor in all its facets at public inquiry or in some other way. He conducts a process of administrative decision which is quite unlike that conducted by courts and some, if not all, tribunals. Nevertheless, it is a process which is governed by disciplines vital to the public interest.

In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) A.C. 1014 at page 1065 Lord Diplock said:

“Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant

information to enable him to answer it correctly?”

It could be said that the Secretary of State did ask himself the right question, although Lord Hooson submits to the contrary in the circumstances, namely whether the financial implications alone could allow him to confirm the compulsory purchase order. But whether, as on any view he should have done, he acquainted himself with all the relevant information or, I would add, all the relevant considerations indispensable to correctly *answer* the question, has not to my mind been established by anything we have read or heard in this court.

In this regard he cannot, contrary to a submission made to us, in my opinion, invoke, nor can anyone else who seeks to support his decision here invoke, the doctrine of estoppel against an appellant who challenges that decision, no matter that that person could have a thought of doing so, ventilated at public inquiry what may turn out to be a crucial facet of the factor upon which the decision is hinged. To allow a legal principle or doctrine of that kind to intrude into an administrative process such as this would, in my opinion, be both inappropriate and unjust. Moreover, in the circumstances under review here, even if the issue of estoppel was validly to be raised, it should not, in my opinion, be determined in favour of either the Secretary of State or the *Welsh Water Authority*. It is clear, I think, that he gave his consent to the compulsory acquisition of Sir Brandon’s land solely because of the financial implications arising out of the use of that land. If, as in my view he did, he considered those implications, leaving out of account a fact vital to a proper appraisal of them, Sir Brandon cannot possibly be estopped from inviting this court to examine the effect of that omission.

The inspector whose conclusions and recommendations he accepted made it abundantly plain, as I read his report, that he was in favour of recommending the CPO site upon a financial implication only having, so it would seem, recognised that, upon all other relevant considerations, there was nothing of consequence to cause him to prefer the CPO site to Sir Brandon’s alternative. In other words, there was nothing to choose between them. In order to substantiate this appreciation of his views, it is necessary, I regret in the interests of brevity, to record in detail the contents of the following paragraphs of his report:

“(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site.

“(xx) As to Sir Brandon’s applications, nothing in the evidence concerning appearance, agriculture, flooding, the Nant Coslech or possible future industry suggests to me that planning permissions for Sites 1 and 2 need be withheld. The evidence concerning the Ancient Monument and the Site of Special Scientific Interest shows that Sites 1 and 2 have ‘negative’ advantages (in the sense that damage elsewhere would be avoided or reduced), although in my view these are marginal and are far outweighed by the prospect of heavy operational traffic being thrown on to the local road network.

“(xxi) The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar, in the sense that the sole object of Sir Brandon submitting his applications has been to force thorough and proper consideration of the alternative sites. There is no question of Sir Brandon ever implementing a permission(s) for the construction of a sewage treatment works, and there can be no doubt that the WNWDA (i.e. the public) would foot the bill.

“(xxii) The machinery of physical planning control does not, and should not, operate in a financial vacuum, divorced from the harsh realities of everyday economics. Rather, I believe that wisely used it should seek to channel public investment into the right places at the right time. Thus, having concluded that the development of Sites 1 and 2 is likely to incur substantial and unnecessary penalties in the shape of scarce public resources, it would be wholly illogical for me to recommend that permission be granted in respect of those sites, unless it had been demonstrated that they possess other overriding advantages compared with the Authority’s preferred scheme. I am convinced that they possess no such advantages, and conclude that the applications should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds.”

If the inspector had thought there were other grounds including, for example, agricultural, environmental, access and highway considerations, he would have undoubtedly, in my view, expressly so stated. Thus, although these considerations are mentioned in paragraph (v) of the decision letter, it cannot be supposed, having regard to the inspector’s detailed assessment of them, that they influenced the Secretary of State into confirming the CPO.

Paragraph (v) reads as follows: “Apart from the specific issues referred to in paragraphs 11(i) – (iv) above the Secretary of State has also carefully considered and accepts his inspector’s general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the inspector’s assessment of the financial implications, contained in the conclusions to the report of the second re-opened inquiry, concerning the Water Authority’s proposed redevelopment and the cost comparisons with the sites advanced by Sir Brandon Rhys Williams” .

In the following paragraph – (vi) – the Secretary of State said he had also considered written representations submitted to him by Sir Brandon. These were contained in his solicitor’s letter of 20th October 1978 wherein this paragraph appears:

“This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the enquiry”.

Regardless of the main purpose of the letter this paragraph clearly alerted, or should have done I think, the Secretary of State to the likelihood that a decision based upon financial implications without consideration of relative land costs would be ill founded and, therefore, unjust to Sir Brandon. The raising of the matter of land costs is nowhere, as I understand the decision letter, answered by it directly or, by implication, within it. The assumption must be, therefore, that the Secretary of State, in refusing to re-open the inquiry or to delay his decision, regarded the financial implication from the standpoint of construction costs and no other.

It was submitted to us that the foregoing paragraph of the solicitor’s letter could not possibly have indicated to the Secretary of State that Sir Brandon was suggesting that hope value *inter alia* was being referred to by the words “material questions of relative land costs” . As already indicated, I do not agree. The Secretary of State has the benefit of advice from senior civil servants well versed in such matters as compulsory purchase and planning. I am not persuaded that they, knowing, of course, that there were material unresolved planning applications before them, did not appreciate that it was being suggested that hope value should be taken account of.

In any event, I do not think it required this paragraph to introduce this financial factor into the mind of the Secretary of State. He was so concerned about the financial implications as to found his decision upon them. That being so, how could he neglect to consider something so fundamental as the cost of the acquisition of land upon which the sewage plant was to be constructed? If this kind of decision were being taken in the commercial world I venture to think that the cost of land would have been very high on the agenda. If the Secretary of State did have it on his agenda – he has failed to prove that – he may have come to the same decision as that which is being challenged, but there is no evidence whatsoever that he gave it so much as a passing thought.

Paragraph (vii) of the decision letter is noteworthy in this connection. He therein contended that all submissions made to him after the close of the enquiries was sufficiently covered by evidence already before him. The plain fact undoubtedly is that no evidence of comparative land

costs was before him. This I take to be a clear indication of his neglect to take account of them.

Does the Secretary of State's failure to enquire into and to consider the full implications of the cost of land acquisition invalidate his decision, bearing in mind the planning and all other relevant considerations? Lord Hooson submits his failure to do so is fatal to the decision – cost of land acquisition was overwhelmingly the main factor to be considered if financial considerations governed the decision. He goes further, and asserts that it was wrong in principle in the exclusive context of finance to prefer the CPO site unless there were overwhelming reasons for this, e.g., a gross disparity in costs which the difference involved in the construction of the plant could not properly be said to amount to.

For the Secretary of State and the Welsh Water Authority it is submitted that he was not called upon to enquire into the cost of the acquisition of land, and that it was reasonable for him and therefore a proper exercise of his discretion to determine the matter as he did.

Mr. Simon Brown conceded, however, that, if there was a glaring lacuna in the evidence and the considerations required to properly found a decision which is capable of being clarified without delaying the decision, the Secretary of State may be “Wednesbury” unreasonable if he does not make enquiries. In other words, he must be shown to have acted perversely.

In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

I have come to the conclusion that his decision should not be upheld. A vital consideration was not enquired into, in my view. It was, therefore, left out of account in the exercise of the Secretary of State's discretion. The hope value of parts of the Miskin lands should not have been disregarded as it was, especially seeing that there was evidence of its possible existence. An enquiry into it would not, it seems to me, have delayed the decision by much time, if any. To fail to make that enquiry was a glaring omission going to a fundamental consideration.

For these reasons I, too, would allow this appeal.

LORD JUSTICE FOX:

I approach this case on the basis that the propriety of the Secretary of State's decision must be

determined by reference to the facts as they existed at the date when he gave the decision. No argument to the contrary was addressed to us. Indeed, Lord Hooson, as I understood him, accepted that basis as correct. That concession was, in my view, rightly made. I see no ground upon which the propriety of the Secretary of State's decision in November 1978 can be determined by reference to an event occurring over three years later (i.e., the Secretary of State's letter of 12th March 1982 indicating that he was prepared to permit industrial development subject to conditions).

The principal matter raised by the appeal is what attitude the Secretary of State should have taken to the question of comparative acquisition costs. The matter was not considered at all at the public inquiry where the investigation of comparative costs was directed to the costs of construction. The Inspector records, however, in paragraph 263(a) of his Report: "All these lands are in the ownership of Sir Brandon or his children's Trustees. Gwern-y-Gedrych is no longer being actively farmed and such land as the Authority might require is "on offer" at existing use value." Gwern-y-Gedrych is the alternative site offered by Sir Brandon. Are the appellants now estopped from raising the point? At the date when the Secretary of State gave his decision there had already been three public inquiries. The opponents of the Order were not lacking in professional advice or, I think, in determination in their resistance to the confirmation of the Order. They had every opportunity and incentive to raise the matter. In my view, however, there is no question of estoppel here. The Secretary of State's duty was to review the position in the light of all relevant considerations. He had a duty to direct his mind to the material questions and to take reasonable steps to inform himself. If the Secretary of State fails to discharge that duty I do not think that the landowner is precluded from complaining merely because he failed to see the point at an earlier stage. The Inquiry is not litigation, it is merely an aid to the ascertainment of the material facts and issues. It may well be that, in determining whether the Secretary of State has directed his mind to the right questions and has taken reasonable steps to inform himself, the court should have regard to what was, at the time the Secretary of State made his decision, common ground or unquestioned between the parties. Thus, where if at the Inquiry (a) the question of cost was in issue, (b) Gwern-y-Gedrych was on offer at existing use value, (c) it was then speculative whether the possibility of industrial development would materially increase land values and (d) the cm., plainants put forward no case that the land values were materially increased by that possibility, it might be said that the Secretary of State could reasonably refer, without further inquiry, that the mere possibility of industrial development being permitted consequent upon the planning applications had no material effect upon land values. But, if that proposition is correct (and, as I mention later, I feel doubt as to what the impact of the applications on value might be), it is not, in fact, the situation which faced the Secretary of State when he made his decision. By that time he had received the letter from Sir Brandon's solicitors dated 20th October 1978. There are a number of passages in that letter to which I should refer. Thus, the letter in its opening paragraph states:

"We understand that the report of the Inspector following the public inquiry which closed in December 1977 has been submitted to you and the purpose of this letter is to request that

this inquiry be re-opened before a decision is taken to enable certain matters which arose since the inquiry closed or were not placed before the inquiry to be fully and openly investigated”. The matters thus referred to are set out in ten numbered paragraphs.

In paragraph 1, after a reference to the applications for planning permission for industrial development, it is stated: “Your decision on the CPO should not, therefore, we submit with respect, be made until these two applications have been considered.”

Paragraph 4 is in the following terms: “This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduced material questions of the relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry.”

Finally, in paragraph 10, the letter states: “Our client considers that for these and other reasons the conclusions of the Secretary of State following the public hearing into the applications to develop the red and the green land should be available before the crucially relevant question of the choice of site for the sewage works can be determined. ... It would, we submit be contrary to natural justice to announce a precipitate decision in favour of the CPO site before the industrial site hearings have taken their proper course and decisions have been taken.”

There is no doubt that the main object of this letter was to ask that the Secretary of State re-open the inquiry or defer a decision upon the Compulsory Purchase Order until the planning applications had been determined. The Secretary of State considered that request and he rejected it. He was perfectly entitled to do so.

Whilst I think that the main object of the letter was as I have indicated, the provisions of paragraph 4 are, I think, of wider effect and are important. The paragraph asserts that the potential of the CPO site for industrial purposes introduced material questions of comparative land costs which had not previously been considered. It is true that the paragraph also states that “these issues cannot be resolved until the nature of the industrial development of the area has been decided” , but it also states that those issues “are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed” . In my view, paragraph 4 must be read as bringing to the attention of the Secretary of State the contention that the possibility of industrial use now introduced material factors of comparative land costs which should be taken into consideration before the Order was confirmed. That condition replaced the attitude adopted by Sir Brandon at the Inquiry.

The Secretary of State, in confirming the Order, accepted, in general, the conclusions and

recommendations of the Inspector. In paragraph 11(v), the Secretary of State says:

“Apart from the specific issues referred to in paragraphs 11 (i)–(iv) above the Secretary of State has also carefully considered and accepts his Inspector’s general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the Inspector’s assessment of the financial implications contained in the conclusions to the Report of the second reopened Inquiry concerning the Water Authority’s proposed development and the cost comparison with the sites advanced by Sir Brandon Rhys Williams.”

The Inspector had reported (see paragraph (xviii) of the Decision Letter:

“(xviii) Mr. Shiell’s assessment of the engineering *evidence* accompanies this report and is wholly accepted by me. It is to be expected that however hard promoters of different schemes may attempt to take a disinterested view they will tend s perhaps subconsciously, to maximise the difficulties of the rival site and minimise the problems of the one they favour. The truth often lies somewhere between. The manner in which Mr. Shiell has picked a scrupulous path through the various elements of the alternative schemes strikes me as being fair, rational and comprehensive. The result of that impartial *analysis* suggests that, compared with the CPO site, the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2.

“(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site.”

It appears, therefore, that the Inspector regarded construction cost as the determining factor and that the Secretary of State accepted that. But, if the increased cost of construction on the alternative site was a determining factor on the figures available to the Inspector, that was a circumstance which could be altered if in fact the cost of acquisition of the alternative site was much lower by reason of the beneficial offer made by Sir Brandon to sell the alternative site at existing use value coupled with the possibility of a large increase in value of the Compulsory Purchase Order site consequent upon the likelihood of industrial development.

So the position is this. The Secretary of State decided in favour of the Compulsory Purchase Order on the basis of the increased construction costs if the alternative site were used. The letter of 20th October 1978, however, asserted that a new factor was introduced into the equation, namely comparative acquisition costs. The Secretary of State was bound to consider that. In paragraph 11(viii) of the Decision letter he states:

“All representations received after the close of the Inquiries have been carefully considered. It has been concluded, however, that there is nothing contained therein which is not sufficiently covered by evidence already before the Secretary of State.”

That statement does not *answer* the present problem. We have no reason to suppose that the Secretary of State ever had any evidence of comparative land costs in front of him. He does not appear to have received any at the Inquiries and there is nothing to suggest that he obtained any from any other source. I do not think it is sufficient to say that nobody suggested at the Inquiry that the difference in value was significant and that the making of the planning application in 1978 left the position as to industrial user as speculative as it was before the planning applications were made. So far as the Inquiry is concerned, the portance of the letter of 20th October 1978 is that it raised a new contention which, as the letter itself stated, was not considered at all during the Inquiry. That being so, I do not think that the fact that no point was taken at the Inquiry can be a reliable guide to the question of value at the time of the Inquiry. If it was not, then the fact that the planning position remained uncertain still does not give a reliable guide to value. I am not, in any event, satisfied on any evidence before us whether the making of the applications might not have affected value. Dealers in land might be influenced by applications made by major local landowners and the Land Authority for Wales.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

THE MASTER OF THE ROLLS:

The judgment is the appeal is allowed; the order is quashed accordingly.

MR. HOWELL: May I respectfully invite your Lordships to allow the respondents their costs here and below and that the costs of Mr. Prest and Mr. Straker be taxed on a trustee basis?

THE MASTER OF THE ROLLS: You are asking for the costs against both the Welsh Water Authority and the Secretary of State?

MR. HOWELL: My Lord, yes.

LORD JUSTICE FOX:

Should they get their costs on a trustee basis? No doubt they can get any costs they do not recover out of the fund, but I think, so far as any other costs are concerned, it is just ordinary litigation.

THE MASTER OF THE ROLLS:

It is just ordinary litigation; it should not be anything special. When a case is ordinary litigation they get ordinary costs, do they not?

LORD JUSTICE FOX:

They can only indemnify themselves out of the fund

MR. HOWELL: It is certainly not a case about administration of the trust.

LORD JUSTICE FOX: As trustees, if they engage in proper activities to preserve the trust property, any expenses in respect of that can be recovered from the trust fund.

MR. HOWELL: My Lord, certainly.

THE MASTER OF THE ROLLS:

Let us hope you will get all your costs without bothering the fund about it. If they are properly taxed it seems to me that all the expenditure which you have incurred, if it is proper and reasonable – therefore, you ought to get your costs from the other side. Mr. Brown, is there any question about that?

MR. BROWN: My Lord, none at all, provided, of course, the court does not make any special order as to costs to reflect the status as trustees of certain of the applicants. I gather the court is not minded to make such special order, so as to that I say nothing.

THE MASTER OF THE ROLLS: Have you anything to say about that, Miss Booth?

MISS BOOTH: My Lord, no. We chose to be separately represented on the last occasion and I cannot resist that application.

MR. BROWN: My Lord, I am instructed to make application to your Lordships to grant leave to appeal to the House of Lords.

THE MASTER OF THE ROLLS: More and more delay: it is about time these sewage works were constructed.

MR. BROWN: My Lord, certainly. It is obviously an important decision in many respects and, indeed, no doubt the Secretary of State for Wales and other departments of the Crown wish to consider certain matters. I am particularly concerned with some aspects of the judgments of this court which are of a wider and more general application than merely to the instant appeal. My Lords, the two particular matters are the nature and extent of the Secretary of State's investigatory function – I use, I hope, the language of my Lord, Lord Justice Watkins – and, secondly, the correct approach to the question whether or not to confirm a compulsory purchase order, to what extent the balance must fall down decisively in favour of acquisition. There is the other question as to fresh evidence but, as I understand the judgments of this court, your Lordship is in a minority on that and perhaps, even in your Lordship's judgment, it is an obiter dictum expression of view. That is the application I am instructed to make.

THE MASTER OF THE ROLLS: What do you say about it, Mr. Howell?

MR. HOWELL: My Lord, obviously the question of the duty of the Secretary of State to make investigations is a point of general application. All that I would say is that all three of your Lordships' judgments

THE MASTER OF THE ROLLS: What seems to me at the moment is the urgency of the work being got on with. If this case goes to the House of Lords, goodness knows how long it will take. Nothing will be done and there it is.

MR. HOWELL: My Lord, it certainly will not be in the public interest that the construction of the sewage works be further delayed.

THE MASTER OF THE ROLLS: We refuse leave. So the appeal will be allowed with costs here and below.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

Order: Appeal allowed with costs here and below. Leave to appeal to the House of Lords refused.

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APPENDIX 9 – 4

determination by the commissioners that any area greater than one acre would be proper in this case, although I understand that the Crown is prepared to concede that the gardens, which do exceed the one acre, do qualify for relief—a house which is sited well over an acre's worth of land away from the main residence and separated from it by a paddock which is not part of the ground so allowed could nevertheless be deemed to be part of it. It seems to me that that really is a totally absurd conclusion. That reinforces my judgment but is not in any way a foundation for it.

Appeal allowed.

Case remitted to commissioners.

By agreement Crown to pay taxpayer's costs.

Solicitors: Solicitor of Inland Revenue; Coole & Haddock with Cotchings, Horsham.

[Reported by HARRIET DUTTON, Barrister-at-Law]

[COURT OF APPEAL]

*CHILTON v. TELFORD DEVELOPMENT CORPORATION

1986 Dec. 8

Purchas, Neill and Balcombe L.JJ.

Compulsory Purchase—Compensation—Relevant date—Notice of entry served in respect of area subject to compulsory purchase order—Acquiring authority taking possession of land in individual parcels—Whether date of first entry proper date for assessment of compensation—New Towns Act 1965 (c. 59), Sch. 6, para. 4(1)(2)

The acquiring authority made a compulsory purchase order under section 7 of the New Towns Act 1965 in respect of 67.87 acres of agricultural land which was owned and occupied by the claimant. On 3 May 1978 the authority served on the claimant a statutory notice of entry relating to the whole of the land. However, the authority actually acquired the land by taking physical possession of it in individual parcels on eight separate dates from 5 June 1978 to 4 October 1980, and during that period the claimant remained in occupation of the unacquired parts. On the authority's notice of reference, the Lands Tribunal held on a preliminary point that for the purposes of calculating the amount of compensation for disturbance and interest on the purchase price payable to the claimant, under the provisions of paragraph 4(2) of Schedule 6 to the New Towns Act 1965,¹ there were eight valuation dates, namely, each of the dates on which the authority entered into possession of the parcels of land.

On the claimant's appeal:—

Held, allowing the appeal, that the Compulsory Purchase Act 1965 and the New Towns Act 1965 were statutes which

¹ New Towns Act 1965, Sch. 6, para. 4(1)(2): see post, p. 876c–d, E–G.

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A deprived the citizen of property rights by the compulsory acquisition of land and therefore the provisions dealing with the calculation of compensation and interest were intended by Parliament to protect the owner or occupier who was being dispossessed, and were to be construed in favour of the owner or occupier; that where a statutory notice to enter was served by an acquiring authority on an owner or occupier, the first entry on to any part of the land described in the notice constituted entry on the land under the powers conferred by paragraph 4(2) of Schedule 6 to the New Towns Act 1965; and that, accordingly, the claimant was entitled to compensation calculated by reference to the date on which the acquiring authority took possession of the first parcel of land (post, pp. 878E-G, 879B-D, F, 880C-E).

B
C *Per* Neill L.J. An acquiring authority may, if so minded, serve a series of notices of entry and can enter on to the land described in each of such notices in accordance with a programme which suits its requirements (post, p. 880B-C).

No cases are referred to in the judgments.

The following cases were cited in argument:

D *West Midland Baptist (Trust) Association Inc. v. Birmingham Corporation* [1970] A.C. 874; [1969] 3 W.L.R. 389; [1969] 3 All E.R. 172, H.L.(E.)
Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission [1928] A.C. 492, P.C.
Washington Development Corporation v. Bamblings (Washington) Ltd. (1984) 83 L.G.R. 561, C.A.

E APPEAL by case stated from the Lands Tribunal.

By a decision given on 1 April 1985, the member of the Lands Tribunal, Mr. V. G. Wellings Q.C., determined a preliminary point on a notice of reference dated 3 January 1983 by the acquiring authority, Telford Development Corporation, and held that on the agreed facts there were eight valuation dates, namely the specific dates on which the authority entered into possession of the several parts of the land, for the purposes of calculating compensation for disturbance and interest on the purchase price payable to the claimant, Mr. A. R. H. Chilton, in respect of the compulsory purchase of 67.87 acres or thereabouts of land known as Trench Lodge Farm, Trench, Telford, Shropshire.

F On the claimant's application pursuant to section 3(4) of the Lands Tribunal Act 1949 the Lands Tribunal stated and signed a case for the decision of the Court of Appeal. The agreed facts included, inter alia, that the claimant was the freehold owner of the land and had at all material times farmed the land as owner-occupier. On 10 July 1973 the acquiring authority made the Telford Development Corporation (Hadley Park No. 1) Compulsory Purchase Order 1973 under section 7 of the New Towns Act 1965. The order was confirmed by the Secretary of State for the Environment on 10 March 1978 and related to the 67.87 acres and other land not belonging to the claimant. On 3 May 1978 the authority served on the claimant a notice to treat and a notice of entry relating to the whole of the 67.87 acres.

H The acquiring authority went into physical occupation of individual parcels of the 67.87 acres in the manner set out in paragraph 6 of the agreed facts, namely: 4.62 acres on 5 June 1978; 0.07 acres on 1 July 1978; 3.10 acres on 18 July 1978; 12.24 acres on 4 September 1978; 4.9

acres on 6 December 1978; 3.95 acres on 1 January 1980; 1.60 acres on 1 July 1980 and 35.501 acres on 4 October 1980. A

After 5 June 1978 the claimant remained in occupation of each parcel, other than the 4.62 acres, until such time as the acquiring authority entered into physical occupation of it. The agreed value of the freehold interest in the 67.87 acres was £220,000 exclusive of disturbance, interest, professional fees, farm loss or home loss payments. The sum of £220,000 had been paid to the claimant save for the sum of £22,000 which was paid into court. The cost of preparing the claim and surveyor's fees in respect of it was agreed to be £2,027.50, which sum had also been paid. B

The questions upon which the decision of the Court of Appeal were sought were: (1) whether the Lands Tribunal was correct in law in determining as the acquiring authority contended, that for the purposes of calculating compensation for disturbance and interest on the purchase price, the authority should be treated as having taken possession of each individual parcel of land on the date on which the authority took actual physical possession of it. (2) Whether the Lands Tribunal erred in law in not adopting the claimant's contention, that for the purposes of calculating compensation for disturbance and interest on the purchase price, the acquiring authority should be treated as having taken possession of the whole 67.87 acres on 5 June 1978, being the date of the first entry on to that land following the notice of entry dated 3 May 1978 relating to the whole property, the subject of the notice to treat of 3 May 1978. (3) Whether the Lands Tribunal was correct in law to find on the agreed evidence that there was no reason to infer that the authority either purported to or did grant a licence to the claimant to remain in possession of part of the land. C D E

Anthony Anderson Q.C. and Robert Fookes for the claimant.

Robert Carnwath Q.C. and Alice Robinson for the acquiring authority.

PURCHAS L.J. This is a case stated by the Lands Tribunal at the request of Mr. A. R. H. Chilton, the claimant, under section 3(4) of the Lands Tribunal Act 1949. The single member of the tribunal had been asked to determine a preliminary point of law, and he did so on 1 April 1985. F

The point arises out of the compulsory purchase and compensation provisions contained in the New Towns Act 1965 and the Compulsory Purchase Act 1965. Although the former Act has been repealed by the New Towns Act 1981, we are told by counsel that the corresponding provisions in the later Act are the same in most relevant particulars, and that the point is one of some interest generally, beyond the interests of the parties particularly involved in this reference. G

The point raises a consideration of the relevant date, or dates, of entry and taking possession of land by the acquiring authority for the purpose of compensation. The acquiring authority involved is the Telford Development Corporation. The question posed was summarised in the decision of the single member in these words: H

"Possession of the land acquired was taken by the acquiring authority in several parcels and the preliminary issue is concerned with the question whether there is a single date, namely, the date on which possession of the first parcel was taken, or several dates

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A namely, the individual dates on which possession of the several parcels was taken, which is or are material for the purposes of valuation."

The parties had agreed the facts so far as they were relevant; they are as follows: The land of which the claimant at all material times was owner-occupier, and which he farmed, consisted of 67.87 acres or thereabouts of agricultural land at Trench Lodge Farm, Trench, Telford, Shropshire:

B "On 10 July 1973 the acquiring authority made the Telford Development Corporation (Hadley Park No. 1) Compulsory Purchase Order 1973 under section 7 of the New Towns Act 1965. The order was confirmed by the Secretary of State for the Environment on 10 March 1978. The order related to the 67.87 acres and other land . . ."

required by the developing corporation for their activities under the New Towns Act 1965.

D A notice to treat in accordance with the statutory provisions was served upon the claimant, and dated, 3 May 1978; it related to the whole of the 67.87 acres. On the same date the acquiring authority served on the claimant one notice of entry relating to the whole of the 67.87 acres.

E As the history evolved, the acquiring authority went into physical occupation of individual parcels of the whole area over a period of 28 months. The first date of entry, 5 June 1978, involved 4.62 acres; thereafter there were three more areas involved and entries made, until 6 December 1978, which I mention specifically because in respect of that area, 4.9 acres, the acquiring authority purported to serve a "revised notice." No point has been taken on this, and for the purposes of this appeal it can be ignored. It is common ground that the "revised notice" was of no formal effect.

F The remaining acts of taking possession and entering occurred, as to 3.95 acres, on 1 January 1980; as to 1.60 acres on 1 January 1980, and then an area which is over half the whole of the area involved, 35.501 acres, on 4 October 1980. After 5 June 1978 in fact the claimant remained in occupation of the parcels not previously entered, until such time as the acquiring authority in fact entered into physical occupation. Saving only the area of 4.9 acres entered on 6 December 1978, there is no evidence or information as to any further sort of notice, but it must be assumed that there was some kind of communication between the parties. That is how things progressed.

G The dispute, as is clear from the question posed, relates to the effective date of entry and taking possession for the purposes of compensation. But the particular statutory provisions which must be considered relate mainly to inhibit or restrict the exercise of the powers to acquire compulsorily by way of granting some limited protection to the owner or occupiers involved.

H In very short summary, and by way of introduction, the statutory procedure involves two main steps: first of all, the obtaining of the compulsory purchase powers; there are provisions in that process whereby the landowner or occupier can oppose the confirming of the order; and secondly, those powers having been confirmed, how they are to be exercised. They are exercised subject to these restrictions: first of

all, there must be a notice to treat served under section 5 of the Compulsory Purchase Act 1965; then, that having been done, there are further restrictions on the acquiring authority preventing that authority from entering upon the land without giving at least 14 days' notice. A

It is now convenient to turn to the statutory provisions with which we are concerned. I start by reading section 12(1) of the New Towns Act 1965:

"Part I of the Compulsory Purchase Act 1965 shall apply in relation to the acquisition of land under this Act subject to any necessary adaptations and to the provisions of Part I of Schedule 6 to this Act." B

Section 11(1) of the Compulsory Purchase Act 1965 is replaced by paragraph 4 of Schedule 6 to the New Towns Act 1965, the relevant provisions of which are: C

"(1) If the acquiring authority have, in respect of any of the land, served notice to treat on every owner of that land, they may at any time thereafter serve a notice—(a) on every occupier of any of that land, and (b) on every person (other than such an occupier) . . . describing the land to which the notice relates and stating their intention to enter on and take possession thereof at the expiration of such period (not being less than 14 days) as may be specified in the notice." D

I pause to emphasise the words "describing the land to which the notice relates;" that is the notice of intention to enter. The period is one of not less than 14 days, and therefore envisages periods of greater notice if appropriate. Paragraph 4(2) of Schedule 6 reads: E

"At the expiration of the period specified in such a notice (or, where two or more such notices are required, and the periods specified in the several notices do not expire at the same time, of the last of those periods to expire), or at any time thereafter, the acquiring authority may enter on and take possession of the land to which the notice or notices relate without previous consent or compliance with section 11 of the Compulsory Purchase Act 1965, but subject to payment of the like compensation for the land of which possession is taken, and interest on the compensation agreed or awarded, as they would have been required to pay if those provisions had been complied with." F

Paragraph 4(2) of the Schedule refers first of all to the cases where there may be more than one occupier or owner in respect of whom notices of intention to enter must be served, but gives power "at any time thereafter . . . [to] enter on and take possession of the land to which the notice or notices relate without previous consent" and then "or compliance with section 11 of the Compulsory Purchase Act 1965; but subject to" the provisions that interest will run from the date of entry and taking possession. G H

The member of the Lands Tribunal considered the arguments of counsel which, generally speaking, were in line with the arguments they have put before us. Mr. Anderson argued to the effect that the notice of entry of 3 May related to the whole of the land and for that reason, when the acquiring authority on 5 June 1978 first took possession of a part of the land, it must be treated as having done so in the name of the

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A whole; he developed his argument along those lines, saying also that any other interpretation of the statute would lead to doubt, confusion and hardship, and in particular relating to identifying not only the area involved if part of the land in respect of which the notice of entry was served was in fact entered, and the unfairness that would be involved, as could be said in this case, by a long delay as to a substantial part of the land under threat. I do pause to comment, however, that counsel have been scrupulous to point out that it is not alleged that there has been either unfairness or difficulty in this case; the matter comes before us essentially as one of construction of the statute and, as Mr. Carnwath submitted, merely construction of the statute on the accepted and established facts of what indeed happened in this case.

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E Mr. Carnwath submitted before the single member that there was no basis in law for the proposition that the original entry into possession of part of the land was to be treated as entry in the name of the whole. There was no factual basis on the agreed statement of facts for inferring the grant of a licence by the authority in respect of the parts which, after 5 June, continued in the occupation of the claimant. I pause to emphasise that in fact the claimant did remain farming the land which had not been occupied by the acquiring authority. Upon one of the two alternative assessments of compensation which had been agreed between the parties, credit is given for what is described, probably inaccurately, as mesne profits to relate to the benefit received by the claimant by his continued occupation of the land, if the contentions of Mr. Anderson are right, namely that the claimant is entitled to compensation, and interest thereon, to run from 5 June 1978 in respect of the whole of the land involved in the notice of entry.

The single member accepted Mr. Carnwath's argument, and said:

F
G "In my judgment, on the agreed facts there is no reason to infer that when the authority took possession of part of the land on 5 June 1978 they did so in the name of the whole. Equally, notwithstanding the use of the expression 'mesne profits' (an expression more appropriate to a tenancy than to a licence) there is no reason to infer that the authority purported to grant a licence to the claimant to remain in possession of the remainder of the land. In my opinion, in the present case, there are eight valuation dates, namely, the specific dates on which the authority entered into possession of the several parts of the land as set out in agreed facts [paragraph 6]. I answer the preliminary issue accordingly."

G The questions stated for this court are threefold:

H "1. Whether I was correct in law in determining as the [authority] contended that for the purposes of calculating compensation for disturbance and interest on the purchase price, the acquiring authority should be treated as having taken possession of each individual parcel of land on the date on which the acquiring authority took actual physical possession of the same . . .

"2. Whether I erred in law in not adopting the [claimant's] contention that for the purposes of calculating compensation for disturbance and interest on the purchase price, the acquiring authority should be treated as having taken possession of the whole 67.87 acres on 5 June 1978, being the date of the first entry onto that land following the notice of entry dated 3 May, 1978 relating to the whole property the subject of the notice to treat of 3 May 1978.

"3. Whether I was correct in law to find on the agreed evidence no reason to infer that the authority either purported to or did grant a licence to the [claimant] to remain in possession of part of the land."

A

The statutory provisions which I have already set out do not give a simple definitive answer to the two contending interpretations. It is perfectly right to say that nowhere in Schedule 6, does one find anything other than the expression "intention to enter on and take possession of the land." Paragraph 4(1) does refer to "intention to enter on and take possession" of the land, and paragraph 4(2) refers to "the land of which possession is taken" shall carry interest at the rate. So the statute refers to taking possession (paragraph 4(2) of Schedule 6) or "intention to enter on and take possession thereof" (paragraph 4(1) of Schedule 6). In addition to that there is no provision providing a period during which a notice of intention to enter should lapse. Subject to reasonable exercise of power, which has not been argued before us, if the acquiring authority took no step in relation to any part of the land, albeit that they had served a notice of intention to enter, then the provisions of paragraph 4(2) of Schedule 6 remain as a threat to the enjoyment of the land, which can be determined at any time without notice.

B

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It must of course be remembered that before the stage of serving a notice of intention to enter and take possession, the acquiring authority has already been obliged to serve a notice to treat, which must incorporate the whole of the land, subject to the notice of intention to enter; but of course it may, and very frequently does, extend to other lands in respect of which a notice of intention to enter will not have been served. But this does afford a remedy to the owner of the land who can, in the absence of agreement as to compensation, refer to the Lands Tribunal, but his remedies are not immediately or easily available.

E

So one is left here with a provision which has on its face an open-ended power granted to the acquiring authority to act or not to act. It may at least be questioned whether that was entirely the intention of Parliament in enacting what are essentially provisions for the protection of an owner or occupier who is subjected to the necessary, but nevertheless draconian, powers of the acquiring authority to dispossess him of his title and occupation of his land.

F

For my part, in approaching the construction of these statutory provisions I have two concepts in mind: first, to give to this part of the legislation, if it is open to do so, a purposive construction, bearing in mind the general considerations and need for these provisions. Secondly, to bear in mind that it is a statute which is depriving the citizen of his rights in property and his title, and the right to enjoy occupation of his lands, or perhaps somebody else's lands.

G

So, looking at section 12 of the New Towns Act 1965, and Schedule 6, I pose the question: What is the purpose of requiring the acquiring authority to give notice of not less than 14 days of an intention to enter on and take possession of the land? What it cannot cover, in my judgment, is a contingent intention, not formally adopted, and not in fact carrying with it the intention to act upon it within a reasonable time. Otherwise, the statute provides that the acquiring authority does not have to serve a notice of intention to enter in respect of the whole of the land, subject to the notice to treat, or of the compulsory purchase order itself as relates to the particular owner or occupier; and that they

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A may serve, as and when necessary—which I would construe as meaning as and when they form the intention necessary to bring into effect the provisions of paragraph 4(1) of Schedule 6—the intention to enter on and take physical possession thereof.

B I am conscious of the argument to the contrary, that there is also no express reference in this statute to give effect to the concept that entry upon part of the land, subject to the notice of intention to enter, should be deemed to constitute entry of the whole, and it would not have been beyond the wit of man to have put that in the drafting of the statute. But, choosing between the two alternative approaches to this legislation, and I hope fairly recognising the lacuna which exists for practical purposes in the day-to-day carrying out of these exercises, I adopt the construction which is favourable to the owner and occupier of the land, because these sections, although incidentally dealing with calculation of compensation and interest, were primarily enacted for the protection of such a person.

D I would therefore construe the statute in that light, and that would bring me to the conclusion that the answers to the questions posed by the single member for our consideration are that with regard to the first question the answer must be “No”; the answer to the second question must be “Yes,” and that leaves the answer to the third question still to be considered. For my purposes the substance of this reference is dealt with by answering the first two questions. Whatever the status may be, whether as licensee or some other formally acquired status as between the parties involved, will depend from case to case, from attitude to attitude adopted by the parties concerned—that is, the landowner or occupier and the acquiring authority—and I do not consider that any formal general answer to question 3 will further the matter in any useful way at all. If I had to choose on the facts of this case, I would have thought that Mr. Chilton was present there as a bare licensee with few or no rights, bearing in mind that under the statute he is not entitled to receive any notice of change of intention or of the termination of his licence; nor is he entitled to any description of the land which the acquiring authority will choose to possess and enter on no notice. That is a further argument for supporting the conclusion I have reached on the interpretation of the statute namely, as I emphasised when reading paragraph 4 of Schedule 6, it does specifically require the acquiring authority to describe the land which it intends to enter and of which it intends to take possession. By adopting the construction for which Mr. Carnwath in his admirable submissions contends, it would merely defeat the object of that precaution which has been put in the Schedule for the protection of the landowner and occupier.

I would therefore answer question 1 and 2 in the way that I have described, and I would not given any formal answer to question 3.

H NEILL L.J. I agree. I add a few words of my own only because we are differing from the construction given to the statutory provisions by the member of the Lands Tribunal.

It was argued on behalf of the acquiring authority that for the purpose of paragraph 4(2) of Schedule 6 to the New Towns Act 1965, they entered on and took possession of the parcels of land set out in paragraph 6 of the agreed facts on the several dates therein set out. It was further argued that for the purpose of calculating the interest to be

paid on the compensation for the land, these several dates constituted the time of entry on the individual parcels. A

However, it seems to me, with respect, that these arguments do not pay due regard to the provisions of paragraph 4 of Schedule 6. It is clear from this paragraph, (a) that a notice of entry may relate to part only of the land comprised in the relevant notice to treat; (b) that any notice of entry must describe the land to which it relates; (c) that the notice of entry must state the intention of the acquiring authority to enter on and take possession of the described land at the expiration of a specified period; and (d) that at the expiration of the period specified in the notice or at any time thereafter, the acquiring authority may enter on and take possession of that land. B

It follows, therefore, that an acquiring authority may, if so minded, serve a series of notices of entry and can enter on to the land described in each of such notices in accordance with a programme which suits its requirements. But where, as here, a single notice of entry is given, it seems to me that, save perhaps where the de minimis rule applies, a subsequent entry on to the land, or any part of the land, is an entry made in accordance with the permissive power given in paragraph 4(2) of Schedule 6, and is an entry on the land described in the notice to enter. The first entry on to the described land constitutes the entry on to the described land foreshadowed by the statutory notice; the date of that entry is the time of entry for the purpose of the interest provisions contained in paragraph 4(2). C D

For these reasons, as well as for those given by Purchas L.J., I too would answer the questions in the manner in which Purchas L.J. has proposed. E

BALCOMBE L.J. I agree, for the reasons which have been given by Purchas and Neill L.JJ., that this appeal should be allowed, and I do not wish to add anything further.

Appeal allowed with costs.

Leave to appeal refused. F

Solicitors: Treasures & Rivers Wyatt, Gloucester; J. C. H. Bowdler & Sons, Shrewsbury.

S. H.

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APPENDIX 9 – 5

**R. v. SECRETARY OF STATE FOR THE ENVIRONMENT,
Ex p. LEICESTER CITY COUNCIL**

QUEEN'S BENCH DIVISION (McCullough J.): January 29, 1987

Town and country planning—Compulsory purchase—Council made order to purchase land for development—Council undertook not to enforce order if owners agreed to make financial contributions to building of sewers and road—Secretary of State refused to confirm order—Meaning of section 112(1)(a) Town and Country Planning Act 1971—Whether section required compulsory acquisition to be required—Whether section required only that land be required for development—Whether improper purpose to confirm order as means of persuading owners to contribute financially to development

Leicester City Council made a compulsory purchase order for land comprising 19 plots of privately owned land. Development of the land would require the construction of new sewers and a road. The council gave a global undertaking that they would not enforce the compulsory purchase order in respect of the separate plots provided that the owners withdrew their objections to the order and made an appropriate contribution, to be determined by the city engineer, towards the cost of providing the sewers and the road. The Secretary of State refused to confirm the order on the grounds that (i) as the council had indicated that they would not compulsorily acquire the land if the objectors agreed to make financial contributions the lands were not required to be compulsorily acquired by the council for the purpose of redevelopment and (ii) the power to confirm the order would be used for an improper purpose namely as a means of persuading the owners of the land to make financial contributions. The council applied for judicial review of the decision of the Secretary of State.

Held, dismissing the application, on a true construction of section 112(1)(a) of the Town and Country Planning Act 1971, the section required that the land must be required and required the need for its acquisition by the local authority in order to secure its development. Consequently, the Secretary of State had not erred in law when he refused to confirm a compulsory purchase order on the grounds that where the local authority would not compulsorily acquire the land if the owners entered into an agreement with the authority to make financial contributions towards the construction of roads and sewers the land was not required to be compulsorily acquired by the local authority. Nor had the Secretary of State erred in his conclusion that if he confirmed the order in those circumstances, he would be exercising his powers under section 112(1)(a) of the 1971 Act for an improper purpose, namely as a means of persuading the owners of the land covered by the order to make financial contributions to the development of the land.

Case cited:

Company Developments (Property) v. Secretary of State for the Environment and Salisbury District Council [1978] J.P.L. 107.

Legislation construed:

Town and Country Planning Act (c.78), s.112(1)(a). The provisions of this section are set out at page 367, *post*.

Application for judicial review by Leicester City Council of a decision of the Secretary of State for the Environment contained in a letter dated May 24, 1985 whereby he refused to exercise his powers under section

112(1)(a) of the Town and Country Planning Act 1971 to confirm the Leicester City Council (Tithe Street/Beatty Road) Compulsory Purchase Order 1983. The facts are set out in the judgment of McCullough J.

N. Thomas for the applicant.

D. Pannick for the respondent.

McCULLOUGH J. This is an application for judicial review of a decision by the Secretary of State for the Environment on May 24, 1985 not to confirm the Leicester City Council (Tithe Street/Beatty Road) Compulsory Purchase Order 1983 pursuant to section 112(1) of the Town and Country Planning Act 1971 (as amended).

The land covered by the order comprised about three and a half acres made up of 19 privately owned plots about two miles east of the centre of Leicester. In addition to a cleared area the plots are variously used as coal yards, car breakers' yards, a car park, storage and garages and a number appear to be derelict and overgrown. The land is served by unmade, unadopted roads. It is bounded on the north and west by residential development and on the east and south by industrial development. It lies in the northern position of an area allocated for industrial use on the adopted local plan.

The Secretary of State refused to confirm a previous compulsory purchase order relating to 9 of the 19 plots in July 1981.

The nearest foul and surface water sewers to the land are at the junction of Tithe Street, Dorrien Road and Robinson Road, some 35 metres from the southern edge of the land. There is no spare capacity in the surface water sewerage system and development of the order land would require the construction of a new outfall sewer, about 140 metres long, to a place called Bushby Brook at a cost of about £25,000. Foul drainage of the order land could be satisfactorily achieved by construction of a linked sewer to the foul sewer at the Tithe Street, Smith Dorrien Road and Robinson Road junction at a cost of about £5,000. The provision of an estate road on the land 7.5 metres wide with two footways, each 1.75 metres wide, would cost about £45,000.

Those facts are taken from the findings of fact by the inspector who held a public inquiry on December 11, 1984 and made his report to the Secretary of State on December 24, 1984. The inspector also found that the city council had given a global undertaking that they would not enforce the compulsory purchase order in respect of the separate ownerships provided the owners withdrew their objections to the order and made an appropriate contribution, to be determined by the city engineer, towards what were called "the infrastructure costs," in other words, the cost of providing these sewers and this road. This undertaking was only given on the basis that the order was confirmed in its entirety. This is to be found in paragraph 44(xi) of the inspector's report.

The inspector's conclusions were as follows:

45. The order land is an unattractive area which is ripe for redevelopment and is allocated for industrial use on the adopted local plan. It can only be satisfactorily developed in a comprehensive manner and the lack of movement towards its proper development in the three and a half years since the decision on the last order,

which involved less than a quarter of the current area, demonstrates that it is unlikely to be developed in the absence of proper road access and drainage over the whole area. This latter provision is unlikely to be achieved without there being a single co-ordinating force.

46. The council's compromise undertaking would enable the comprehensive provision of road and drainage and, at the same time, allow those owners who wished to develop their land themselves to do so. This solution seems acceptable to the majority of the objectors. I would hope that the council would carry out their undertaking to Mr. S. Collin and would endeavour to assist Messrs. Durston & Son Ltd. by, for example, allowing them a car park to meet the present degree of usage. (Mr. S. Collin is the lessee of plot 15 and George Durston & Son Ltd. are the owners and occupiers of plot 10.)

The report continues:

47. I recommend that the Leicester City Council (Tithe Street/Beatty Road) Compulsory Purchase Order 1983 be confirmed.

The Secretary of State, however, reached the opposite conclusion. His decision letter is dated May 24, 1985 and paragraphs 6 to 10 read as follows:

6. The Council's case and the argument and views put forward by the objectors and their representatives have been carefully considered.

7. The Inspector accepted that the order land should be redeveloped or improved for light industrial use and that it could only be redeveloped by a "single co-ordinating force."

8. However, the Secretary of State has had regard to the Council's evidence at the Inquiry that the Council would not compulsorily acquire the objectors' land if they entered into agreement with the Council to make financial contributions towards the construction of roads and sewers (see paragraphs 23, 25-27, 31 and 44(xi)). The Secretary of State is not, therefore, satisfied that the order lands are required to be compulsorily acquired by the Council for the purposes of redevelopment and improvement.

9. Moreover, the Secretary of State takes the view that if he were to confirm this order in these circumstances, he would be exercising his powers under section 112(1)(a) of the Town and Country Planning Act 1971 for an improper purpose namely as a means to persuade the owners of the order land to make financial contributions.

10. Accordingly, he has decided not to confirm this order. This letter constitutes his decision to that effect.

On behalf of the city council Mr. Thomas has mounted two attacks upon this decision, one on paragraph 8 and the other on paragraph 9. He accepts that for his present application to succeed both attacks must prevail.

The last sentence of paragraph 8 contains the phrase "to be compulsorily acquired by the council." Mr. Thomas submits that the

inclusion of those words indicates that the Secretary of State has put into section 112(1)(a) of the Town and Country Planning Act 1971 a requirement which is not there.

That provision (in its amended form applicable at the material time) reads:

A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily (a) any land which is in their area which is suitable for and is required in order to secure the carrying out of one or more of the following activities, namely, development, redevelopment and improvement.

In my opinion the Secretary of State has not in paragraph 8 added a requirement which is not found in the section itself. If one looks at the word "required" in section 112(1)(a) and asks by whom the land is to be required, the answer can only be "the local authority," in this case the city council. If one asks how the requirement is to be met, the answer can only be "by compulsory acquisition." Thus, all that the Secretary of State has done is to spell out what section 112(1)(a) itself states. He has added no further requirement.

Although he did not phrase his submission in the way which I am about to, Mr. Thomas invited me to treat the word "required" as indicating no more than that development, redevelopment or improvement was required. He submitted that there was no need for a compulsory purchase order to be required, let alone that compulsory acquisition was required. In my opinion such a construction is inconsistent with the plain words of the section. It could not stand with the phrase "and is required in order to." In my judgment the section requires that the land must be required, and requires the need for its acquisition by the local authority in order to secure its development. So much for the second sentence of paragraph 8 of the decision letter.

There is nothing wrong with the first sentence of paragraph 8 as a statement of fact. It is wholly accurate. It is founded on the paragraphs in the inspector's report to which the Secretary of State refers. I have already read paragraph 44(xi) of the inspector's report and I will now read paragraph 23:

In order to effect the implementation of redevelopment of the order land the council have given the undertaking that they will not enforce the compulsory purchase order in respect of the separate ownerships provided the owners would withdraw their objection to the order and make an appropriate contribution, as shall be determined by the city engineer, towards the infrastructure costs. This undertaking is limited to confirmation of the order in its entirety in order to have a basis for the infrastructure contributions.

Paragraphs 25 to 27 and 31 (which it is not necessary to read) show that the owners of all the plots save numbers 1, 6, 7, 8, 9 and 10 (all of which are at the southern edge and south-west corner of the order land) and plot 16 (which lies on its own at the north of the order land) would accept the undertaking. Thus the Secretary of State knew when he was making his decision that in all probability the plots at the heart of the order land extending, as the plan reveals, to significantly over half its

total area would not be acquired by the city council. They would remain in individual ownership and occupation, the local authority being content that they should be individually developed, provided that the undertakings were accepted, which would involve the owners being prepared to make the desired financial contribution.

It seems to me, as it must have seemed to the Secretary of State, that it could not be said that the city council required the acquisition of the majority of the order land. The undertaking was offered to the owner of every one of the 19 sites. By the city council's own case, far from requiring the acquisition of plots, it did not even want to acquire them provided the owners made the desired financial contribution towards the cost of improving the roads and sewers.

In his submissions Mr. Thomas cited a passage from the judgment of Sir Douglas Frank, Q.C. sitting as a Deputy Judge of the High Court in *Company Developments (Property) Ltd. v. Secretary of State for the Environment and Salisbury District Council*.¹ There Sir Douglas Frank remarked that the word "required" in the context of compulsory purchase did not mean "essential." It meant no more than that the acquiring authority thought the acquisition desirable. In my judgment the observation is not a point in the present context. As Mr. Pannick said, it goes to the question of how badly the local authority want the land. In the present case they did not want the land at all provided they got the money.

I accept Mr. Pannick's submission that in reaching the conclusion expressed in the second sentence of paragraph 8 the Secretary of State reached a conclusion which on the material before him he could properly reach. Although I have no need to do so in order to decide the case, I would go further and say, as Mr. Pannick submitted, that had the Secretary of State reached the opposite conclusion he would have made an unlawful decision.

No one has impugned or sought to impugn the motives of the city council in deciding to proceed in the way they did. This was a site which had caused a good deal of trouble, one way and another, to those living in and about it and to the city council for a number of years. The city council had directed its mind to the best way in which to alleviate the difficulties.

I am going to read part of the affidavit of Mr. Donald Smith, the city's deputy city planning officer, quoting from paragraphs 6 and 7:

The applicant felt that there was an impasse as there had been no improvement and no development by the individual owners and moreover that it was unlikely that there would be any improvement as they would not or could not carry out any works until the necessary services, such as roads, sewers and so on, had been constructed. This of course had to be paid for. A number of the individual owners were unwilling to make such payments. The only apparent alternative available was for the applicant to acquire all the Order Land in order to enable development to be effected and for the necessary infrastructure to be established.

7. The applicant's intention was not to acquire compulsorily land for the sake of it but simply to improve, by development, the Order

¹ [1978] J.P.L. 107 at p.109.

Land. Therefore at public and local inquiries into the purchase orders the applicant was prepared to give undertakings to those individual owners of plots on the Order Land that the applicant would not compulsorily acquire the individual parcels of land so long as they entered into agreement with the applicant to make financial contributions towards the construction of roads and sewers. This undertaking was given as otherwise the applicant would be acquiring from individual owners land within the Order Land which would then be resold to those owners to carry out the necessary development although the resale price of course would have to take into account the costs of installing the roads and sewers and other services. The applicant realised that only some of the owners would be prepared to carry out the development and to make contributions and the order needed to be confirmed if the proposed plan was to proceed.

On the city council's behalf Mr. Thomas submits that what it was doing in offering the undertaking was making a sensible short cut of the process which would otherwise have taken place, *i.e.* the city council acquiring the land compulsorily, paying compensation on the basis that the sites were served by roads and sewers which were inadequate, the roads and sewers then being improved at the expense of the city council (and its ratepayers) and the city council then being likely to sell the individual sites back to their old owners who, if willing to buy, would have had to pay rather more on account of the improvements which had taken place.

One can see the attraction of offering this undertaking and, if it was accepted and if the necessary financial contributions were forthcoming, leaving the sites in the existing ownerships throughout. It is interesting to ask what decision the Secretary of State would have been likely to reach had the undertakings not been offered. Interesting though it be, this was not the factual position which he had to consider. However, I would say that it seems possible that he would, even then, have taken the view that it was not desirable to make any compulsory purchase order, having regard to the fact that the roads and sewers could have been provided by the use of the Private Street Works Code currently to be found, I believe, in Part XI of the Highways Act 1980, or by the acquisition of a mere strip of land from each frontage.

It seems to me that the decision which the Secretary of State reached and set out in paragraph 8 is unassailable.

Mr. Thomas went on to submit that the Secretary of State was in error in what he said in paragraph 9, in that he was wrong to believe that if he were to confirm the Order he would be acting improperly because it would be used as a means of persuading the owners of the land to make financial contributions. In answer Mr. Pannick submitted that the Secretary of State must be taken to have used the word "improper" as indicating that if he were to reach a contrary conclusion he would be using his powers under section 112(1)(a) of the Act for a purpose not intended by Parliament. He cited authorities in support of the proposition that the Secretary of State in such circumstances would not be at liberty to use the powers under that section for an ulterior object, however desirable.

I do not think the Secretary of State's approach can be faulted. I share his opinion of the law that on the material presented to him he could properly take the view that the city council's purpose in proceeding in this way was to encourage owners to make financial contributions towards a cost which would otherwise have to be borne by the ratepayers. That being the purpose of the compulsory purchase order, it seems to me that the Secretary of State was right to take the view that to confirm it would be a wrongful exercise of his powers.

In my judgment the attack on paragraph 9 also fails and accordingly the application for judicial review must be dismissed.

Application for judicial review dismissed.

Solicitors—Field Fisher and Martineau, London WC1, Agents for A. P. Price-Jones, Leicester City Council; Treasury Solicitor.

APPENDIX 9 – 6

**SHARKEY AND ANOTHER v. SECRETARY OF STATE
FOR THE ENVIRONMENT AND SOUTH
BUCKINGHAMSHIRE DISTRICT COUNCIL**

QUEEN'S BENCH DIVISION (Roch J.): May 11, 1990

Town and country planning—Compulsory purchase order—Town and Country Planning Act 1971, s.112(1)(b)—Land required for planning purpose—Meaning of “required”—Whether local authority must exhaust all other powers before exercising their compulsory purchase powers—Whether confirmation of order in respect of some parts of land vitiated by decision of Secretary of State to defer decision whether to confirm order in respect of other parts

Swallow Street enters the village of Love Green, Ivor, Buckinghamshire, from the north. It was bounded by agricultural land on both sides until about 1981. At about that time, the land immediately adjoining the west of Swallow Street was sold. It was divided into plots. The plots were occupied by gipsies who wished to settle. However, Swallow Street was within the green belt and, the South Buckinghamshire District Council, as the local planning authority, served enforcement notices in relation to all the plots of land. In respect of one of the plots, the council ultimately obtained an injunction to prevent it being used by gipsies. In 1985, the council sought authorisation under section 112(1)(b) of the Town and Country Planning Act 1971 to compulsorily purchase the land comprising the plots in order to secure proper planning in the area. Appeals against the enforcement notices and the council's application to confirm the purchase order were both heard at a public inquiry in 1987. The inspector recommended that the order be not confirmed. He did not consider that the council had satisfactorily shown that the only practicable means of achieving proper planning of the area was by the order, save with the possible exception of the plot to which the injunction applied: at that stage, the order was premature. However, the Secretary of State confirmed the order in respect of some of the plots, but deferred his decision in respect of those where the time for compliance with the relevant enforcement notices had yet to expire. He concluded that successful restoration of the land via the enforcement notices was unlikely in respect of the former plots since the evidence was that the owners would not, or could not afford to, restore the land even if the notices were upheld. An application was made to quash the compulsory purchase order.

Held, dismissing the application, that the word “required” in section 112(1)(b) of the 1971 Act means that the land is needed for the accomplishment of one of the activities or purposes set out in the section. It is not enough that compulsory acquisition is desirable. However, it does not have to be shown that the compulsory acquisition of the land is indispensable to the carrying out of the activity or the achieving of the necessary planning purpose. The local authority need not have tried to use all their other powers before resorting to compulsory purchase, provided there is evidence on which they and the Secretary of State can conclude that, without the use of compulsory purchase powers, the necessary planning purpose is unlikely to be achieved. In this case, the Secretary of State correctly identified the purpose which it was necessary to achieve in the interest of proper planning, namely to remove inappropriate and unacceptable development and to ensure that the land should not be left in a derelict or neglected state. He was then entitled to reach the conclusion, on the balance of probabilities, that the restoration of the land was unlikely unless the order was confirmed and therefore that the compulsory purchase of the land was required in the sense of it being need for the accomplishment of that purpose.

The Secretary of State was entitled to confirm the compulsory purchase order in

some cases and to defer it in others. Had he refused to confirm the order in respect of those plots in respect of which it was deferred his decision might have been overturned on the ground of irrationality.

Legislation construed:

Town and Country Planning Act 1971 (c. 78), section 112(1)(b). This provision is set out at pages 132–133, *post*.

Cases cited:

(1) *Company Developments (Property) Ltd. v. Secretary of State for the Environment and Salisbury District Council* [1978] J.P.L. 107.

(2) *R. v. Secretary of State for the Environment, ex p. Leicester City Council* (1988) 55 P. & C.R. 364.

Application by L. Sharkey and C. Fitzgerald under section 23(1) of the Acquisition of Land Act 1981 to quash the “South Bucks District Council (Ivor No. 1) Compulsory Purchase Order 1985” in respect of certain plots of land at Swallow Street, Ivor, Buckinghamshire. The Secretary of State for the Environment confirmed part of the order and deferred a decision on the remainder in a letter dated February 24, 1989. The grounds of the application were that such confirmation was *ultra vires* section 112(1) of the Town and Country Planning Act 1971. In particular, that:

- (1) The land was not “required” for proper planning; and
- (2) It was illogical and absurd to confirm the order in respect of only four plots of land which were not contiguous.

H. Sales for the applicants.

M. Kent for the first respondent.

G. Stephenson for the second respondent.

ROCH J. Originally there were two applications for judicial review in this matter. The first application in which the applicants were a Mr. Carey, a Mr. Stubbings and a Mr. Fitzgerald has been withdrawn with no order as to costs on terms of an undertaking given by counsel for the local planning authority, Mr. Stephenson, to counsel for the applicants, Mr. Sales.

The second application relates to the decision of the Secretary of State in the letter dated February 24, 1989, to confirm the South Bucks District Council (Ivor No. 1) Compulsory Purchase Order 1985 in respect of plots 1, 5, 6 and 7A at Swallow Street, Ivor, Buckinghamshire.

Swallow Street, Ivor, Buckinghamshire runs approximately on a north/south line. It enters the village of Love Green from the north. Immediately to the north of Love Green, Swallow Street was bounded on both sides by agricultural land and the evidence indicates that in and before 1981 the land to the west of that part of Swallow Street was used for grazing.

In 1981 or 1982, the land to the west of Swallow Street and immediately adjoining it was sold. In time it was divided into seven plots. Those seven plots are shown on Plan No. 5 exhibited at a public inquiry which Mr. Stephenson placed before me with the consent of the other counsel in this case. The plots are numbered 1 to 7 when proceeding in a northerly direction. At some stage plot 7 was divided into two parts and those parts were referred to as plots 7A and 7B. Some of the plots had names, for example, plot 1 was known as the “Cherry Orchard Site.” Plot 2 was known as “Springfield Rose Site.” Plot 3 was known as “Little Apple” and also as

"Site 1." Plot 4 was known as "Mill Place" and also as "Site 2." Plot 5 was known as "The Silver Birch" and also as "Site 3" and plot 6 was known as "Swallows Nest" and also "Site 4." Plot 7A is also referred to as "Site 5A" and plot 7B as "Site 5B."

Unless it becomes necessary to refer to a parcel of land by other than its plot number, I shall refer to each parcel of land by its plot number.

Those plots were occupied by travellers or gipsies. Often the occupant was the person who had purchased the plot. Entrances were made on to Swallow Street in most cases, although in some cases it was said that existing entrances were used. Hardstanding was put down for caravans and for vehicles, walls were built and gardens cultivated. In addition some septic tanks were constructed.

It seems that the travellers who bought and occupied those plots were travellers who wished to settle, to send their children to school, and to avoid having to move their children from one school to another. In short that the occupants were responsible and orderly people.

However, Swallow Street is within the Metropolitan Green Belt and there was and is a presumption against such development which is only to be displaced in certain exceptional cases. The second respondent, as the local planning authority, were against this unpermitted development and took steps to terminate this unauthorised use of this land.

Enforcement notices were prepared and served under section 87 of the Town and Country Planning Act 1971. In respect of some of the plots there was more than one enforcement notice.

The history in relation to plot 1 was this: that in 1984 four enforcement notices were served. In August 1985 the second respondent used its powers under section 91 of the Town and Country Planning Act 1971 to enter plot 1 and execute the work set out in four enforcement notices. Consequently, by October 8, 1985, plot 1 was unoccupied and the hardstanding, fences and vehicular access which had existed on plot 1 had been removed.

In May 1986 a High Court injunction was obtained to prevent plot 1 being used by a traveller. In August 1986 a second such injunction was obtained by the second respondent. In February 1987 further action under section 91 of the Act was taken. In April 1987 a writ was served on the then occupant of plot 1. Nevertheless by September 1987, at the time that a public inquiry was held by a planning inspector, Mr. Brock, plot 1 was being used by a traveller who had a caravan on the plot sited on hardstanding.

The inspector's report indicates that four enforcement notices were served in respect of plot 2, the first on May 15, 1985, and the remaining three on September 3, 1985. Three enforcement notices were served in respect of plot 6, two on September 5, 1985, and the third on September 20, 1985. Five enforcement notices were served in respect of plot 4, four on September 5, 1985, and the fifth on March 7, 1986. One enforcement notice was served in respect of plot 7 on August 8, 1987.

On October 8, 1985, the second respondent promulgated a compulsory purchase order under section 112(1) (b) of the Town and Country Planning Act 1971 seeking authorisation to purchase compulsorily the land described in the schedule which was all eight plots, that is to say, plots 1 to 6, 7A and 7B which were described in the schedule simply as plot 7: "For the purpose which it is necessary to achieve in the interests of the proper planning in the area in which the land is."

Appeals were brought against the enforcement notices by the owners of

four of the plots, namely, plots 2, 5, 6 and 7 and the second respondent applied for confirmation of the compulsory purchase order. Those two matters were taken together at a public inquiry held by Mr. Brock between September 15 and 17, 1987. The inspector's recommendations with regard to the enforcement notices are no longer material. With respect to the compulsory purchase order, the inspector said: "I recommend that the South Bucks District Council (Ivor No. 1) Compulsory Purchase order 1985 be not confirmed." The inspector's findings on which that recommendation was based were these: that there was a compelling need to keep the order land free from inappropriate development; that the land development which had taken place on the order land was inappropriate and unacceptable; that the location of the order land was such that it should not be left in a derelict or neglected state but should be put to a suitable use; that that aim was one which it was necessary to achieve in the interests of the proper planning of the area.

However, the inspector did not consider that the second respondent had shown satisfactorily that the only practicable means of achieving the necessary purpose was by compulsory purchase, save with the possible exception of plot 1; that with regard to plots 3 to 6 there was no evidence of prosecutions or attempted prosecutions for non-compliance with the enforcement notices; that with regard to plots 7A and 7B action in respect of a breach of a stop notice was apparently still being pursued and the period of compliance with the enforcement notice had not expired; that there was insufficient evidence to substantiate the second respondent's claim that the general level of fines imposed for non-compliance with enforcement notices were so low as to vitiate the value of prosecution; that as to the enforcement notices which had been appealed, it might be that the appellants would now decide to comply with the requirements of those notices within the time allowed (the inspector having increased the time allowed with regard to those notices); that the second respondent had given evidence that it would seek to use its powers under section 91 of the Act if those notices were not obeyed; that it had not been shown by the history of plot 1 that further action by the second respondent under section 91 of the Act would fail to have the desired effect in the future; that even if the past history of plot 1 was a good reason for a compulsory purchase order in respect of that plot, the purpose of which it is necessary to achieve would be unlikely to be realised by the acquisition of an individual plot in isolation. The council had at the inquiry put forward a scheme for restoration and landscaping of the seven plots and the inspector found that that scheme could not be implemented by the compulsory purchase only of plot 1.

The inspector concluded that whereas it might eventually be shown that in order to achieve the necessary purpose on planning grounds, no practicable alternative existed to the compulsory purchase of the land, the making of the order at that stage was, at the least, premature.

The Secretary of State's decision on the compulsory purchase order was to confirm the order in relation to plots 1, 5, 6 and 7A and to defer his decision on the order in respect of plots 2, 3, 4 and 7B until the period for compliance with the relevant enforcement notices relating to those plots had elapsed. Accordingly the Secretary of State exercised his power under section 132(2) of the Town and Country Planning Act 1971 to confirm the compulsory purchase order in so far as it related to plots 1, 5, 6 and 7A,

subject to certain modifications, and to postpone his consideration of the order in relation to plots 2, 3, 4 and 7B until September 28, 1989.

I was told during the hearing that no further consideration had been given to the order in so far as it relates to plots 2, 3, 4 and 7B. The reasoning of the Secretary of State was this: that he agreed with the inspector that the development which had taken place on the order land was inappropriate and unacceptable; that the implementation of the second respondent's proposed landscaping scheme was consistent with green belt policy, but was not the only purpose to which the land could appropriately be put; that the land should not be left in a derelict or neglected state. The Secretary of State went on to say that he did not accept in its entirety the inspector's conclusion that the second respondent had not demonstrated satisfactorily that the only practicable means of achieving the aim of putting the order land to a suitable rural use was by compulsory acquisition. The Secretary of State had concluded that successful restoration of the land as a consequence of upholding the enforcement notices was unlikely as respects plots 1, 5, 6 and 7A since the evidence of the owners of those plots was to the effect that they would not, or, in one case, could not afford to restore the land even if the notices were upheld. Accordingly the Secretary of State had decided to confirm the order in relation to those plots. On the other hand, because the evidence given by the owners of plots 3 and 4 suggested that the land would be restored if the enforcement notices were upheld, the Secretary of State concluded that it would be appropriate to defer his decision in relation to those plots until the period for compliance with the relevant enforcement notices had elapsed.

He reached the same decision in respect of plots 2 and 7B where the owners either expressed no view or were undecided about restoration.

The applicants say that they are aggrieved by the compulsory purchase order and make application to this court, questioning the validity of the order, under section 23(1) of the Acquisition of Land Act 1981. The ground on which the validity of the compulsory purchase order is questioned is that the authorisation of a compulsory purchase order is not empowered to be granted under section 112(1) of the Town and Country Planning Act 1971. The powers of this court on such an application are set out in section 24 of the 1981 Act. Section 24(2) provides that if on the application this court is satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted under the 1981 Act or any such enactment as is mentioned in section 1(1) of the 1981 Act, the court may quash the compulsory purchase order either generally or in so far as it affects any property of the applicant.

Two submissions are made on behalf of the applicants to make good their claim that the decision of the Secretary of State to affirm the compulsory purchase order should be quashed. The first is that the land and the compulsory purchase order were not required by the local planning authority for the purpose which it was necessary to achieve in the interests of the proper planning of the area in which Swallow Street is situated. The second that the purpose which it was necessary to achieve contemplated by the local planning authority was not merely the removal of those matters in respect of which the enforcement notices were served, but also the return of the land, that is to say the whole of the strip comprising the eight plots, to a use appropriate to the metropolitan green belt and the area, so that the land should not be left in a derelict or neglected state. The purpose con-

templated by the local planning authority could only be achieved by confirmation of the compulsory purchase order in respect of all eight plots, because the purpose went beyond the simple removal of caravans, hard-standing, walls, septic tanks and so forth. That this was so is clearly demonstrated by the local planning authority's restoration and landscaping scheme prepared, authorised and budgeted for prior to the holding of the public inquiry. Against that purpose, submits Mr. Sales, it was illogical and absurd for the Secretary of State to confirm the compulsory purchase order only in respect of four of the eight plots and in respect of four plots which were not contiguous.

The respondents answered those submissions in these ways. First "required" does not mean that the land or the compulsory purchase order are essential, nor need the use of compulsory purchase powers be a last resort. "Required" means no more than the compulsory acquisition of the land is needed for the necessary planning purpose. It is for the Secretary of State, having identified the necessary planning purpose, to make a judgment whether the land and the compulsory purchase order are required to achieve that purpose. It is not for this court to make that judgment. In the present case there was clear evidence in respect of plot 1 that the local planning authority's other powers had not been and would not be effective to achieve the necessary planning purpose. There was evidence in respect of plots 5, 6 and 7A on which the Secretary of State was entitled to conclude that the compulsory purchase of those plots by the local planning authority was required in order that the necessary planning purpose be achieved.

Section 132(2) of the Town and Country Planning Act 1971 enables the Secretary of State, where a compulsory purchase order authorising the acquisition of land under section 112 of the Act is submitted to him, to confirm the order so far as it relates to part of the land comprised in the order, if he is satisfied that the order ought to be confirmed so far as it relates to such part of the land and to give directions postponing consideration of the order so far as it relates to any other land specified in the directions until such time as the Secretary of State specifies. It is submitted on behalf of the respondents that the Secretary of State in the present case has done no more than to exercise that power given to him by section 132(2) of the 1971 Act. Consequently, unless it can be shown that the decision to confirm part of the order in so far as it relates to plots 1, 5, 6 and 7A but to postpone consideration of the order so far as it relates to plots 2, 3, 4 and 7B was unreasonable in the *Wednesday* sense these applications must fail. It is pointed out, on behalf of the respondents, that this is not a case where the Secretary of State has confirmed the compulsory purchase order in part and refused to authorise the acquisition of the other parts of the land set out in the schedule to the order. In respect of those latter parts he has merely postponed consideration to see whether the owners of those plots will comply with the enforcement notices. Consequently there is nothing illogical, perverse or absurd about the decision reached by the Secretary of State and it was a decision which is consistent with the findings of fact made by his inspector. The mere fact that the Secretary of State has reached a conclusion different from that reached by his inspector, and that the court may consider that the inspector's conclusion is to be preferred to that of the Secretary of State, is not sufficient to enable these applications to succeed.

Mr. Sales' reply on behalf of the applicants is that the power given by

section 112 of the Town and Country Planning Act 1971 is one which should be used as a last resort; that this was accepted by the Secretary of State in paragraph 6 of his decision letter where the Secretary of State says that he does not accept in its entirety the inspector's conclusion that the council has not satisfactorily shown that the only practical means of achieving the aim of putting the order land to a suitable rural use is by compulsory acquisition. The principle was also accepted by Mr. Bradford, the planning officer of the second respondent, at the public inquiry when he gave evidence to this effect:

If an owner consistently refuses to observe his obligations under the planning legislation, and normal legal measures designed to make him do so prove ineffective, the final essential step is the making of a compulsory purchase order.

In the next paragraph of the inspector's report, paragraph 154, Mr. Bradford is recorded as saying:

Were the order (that is to say the compulsory purchase order) not to be confirmed but the enforcement notice is upheld, the council would seek to use its powers under section 91 of the 1971 Act in the event of non-compliance with the requirement of the notice.

Consequently, says Mr. Sales, the local planning authority were conceding that they were not using their power under section 112 as a last resort and that if the compulsory purchase order was not confirmed, they would use their powers under section 91 from which it must follow that the local planning authority were not of the view that the use of such powers would be a complete waste of time.

Mr. Sales further submits that the sentence in paragraph 6 of the Secretary of State's letter is unsatisfactory in that it is not clear to what extent the Secretary of State did or did not accept the inspector's conclusion that the council had not shown that the only practical means of achieving the aim of putting the land to suitable rural use was by compulsory acquisition. Because successful restoration of the land as a consequence of upholding the enforcement notices was unlikely in respect of plots 1, 5, 6 and 7A it did not mean that the local planning authority could resort straight away to their compulsory acquisition powers under section 112. They should first await the outcome of the enforcement notice, then use their powers under section 91 of their power to obtain an injunction in the High Court or both before resorting to section 112. The power to deprive a person of his or her land should only be used where both the land and its compulsory acquisition were necessary, otherwise the use of this confiscatory power would be arbitrary.

Mr. Stephenson on behalf of the second respondent submitted that the expense and difficulty of the compulsory purchase procedures were an adequate safeguard against the arbitrary use of the power given to local planning authorities by section 112, when taken together with the need to obtain the Secretary of State's authorisation and consequently the terms of the section should not be construed in the narrow way suggested on behalf of the applicants.

Section 112(1) of the Town and Country Planning Act 1971, in so far as it is material, provides:

A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily

- (a) any land which is in their area and which is suitable for and is required in order to secure the carrying out of one or more of the following activities, namely, development, redevelopment, and improvement;
- (b) any land which is in their area and which is required for a purpose which it is necessary to achieve in the interest of the proper planning of an area in which the land is situated.

In the present case the respondents rely upon subsection (1)(b).

I was referred to two authorities. The first was the case of *Company Developments (Property) Ltd. v. Secretary of State for the Environment and Salisbury District Council*, a decision of Sir Douglas Frank, Q.C. sitting as a deputy judge of the Queen's Bench. That was a case where the compulsory purchase order had been made under section 112(1)(a). During the course of his judgment, Sir Douglas Frank accepted the submission that the word "required" in a compulsory purchase situation does not mean "essential." It meant that the acquiring authority and the Secretary of State considered that it was desirable to acquire the land to secure the development of the area as a whole. The second decision was that of McCullough J. in *R. v. Secretary of State for the Environment, ex p. Leicester City Council* where McCullough J. held that the Secretary of State had been right to refuse to authorise a compulsory purchase order made by the Leicester City Council under section 112(1)(a) of the 1971 Act on the ground that the local authority had not shown that it required the land and the compulsory purchase order in order to secure the carrying out of the development contemplated. McCullough J. referred to the dictum of Sir Douglas Frank in the earlier case but said that that observation was not in point in the case that he, McCullough J., had to decide.

Nevertheless, it emerges from the earlier passages in the judgment of McCullough J. that he considered that the word "required" meant more than simply the acquisition of the land being in the view of the local planning authority and the Secretary of State desirable and that what had to be demonstrated was a need on the part of the local authority both for the land and the power to acquire it compulsorily.

Although both those cases involve consideration of section 112(1)(a), in my judgment the word "required" must have the same meaning in section 112(1)(a) and in section 112(1)(b). Because of the nature of the power given to local authorities by section 112, namely, to deprive the owner of his land against the owner's will, I prefer and adopt the stricter meaning of the word "required" suggested by the judgment of McCullough J. In my judgment the word means that the compulsory acquisition of the land is called for; it is a thing needed for the accomplishment of one of the activities or purposes set out in the section. However, I accept the dictum of Sir Douglas Frank, Q.C. to this extent that neither the local authority nor the Secretary of State have to go so far as to show the compulsory acquisition of the land is indispensable to the carrying out of the activity or the achieving of the necessary planning purpose. The local authority need not have tried to use all their other powers before resorting to compulsory purchase, provided there is evidence on which they and the Secretary of State can

conclude that, without the use of compulsory purchase powers, the necessary planning purpose is unlikely to be achieved.

In this case the Secretary of State in paragraph 5 of the letter of his decision correctly, in my view, identified the purpose which it was necessary to achieve in the interest of proper planning of the area in which the land was situated, namely, to remove the development which had taken place and which was inappropriate and unacceptable and to ensure that the land should not be left in a derelict or neglected state. The Secretary of State then went on to consider whether acquisition of the land by compulsory powers was required in the sense of being needed for the accomplishment of the purpose because he has concluded, on the balance of probabilities, that successful restoration of the land was unlikely in respect of plots 1, 5, 6 and 7A, unless the order was confirmed in relation to those plots. In my judgment there was evidence on which the Secretary of State was entitled to reach that conclusion. If the Secretary of State had asked himself the question, is the compulsory acquisition of this land desirable for the accomplishment of the purpose, I would have held that he had applied the wrong test.

Had the Secretary of State gone on to refuse to confirm the compulsory purchase order with regard to the other four plots, then in my opinion there may have been some prospect of his decision being overturned on the grounds of irrationality. However, that is not the decision reached by the Secretary of State and I assume, in his favour, that he will confirm the compulsory purchase order in respect of those plots if, despite the removal of caravans and so forth from those plots, those plots are not restored to some use suitable for the area but are left in a state where they become or are likely to become derelict and neglected.

I may confess in this case that had the decision been mine, I would have reached the same conclusion as that reached by the inspector, namely, that the making of the compulsory purchase order at that stage was premature. However, it is a well established principle of administrative law that such judgments are for the local authority and the Secretary of State and not for this court.

Consequently the conclusion that I have reached is that I must dismiss these applications for judicial review.

Application dismissed. Applicants to pay first respondent's costs.

Solicitors—Lance Kent & Co., Chesham, Bucks; Treasury Solicitor; Solicitor to the South Buckinghamshire District Council.

APPENDIX 9 – 7

**SHARKEY AND ANOTHER v. SECRETARY OF STATE
FOR THE ENVIRONMENT AND SOUTH
BUCKINGHAMSHIRE DISTRICT COUNCIL**

COURT OF APPEAL (Parker, McCowan and Scott L.JJ.): October 14,
1991

Compulsory purchase order—Land required for a planning purpose—Meaning of “required”—Whether local authority should exhaust other planning enforcement powers before using compulsory purchase powers—Town and Country Planning Act, 1971, s.112(1)(b)

Gipsies brought mobile homes onto eight plots in the metropolitan green belt, where there was a presumption against development, without obtaining planning permission. They intended to settle permanently there. The local authority proceeded against the gipsies, initially by way of enforcement notices and then by obtaining injunctions, but finally, finding that these procedures were cumbersome, expensive and ineffective, made a compulsory purchase order seeking to purchase all eight plots on the ground that the land was “required” to achieve proper planning of the area within the Town and Country Planning Act 1971, s.112(1)(b).

After holding a public inquiry into the compulsory purchase order, the inspector, while accepting that the development was inappropriate and unacceptable in the green belt, recommended that the order should not be confirmed, on the grounds that the council had not satisfactorily shown that this was the only reasonable means of achieving proper planning of the area and that the order was premature. This was not accepted by the Secretary of State, who confirmed the order in respect of four plots on the ground that, on the evidence, successful restoration of the land without the compulsory purchase order would be unlikely in these cases, but deferred his decision in respect of the other four plots where time for compliance with the enforcement notices had not yet expired.

Certain gipsies appealed against the decision of Roch J.,¹ who had dismissed their application to quash the compulsory purchase order. They contended that the land was not “required” by the local authority within section 112(1)(b), since there were various ways in which the clearance of the land could be achieved without compulsory purchase.

Held, dismissing the appeal, that in order to show that land was “required” for a purpose which it was necessary to achieve in the interests of proper planning within the Town and Country Planning Act 1971, s.112(1)(b), a local authority did not have to show that compulsory purchase of the land was indispensable to the achieving of that purpose, but that it was necessary in the circumstances of the case. It was not enough, however, that such compulsory purchase might be desirable. The Secretary of State was entitled to find that the council was unlikely to achieve successful restoration of the land without compulsory purchase in respect of four plots and to defer a decision in respect of the four further plots where there was a possibility that this might be achieved.

Cases cited:

(1) *Company Developments (Property) Ltd. v. Secretary of State for the Environment and Salisbury District Council* [1978] J.P.L. 107.

(2) *R. v. Secretary of State for the Environment, ex p. Leicester City Council* (1988) 55 P. & C.R. 364.

¹ See (1991) 62 P. & C.R. 126.

(3) *Runnymede Borough Council v. Ball* [1986] 1 W.L.R. 353; [1986] 1 All E.R. 629; 53 P. & C.R. 117, C.A.

Legislation construed:

Town and Country Planning Act 1971 (c. 78), s.112(1)(b) (see now Planning Act 1990, s.226(1)). The provision is set out at page 335, *post*.

Appeal by L. Sharkey and C. Fitzgerald from a decision of Roch J. on May 11, 1990 (see 62 P. & C.R. 126) in which he dismissed their application to quash a compulsory purchase order made by the South Buckinghamshire District Council on October 8, 1985, relating to certain plots of land at Swallow Street, Iver, Buckinghamshire, in the metropolitan green belt, upon which they had installed mobile homes without planning permission. The appellants contended that the district council only required clearance of the land, which could be achieved by prosecution, by the council entering upon the land and clearing it, by injunction or by providing a suitable alternative site. Compulsory purchase was not "required."

Harry Sales for the appellants (applicants).

W. Robert Griffiths for the first respondent.

R. J. Rundell for the second respondent.

PARKER L.J. I will ask McCowan L.J. to give the first judgment.

McCOWAN L.J. This is an appeal from a decision of Roch J. given on the May 11, 1990, dismissing an application by the appellants that the South Bucks District Council (Ivor No. 1) Compulsory Purchase Order 1985 be quashed. The first respondent is the Secretary of State for the Environment and the second respondent is the South Bucks District Council.

The order in question, as made by the South Bucks District Council on October 8, 1985, related to plots 1 to 6, 7A and 7B Swallow Street, Iver. The order as confirmed by the Secretary of State related only to plots 1, 5, 6 and 7A. Postponement of consideration of the order in so far as it related to plots 2, 3, 4 and 7B was directed by the Secretary of State.

Between September 15 and 17, 1987, an inspector held a public inquiry into the compulsory purchase order and also into various enforcement notices with which neither the hearing before Roch J. nor the appeal have been concerned. The reason for that, as we understand it, is that before the case started in front of Roch J. it was agreed between the parties that the appellants would not pursue their appeals against the enforcement on the basis that the council for their part would not take action in respect of them before some date in 1991. Those enforcement notices are therefore effective.

That inspector described the site covered by the order thus:

The order land is on the west side of Swallow Street and in a generally open area between the north-western and south-western extremities of the built-up areas of Iver and Iver Heath respectively. It is approximately 0.28 (0.69 acres) in area and divided into 7 plots, numbered 1 to 7 consecutively from south to north (Plan A). At the time of the inquiry Plot 7 had been sub-divided into 2, the southern part referred to as Plot 7A and the northern as Plot 7B (Plan Q).

The inspector went on to make findings of fact about, among other things, the state of occupation of the various plots. He said:

5. Plot 1, Cherry Orchard, contains a mobile home and hardstanding and garden areas, and is residentially occupied by Mr. Sharkey and family.
6. Plot 2, Springfield Rose, contains a mobile home and hardstanding area, and is residentially occupied by Mr. And Mrs. Carey.
7. Plot 3, Little Apple, contains a mobile home, touring caravan and hardstanding area, and is residentially occupied by Mr. M. Smith and family.
8. Plot 4, Mill Place, contains a mobile home, touring caravan and hardstanding area, and is residentially occupied by Mr. J. Smith and family.
9. Plot 5, Silver Birch, contains a mobile home and hardstanding area, and is residentially occupied by Mr. Fitzgerald and family.
10. Plot 6, Swallows Nest, contains a mobile home and patio, garden and hardstanding areas, and is residentially occupied by Mr. Stubbings and family.
11. Plot 7A, Summerset Place, contains a touring caravan and hardstanding area, and is residentially occupied by Mr. Brown and family.
12. Plot 7B, Meadowside, contains a touring caravan and hardstanding and garden areas, and is residentially occupied by Mr. Price and family.

Plots 1 and 5, it is to be noticed, are occupied by the two appellants. The learned judge summarised the situation in this way²:

Those plots were occupied by travellers or gypsies. Often the occupant was the person who had purchased the plot. Entrances were made on to Swallow Street in most cases, although in some cases it was said that existing entrances were used. Hardstanding was put down for caravans and for vehicles, walls were built and gardens cultivated. In addition some septic tanks were constructed.

It seems that the travellers who bought and occupied those plots were travellers who wished to settle, to send their children to school, and to avoid having to move their children from one school to another. In short that the occupants were responsible and orderly people.

However, Swallow Street is within the Metropolitan Green Belt and there was and is a presumption against such development which is only to be displaced in certain exceptional cases. The second respondent, as the local planning authority, were against this unpermitted development and took steps to terminate this unauthorized use of this land.

Enforcement notices were prepared and served under section 87 of the Town and Country Planning Act 1971. In respect of some of the plots there was more than one enforcement notice.

The history in relation to plot 1 was this: that in 1984 four enforcement notices were served. In August 1985 the second respondent used its powers under section 91 of the Town and Country Planning Act 1971 to enter plot 1 and execute the work set out in the four enforce-

² (1991) 62 P. & C.R. 126 at p. 128.

ment notices. Consequently, by October 8, 1985 plot 1 was unoccupied and the hardstanding, fences and vehicular access which had existed on plot 1 had been removed.

In May 1986 a High Court injunction was obtained to prevent plot 1 being used by a traveller. In August of 1986 a second such injunction was obtained by the second respondent. In February 1987 further action under section 91 of the Act was taken. In April 1987 a writ was served on the then occupant of plot 1. Nevertheless by September 1987, at the time that a public inquiry was held by a planning inspector, Mr. Brock, plot 1 was being used by a traveller who had a caravan on the plot sited on hardstanding.

The inspector's report indicates that four enforcement notices were served in respect of plot 2, the first on May 15, 1985 and the remaining three on September 3, 1985. Three enforcement notices were served in respect of plot 6, two on September 5, 1985 and the third on September 20, 1985. Five enforcement notices were served in respect of plot 4, four on September 5, 1985 and the fifth on March 7, 1986. One enforcement notice was served in respect of plot 7 on August 8, 1987.

On October 8, 1985 the second respondent promulgated a compulsory purchase order under section 112(1)(b) of the Town and Country Planning Act 1971 seeking authorization to purchase compulsorily the land described in the schedule which was all eight plots, that is to say, plots 1 to 6 7A and 7B which were described in the schedule simply as plot 7; "For the purpose which it is necessary to achieve in the interests of the proper planning in the area in which the land is."

It is convenient at this point to read section 112 of the Town and Country Planning Act 1971. In so far as it is material it provides as follows:

- (1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily
 - (a) any land which is in their area and which is suitable for and is required in order to secure the carrying out of one or more of the following activities, namely, development, redevelopment and improvement;
 - (b) any land which is in their area and which is required for a purpose which it is necessary to achieve in the interest of the proper planning of and area in which the land is situated.

As the judge said, the council relied in this case on subsection 1(b). The council's case under that subsection before the inspector was summarised by him as follows:

167. The need for a compulsory purchase order is due to deliberate flouting of planning control by the occupiers of the land or their predecessors. Normal legal procedures have been shown to be cumbersome, expensive and ineffective. Enforcement procedure has been satisfactory up to a point, but thereafter has been ineffective; prosecutions depend on identification, which is difficult when occupiers come and go, the level of fines imposed is low and injunctions obtained apply only to the persons named. On the Cherry Orchard site [I interpolate that is a reference to plot 1] section 91 action has been found ineffective; twice the land has been cleared, and twice reinstated. A stop

notice on Plot 7 has been ineffective. No grounds exist for expecting that the land would revert to an appropriate Green Belt use even if section 91 powers were again to be used. All except one of the present occupiers have said that they would not reinstate their land to the condition in which it formerly was. Public money would be wasted by the use of section 91 powers, and the aim of protecting the Green Belt would be rendered futile.

168. The only effective means of protection is by compulsory purchase. As a housing action area is purchased for the benefit of the community as a whole, so would the purchase of this Green Belt land be of benefit to the community. In the light of that consideration the order should be confirmed. Even if it is thought that it should not be confirmed in respect of Plots 2 to 6 on the grounds that all other avenues have not yet been fully explored, it should be confirmed in respect of Plots 1, 7A and 7B.

The inspector's conclusion on this issue was:

189. . . . I find the development which has taken place on the land to be inappropriate and unacceptable. In my opinion the location is such that the land should not be left in a derelict or neglected state, but should be put to a suitable rural use. That aim seems to me to be one which it is necessary to achieve in the interests of the proper planning of the area.

190. However, I do not consider that, with the possible exception of Plot 1, the Council have satisfactorily shown that the only practicable means of achieving the aim is by compulsory purchase. With regard to Plots 3 to 6, there is no evidence of prosecutions or attempted prosecutions for non-compliance with those enforcement notices which are not the subject of appeal and should by now have been complied with. Regarding Plots 7A and 7B, action in respect of a breach of the stop notice is apparently still being pursued, and I note that the period for compliance with the enforcement notice issued on September 11, 1987 is not due to and until November 16, 1987. I find insufficient evidence to substantiate a claim that the general level of fines imposed for non-compliance with enforcement notices is so low as to vitiate the value of prosecution.

191. As to the notices currently under appeal, it might be that the appellants would now decide to accept what I believe to be the inevitability of the situation, and would choose to comply with the requirements within the time allowed. The evidence is that, in the event of non-compliance with the notices if upheld, and of the order not being confirmed, the Council would seek to use its powers under section 91 of the 1971 Act. This course of action would no doubt be open to the Council to pursue if it wished, and it does not seem to me necessarily to follow that, because Plot 1 has been reoccupied after such action in the past, further action would fail to have the desired effect in the future.

192. Even if past experience provided a good reason for the compulsory purchase of Plot 1, the purpose which it is necessary to achieve would be unlikely to be realised by the acquisition of an individual plot in isolation. The Council's restoration and landscaping scheme could not be implemented by the use only of Plot 1. With regard to that

scheme, it seems to me that an appropriate rural use would equally lie in the return of the land to grazing land, whether as a parcel on its own or in conjunction with adjoining land. It could be that the present owners of the land, notwithstanding the evidence given at the inquiry, would be finally convinced that they should dispose of their land, and would offer it for sale to an owner of adjoining or adjacent land for use by him for an appropriate purpose.

I interrupt the reading at this point to make the comment that nothing has happened since to justify the inspector's optimism. He continued:

193. I conclude that, whereas it may eventually be found that, in order to achieve the necessary purpose on planning grounds, no practicable alternative exists to compulsory purchase of the land, the making of the order at this stage is, at the least, premature.

He went on to recommend that the compulsory purchase order be not confirmed.

In turn the Secretary of State had this to say on the issue in his decision letter of the February 24, 1989:

The Secretary of State agrees that the interests of the proper planning of an area within the Metropolitan Green Belt are served by the removal of development which is detrimental to the visual amenities of that area.

5. In considering the Inspector's conclusions in the light of the council's statement of reasons, the Secretary of State agrees that the development which has taken place on the order land is inappropriate and unacceptable in this generally open area which is within the Metropolitan Green Belt and the Colne Valley Park. He shares the Inspector's opinion that the implementation of the council's proposed landscaping scheme (which was prepared only after the order had been submitted for confirmation) whilst consistent with Green Belt policy, is not the only purpose to which the land could appropriately be put. He agrees that the land should not be left in a derelict or neglected state.

6. On the basis of the evidence presented at the inquiry, the Secretary of State does not accept in its entirety the Inspector's conclusion that the council have not satisfactorily shown that the only practicable means of achieving the aim of putting the order land to a suitable rural use is by compulsory acquisition. The Secretary of State has had particular regard to the evidence presented by the council as to the result of enforcement action in respect of various sites in the district, including sites which are also the subject of this order. He has concluded, on the balance of probabilities, that successful restoration of the land as a consequence of the upholding of the enforcement notices is unlikely as respects plots 1, 5, 6 and 7A since the evidence of the owners of those plots is to the effect that they would not, or in one case could not afford to restore the land, even if the notices were upheld. Accordingly he has decided to confirm the order in relation to those plots.

7. The evidence given by the owners of plots 3 and 4 suggests that the land would be restored if the enforcement notices were upheld. In relation to plots 2 and 7B the owners either expressed no view or were undecided about restoration. The Secretary of State considers that it

would be appropriate in relation to these plots to defer his decision on the order until the period for compliance with the relevant enforcement notices has elapsed. He will then form a view as to the necessity for confirmation of the order in respect of those plots.

I need not read paragraph 8, which deals with certain modifications. In paragraph 9 he went on to say:

9. Accordingly, in exercise of the power conferred on him by section 132(2) of the Town and Country Planning Act 1971, he hereby confirms the South Bucks District Council (Iver No. 1) Compulsory Purchase Order 1985 insofar as it relates to plots 1, 5, 6 and 7A subject to the modifications shown thereon in red ink. He hereby directs that consideration of the order insofar as it relates to plots 2, 3, 4 and 7B be postponed until September 28, 1989.

In challenging this decision in the courts the appellants put forward two grounds in their notice. First, it is said that:

the first respondent treated the likelihood of the applicants carrying out works of restoration in accordance with enforcement notices as the determining factor and in so doing ignored the powers of the Second Respondent to carry out works of restoration under section 91 of the Town and Country Planning Act 1971.

Secondly, that:

the first respondent considered it unnecessary to confirm the compulsory purchase order in respect of plots owned by other than the applicants and thereby and by his express conclusions concluded that the avowed purpose of the order in the form of the second respondent's proposed landscaping scheme did not justify confirmation of the compulsory purchase order.

The provisions of section 91(1) of the Town and Country Planning Act 1971 there referred to read as follows:

If, within the period specified in an enforcement notice for compliance therewith, or within such extended period as the local planning authority may allow, any steps which by virtue of section 87(7)(a) of the Act are required by the notice to be taken (other than the discontinuance of a use of land) have not been taken, the local planning authority may enter the land and take those steps, and may recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so.

It is to be observed, however, that, in practical terms, to do this it would be necessary first to get occupiers off the site.

The appellants submitted before Roch J. that compulsory purchase of the land was not required for the purpose in question, because that purpose could be achieved by other means, notably under section 91. Roch J. was referred to two authorities on the word "required" in this context, as have we. Both cases involve consideration of section 112(1)(a) but, as the judge said, and it has not been disputed, the word "required" must have the same meaning in (b) as in (a).

In *Company Developments (Property) Ltd. v. Secretary of State for the Environment and Salisbury District Council* Sir Douglas Frank held that

the word "required" in this context does not mean "essential," but only that the acquiring authority and the Secretary of State consider it desirable to acquire the land to secure the carrying out of the activity in question.

In *R. v. Secretary of State for the Environment, ex p. Leicester City Council* McCullough J. considered that the word "required" meant more than mere desirability. Roch J., in this case, dealt with that argument as follows.³

Because of the nature of the power given to local authorities by section 112, namely, to deprive the owner of his land against that owner's will, I prefer and adopt the stricter meaning of the word "required" suggested by the judgment of McCullough J. In my judgment the word means that the compulsory acquisition of the land is called for; it is a thing needed for the accomplishment of one of the activities or purposes set out in the section. However, I accept the dictum of Sir Douglas Frank QC to this extent that neither the local authority nor the Secretary of State have to go so far as to show the compulsory acquisition of the land is indispensable to the carrying out of the activity or the achieving of the necessary planning purpose. The local authority need not have tried to use all their other powers before resorting to compulsory purchase, provided there is evidence on which they and the Secretary of State can conclude that, without the use of compulsory purchase powers, the necessary planning purpose is unlikely to be achieved.

In this case the Secretary of State in paragraph 5 of the letter of his decision correctly, in my view, identified the purpose which it was necessary to achieve in the interest of proper planning of the area in which the land was situated, namely, to remove the development which had taken place and which was inappropriate and unacceptable and to ensure that the land should not be left in a derelict or neglected state. The Secretary of State then went on to consider whether acquisition of the land by compulsory powers was required in the sense of being needed for the accomplishment of the purpose because he has concluded, on the balance of probabilities, that successful restoration of the land was unlikely in respect of plots 1, 5, 6 and 7A, unless the order was confirmed in relation to those plots. In my judgment there was evidence on which the Secretary of State was entitled to reach that conclusion. If the Secretary of State had asked himself the question, is the compulsory acquisition of this land desirable for the accomplishment of the purpose, I would have held that he had applied the wrong test.

Had the Secretary of State gone on to refuse to confirm the compulsory purchase order with regard to the other four plots, then in my opinion there may have been some prospect of his decision being overturned on the grounds of irrationality. However, that is not the decision reached by the Secretary of State and I assume, in his favour, that he will confirm the compulsory purchase order in respect of those plots if, despite the removal of caravans and so forth from those plots, those plots are not restored to some use suitable for the area but are

³ (1991) 62 P. & C.R. 126 at pp. 133-134.

left in a state where they become or are likely to become derelict and neglected.

I may confess in this case that had the decision been mine, I would have reached the same conclusion as that reached by the inspector, namely, that the making of the compulsory purchase order at that stage was premature. However, it is a well established principle of administrative law that such judgments are for the local authority and the Secretary of State and not for this court.

Consequently the conclusion that I have reached is that I must dismiss these applications for judicial review.

I agree with Roch J. that the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word "desirable" satisfactory, because it could be mistaken for "convenient," which clearly, in my judgment, is not sufficient. I believe the word "required" here means "necessary in the circumstances of the case."

Before this court the appellants put their case in this way. It is said by Mr. Sales that the seven grounds of appeal in the notice of appeal all relate to different aspects of the same point, which is that the land, the subject of a compulsory purchase, is not required by the second respondent. Compulsory purchase by, for example, local authorities can be authorised when they require land for the carrying out of their function, such as by-ways, housing, parks, etc. In all cases it is the land itself which is required for the purpose for which there is statutory authority to acquire compulsorily. In the case of section 112(1)(b) of the 1971 Act, this, he points out, is an express requirement. But, he says, in this case there is no requirement whatever of the second respondents for the land itself. Their requirement is only the clearance of the land and that could be achieved without compulsory purchase of the land itself by any of the following methods or a combination of them: (1) prosecutions under section 179 of the 1990 Act for non-compliance with enforcement notices; (2) execution of work by the local planning authority plus entry on to the land for that purpose, pursuant to section 178 of the 1990 Act, coupled with a right to recover from the owner expenses reasonably incurred in so doing; (3) injunction proceedings pursuant to section 222 of the Local Government Act 1972; (4) the provision of an acceptable alternative site for the appellants.

I am bound to say, however, that the planning history of the site, notably that of plot 1, gives one little faith in the efficacy of these remedies in dealing with these occupiers. It is indeed important, in my judgment, not to lose sight of two sections of the evidence which was before the Secretary of State. The first of these was the history of the unsuccessful attempt by the council using other methods to get these plots cleared, which history was recounted by Roch J. in a passage which I have quoted from his judgment.

The second section concerned the intentions of the occupants themselves. These the inspector summarised on the evidence they gave as follows. He recounted that Mr. Sharkey, one of the appellants, who occupies plot 1, said in evidence that "they could not afford to restore it to green field land." Mr. Carey's evidence in respect of plot 2 was that he would not be prepared to move to any council owned site. Mr. M. Smith said in respect of plot 3 that he would be prepared, with the council's help, to

reinstate it. Mr. J. Smith from plot 4 said that he would reinstate it to green meadow. Mr. Fitzgerald, the other of the appellants, said of plot 5 that he could not reimburse the council for any costs of reinstatement. Mr. Stubblings from plot 6 said that he would not restore it to its former condition. Mrs. Brown from plot 7A said that they would not themselves clear it. Mr. Price from plot 7B on the other hand, said that he did not know if he would reinstate it.

In the light of all that evidence the Secretary of State was, in my judgment, entitled to arrive at the conclusion that the council were not likely to achieve successful restoration of the land including plots 1, 5, 6 and 7A without compulsory purchase but that in respect of the remaining plots it was still possible that they might.

I agree with Roch J. that, had the Secretary of State refused to confirm a compulsory purchase order with regard to those remaining four plots, some force might have been given to an argument that he had acted irrationally, but, as it is, the plain implication of his decision is that if these plots are not restored to a use suitable for their area he will confirm the compulsory purchase order in respect of them.

As I indicated, a subsidiary argument was advanced by the appellants that by deferring a decision in respect of those plots the Secretary of State has put it out of the council's power to carry out their landscaping scheme. I am satisfied however that this scheme was only put forward at the inquiry as a possible scheme should the order be confirmed in respect of all eight plots. The scheme is not essential to the planning purpose, which is to restore the land to rural use. That purpose can be achieved in respect of a single plot by removal of a caravan, hardstanding, etc., and reversion to grass or shrubs and trees.

For all these reasons I agree with Roch J.'s decision and would dismiss the appeal.

SCOTT L.J. I agree with the judgment that McCowan L.J. has given and would add only one point.

Both before us and before Roch J. Mr. Sales submitted that the power of compulsory purchase given by section 112 of the 1971 Act was a power which should be used only as "a last resort," as he put it. That may be so as between the various statutory powers available to the local authority under the Town and Country Planning Acts. If, however, the choice is between an exercise of the power of compulsory purchase and the alternative route by means of which a local authority may seek to enforce the planning law, namely High Court proceedings for a civil injunction, then I do not agree.

There are statements in a number of cases at levels all the way up to the House of Lords to the effect that the use of civil proceedings for injunctions in order to enforce the public law should be confined to exceptional cases (see, e.g. *Runnymede Council v. Ball* and the cases there cited). A civil injunction involves the substitution of an unlimited power of imprisonment, available in contempt of court proceedings against persons who disobey the injunction, for the limited penalties for disobedience of the law prescribed by Parliament. I do not doubt that in many cases local authorities are entirely justified in taking High Court proceedings for injunctions so as to obtain the additional sanction of committal for contempt in order to enforce obedience to the statutory offences in question. But to say that a compulsory purchase power is only to be used as a matter of last

resort after a civil injunction has been shown to be ineffective is a proposition I find entirely unacceptable. Which of the two, compulsory purchase or High Court proceedings, is to be preferred may depend upon the facts of a particular case. Which ought to be the last resort may be a matter of debate in a number of cases. But in the circumstances with which the council was faced in the instant case, I do not regard an application for a High Court injunction, with the possibility of contempt proceedings following, as something which had to be tried before the compulsory purchase procedure could be invoked. I agree that this appeal should be dismissed.

PARKER L.J. I agree. Both the inspector and the Secretary of State came to the clear conclusion that this land was necessary to be acquired in the interests of proper planning and that, unless that purpose could be achieved by other means, a compulsory purchase order was justified. The inspector had a somewhat rosier view of the situation than the Secretary of State and apparently took the view that the purpose might be achieved without a compulsory purchase order. The Secretary of State considered that it could not be achieved in respect of certain of the plots, but that it might conceivably be achieved in respect of others and therefore deferred his decision with respect to those others.

In my view the Secretary of State not only came to the right conclusion but no other conclusion was really open to him. I would also dismiss this appeal.

*Appeal dismissed with costs.
Application for leave to appeal
to the House of Lords refused.*

Solicitors—Lance Kent & Co. Chesham, Buckinghamshire; the Treasury Solicitor; the Solicitor to the South Buckinghamshire District Council.

APPENDIX 9 – 8

R. v. ROCHDALE METROPOLITAN BOROUGH COUNCIL *ex p.* MILNE

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

(Sullivan J.): July 31, 2000¹

[2001] Env. L.R. 22

H1 *Environmental assessment—information as to scale provided but design of development to be a reserved matter for planning authority—whether sufficient description of proposed development provided for purposes of environmental assessment regulations—whether proposals in accordance with the development plan*

H2 In 1998, the respondent council ("R") granted 'bare' outline planning permission for a business park and full permission for a spine road to serve the business park. R considered that an environmental assessment was required and the developer had provided an environmental statement, based upon an illustrative masterplan and indicative schedule of uses of the business park. The permissions included conditions as to the submission of further details which would address the minimisation of certain environmental impacts, and one in particular which required the preparation of a Framework Document which would show the design and layout of the proposed development with plans for phasing different aspects of the development. Local residents challenged the decisions to grant planning permission, *inter alia*, on the grounds that there had been a failure to provide the information required under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988, No. 1199). The High Court held (in *R. v. Rochdale MBC, ex p. Tew* [2000] Env. L.R. 1) that, whilst R took 'environmental information' into account about the effects of carrying out a business park development in accordance with an illustrative masterplan and schedule of land uses, that was not the actual development proposed, nor for which permission was granted. The court further held that, in any event, insufficient information as to mitigating measures had been provided so that the Regulations had not been complied in that respect, and that R therefore, did not have the power to grant the planning permissions. R did not appeal against that decision.

¹ Paragraph numbers in this judgment are as assigned by the court.

- H3 The developers substantially revised the application for the business park, amendments were made to the spine road application, and both were then renewed, together with an application regarding estate roads and ancillary services. A new environmental statement covering the project as described in the three applications was presented to R, which then granted permission. A new application for judicial review was then made by the applicant ("M"), submitting: that a sufficient description of the development had not been provided in the revised applications in accordance with the Regulations, the scale or size of the development being provided, but design being a reserved matter; that outline planning permission could not be granted for a project which required environmental assessment; and that the development did not accord with the development plan with regard to creation of public open space and/or recreational areas.
- H4 M argued that to comply with the requirements of paragraph 2(a) of Schedule 3 the development proposed had to be described in such detail that nothing was omitted which could be capable of having a significant effect on the environment if comprehensively assessed, and that since it was impossible to say that the ultimate treatment of any of the reserved matters in an outline application was incapable of having a significant effect on the environment, the outline application procedure was inconsistent with the requirements of environmental assessment. Directive 85/337 was not aimed at permitting decisions to be taken "in principle" on relevant projects, but only after a comprehensive assessment of them.
- H5 Held, in refusing the application:
- H6 The proper starting point was the Regulations themselves, rather than the Directive, since it was not suggested that they did not fully and accurately transpose the Directive into domestic law, although the Regulations should be construed, so far as possible, to accord with the objectives of the Directive. The objective of the Directive was that the likely significant environmental effects of such projects should be comprehensively assessed before development consent was granted, and not to frustrate the carrying out of important projects.
- H7 It was for the decision maker to determine whether a sufficient description had been provided in an environmental statement, not the courts. The requirement in Article 5(2) to provide "information on the site, design and size of the project" was intended to be sufficiently flexible to accommodate the particular characteristics of the different types of project listed in Annexes I and II. It could be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed. If a particular kind of project was, by its very nature, not fixed at the outset, but was expected to evolve over a number of years

depending on market demand, there was no reason why "a description of the project" for the purposes of the Directive should not recognise that reality. What was important was that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of flexibility. The assessment process could well be easier in the case of projects which were "fixed" in every detail from the outset, but the difficulty of assessing projects which did require a degree of flexibility was not a reason for frustrating their implementation. It was for the authority responsible for granting the development consent to decide whether the difficulties and uncertainties were such that the proposed degree of flexibility was not acceptable in terms of its potential effect on the environment. Provided the outline application had acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment had taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposed conditions to ensure that the process of evolution kept within the parameters applied for and assessed, the project, as it evolved with the benefit of approvals of reserved matters, remained the same as the project which was assessed.

H8 The Directive sought to ensure that as much knowledge as could reasonably be obtained, given the nature of the project, about its likely significant effect on the environment was available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, "full knowledge" was not available at the outset. This did not give developers an excuse to provide inadequate descriptions of their projects. It would be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has "full knowledge" of its likely significant effects on the environment. The local planning authority was entitled to say that it had sufficient information about the design of a project to enable it to assess its likely significant effects on the environment, and that it did not require details of the reserved matters because it was satisfied that such details, provided they were sufficiently controlled by condition, were not likely to have any significant effect. Whilst R had deferred a decision on some matters of detail, which could have some environmental effect, it had not deferred a decision on any matter which was likely to have a significant effect, or on any mitigation measures in respect of such an effect.

H9 It was sufficient that the proposed development was in accordance with the development plan as a whole, and did not have to accord with every relevant policy within it. Policies could pull in different directions

and it was for the local planning authority to make a judgement, bearing in mind the importance of the various policies and the extent of compliance or breach.

Legislation considered:

- H10 E.U. Treaty, Art. 174 (ex 130r).
 Town and Country Planning (Assessment of Environmental Effects) Regulations (S.I. 1988 No. 1199), reg. 21, Sched. 3, paras 2(a), 3(a).
 Town and Country Planning Act 1990, ss.54A, 70

Legislation referred to:

- H11 Town and Country Planning (Scotland) Act 1972, s.18A.
 Directive 85/337, Arts. 2(2), 3, 5(2), Annex I, II.
 Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988, No. 1199), Regs 2(1), 4(2), Schedules 1–3.
 Town and Country Planning Act 1990, s.70(2).
 Directive 97/11, 1st and 11th Recitals.
 Regional Development Agencies Act 1998.
 Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999 No. 293).

Cases considered:

- H12 *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447.
 R. v. Rochdale MBC, ex p. Tew [2000] Env. L.R. 1; [1999] 3 P.L.R. 74
 Berkeley v. Secretary of State for the Environment [2000] 3 W.L.R. 420; [2001] Env. L.R.
 World Wide Fund (WWF) v. Autonome Provinz Bozen (Case C–435/97) [2000] 1 C.M.L.R. 149; [2000] Env. L.R. D14.

Cases referred to:

- H13 *Kraaijfeld v. Gedeputeerde Staten van Zuid-Holland* (Case C–72/95) [1997] Env. L.R. 265; [1999] 3 C.M.L.R. 1.
 R. v. Bromley London Borough, ex p. Barker [2001] Env. L.R. 1.
 R. v. London Borough of Hammersmith and Fulham, ex p. CPRE London Branch [2000] Env. L.R. 549.
 R. v. North Yorkshire C.C., ex p. Brown [2000] 1 A.C. 397; [1999] Env. L.R. 623.

R. v. Secretary of State for the Environment, ex p. Webster [1999] J.P.L. 1113.

Policy considered:

H14 D.E.T.R. Circular 2/99, paras 48, 82.

Policy referred to:

H15 D.o.E. Circular 15/88, para.42.

H16 *Mr J. Howell Q.C.* and *Ms K. Markus* appeared on behalf of the applicant.
Mr T. Straker Q.C. and *Mr P. Kolvin* appeared on behalf of the first respondent.
Mr B. Ash Q.C. and *Mr P. Grestorex* appeared on behalf of the second respondent.

SULLIVAN J.:

Introduction

- 1 This is round 2 of the battle for Kingsway Park. Round 1 concluded with my judgment on May 7, 1999 reported as *R. v. Rochdale MBC, ex p. Tew* [1999] 3 P.L.R. 74. ("*Tew*") The applicant in the present proceedings was among the "others" in that title.
- 2 The background to the matter is set out in some detail in *Tew* and repetition in this judgment is unnecessary. For convenience, I will use the same definitions or abbreviations as were adopted in *Tew*. If no other source is cited, page references in parenthesis are to *Tew*.
- 3 In summary, two applications for planning permission were made by Wilson Bowden Properties Limited (Wilson Bowden) and English Partnerships on February 23, 1998. These were a bare outline application for a business park and a full application for a spine road to serve the park. The Council considered that the proposal required an environmental assessment under the assessment regulations. A detailed environmental statement was prepared by ERM. Having considered that environmental statement and a lengthy report by Mr Beckwith, the Council's Director of the Environment, the Council granted the two planning permissions on August 6, 1998.
- 4 The applicant and others challenged the validity of the planning permissions on five grounds set out on pages 79E to 80A. I upheld the challenge of grounds 2 and 3 and quashed both planning permissions. The Council did not appeal against this decision.
- 5 The applicants for planning permission made extensive revisions of the form to the business park application, minor amendments to the form of

the spine road application and added a new, full application for planning permission to construct the estate roads leading off the spine road together with surface water attenuation areas. A new environmental statement dealing with the project as described in all three applications was prepared by ERM. The three applications (two amended and one new) were submitted for approval accompanied by a new environmental statement on July 23, 1999. Mr Beckwith prepared a lengthy report recommending the grant of planning permission subject to numerous conditions. The Council accepted his recommendation and granted the three planning permissions on December 17, 1999. The applicant returns to the fray and challenges the validity of these planning permissions.

- 6 Before turning to the submissions advanced by Mr Howell Q.C. on behalf of the applicant, a brief explanation of the basis of the decision in *Tew* will be helpful.

The *Tew* decision

- 7 I have mentioned that the business park application as submitted in 1998 was a "bare" outline, reserving all detailed matters for subsequent approval. It was accompanied by an illustrative masterplan and an indicative schedule of land uses. ERM's environmental assessment and the resulting environmental statement were based on the illustrative masterplan and indicative schedule.
- 8 Although condition 1.3 in the business park planning permission required the development to be carried out in accordance with the mitigation measures set out in the environmental statement, unless otherwise provided for by any other condition in the planning permission, the Council did not approve the illustrative masterplan. It was, effectively, rejected by condition 1.11 and the applicants for planning permission were required by condition 1.7 to submit a new "Framework Document ... showing the overall design and layout of the proposed business park".
- 9 The indicative schedule of uses was not incorporated into the planning permission and the hectareage of B8 uses was substantially altered by condition 1.10 which would in turn have had a knock on effect for the amount of other uses in the schedule: see pages 98G to 99C.
- 10 Against that background, Mr Howell had submitted under ground 2 of his challenge that the application for planning permission did not contain "a description of the development proposed, comprising information about the site and design and size or scale of the development", as required by paragraph 2(a) of Schedule 3 to the assessment regulations.
- 11 In response to that submission I concluded:

"In summary, while the council took into consideration 'environmental information' about the effects of carrying out a business park develop-

ment in accordance with an illustrative masterplan and an indicative schedule of land uses, that was not the development that was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Schedule 3: see, for example, para 2(d), as to mitigation measures. It follows that the council did not have power to grant planning permission for the business park: see regulation 4(2) of the assessment regulations." See page 99C to E.

- 12 During the course of his submissions under ground 2 Mr Howell had argued:

"That an application for outline planning permission may not be made if the development falls within Schedule 2 or 3 to the assessment regulations", see page 90F.

- 13 At page 96C to D I said this:

"I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development that falls within Schedule 1 or Schedule 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para. 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of para. 2(a) of Schedule 3."

- 14 Paragraph 42 of Circular 15/88 is to be found on page 93F.

- 15 I then turned to the description of the development in the 1998 business park application and reached the conclusions set out above. At page 96H I acknowledged that the outline application procedure is particularly valuable for projects such as a business park which are demand led and which may be expected to evolve over many years (if the 1999 permissions are upheld the new environmental statement explains that construction will commence in 2001 and all the buildings are not expected to be occupied until 2013).

- 16 In response to the practical difficulties posed by such developments I said this at page 98F to G:

"Recognising, as I do, the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a masterplan approach, provided the masterplan was tied, for example, by the imposition of conditions, to the description of the development permitted. If illustrative floorspace or hectareage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects.

Conditions may then be imposed to ensure that any permitted development keeps within those ranges."

- 17 Turning from the assessment regulations to the UDP, policy EC/6 allocates the application site for business park use but says that:

"The Council will strictly apply the following criteria to the development of the site (to be known as the Kingsway Business Park): ...

- (c) the creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park."

- 18 The Council had proceeded on the basis that the business park application complied with this criterion and was therefore in accordance with the provisions of the UDP. At pages 100H to 101D I concluded that the 1998 business park application did not comply with criterion (d): specifically it did not include any proposals for open space and the Council could not, under the terms of the outline planning permission granted, insist on the provision of 32 hectares of land for open space for informal recreation purposes. However, I added this at page 101D to F:

"There is very often an element of planning judgment as to whether or not a proposed development complies with a development plan policy. It could not reasonably be concluded that this application complied with criterion (d). However, that is but one of a long list of criteria in the policy. The council clearly considered that the remaining criteria within policy EC/6 were fulfilled. The primary purpose of the policy is, after all, to allocate the land as a business park, not the creation of additional open space. It would be for the council to decide whether the failure of this application to meet one of the criteria in policy EC/6 meant that the application was contrary to either the district plan or the emerging UDP. To the extent that the Council erred in concluding that criterion (d) in policy EC/6 was met, ground 3 is made out."

The amended/new applications

- 19 As amended in 1999 the business park application, whilst still an application for outline planning permission, is no longer a "bare outline" application. It comprises the application form which cross refers to and incorporates into the application:

- (i) an Attachment which describes the development.
- (ii) a Schedule of Development.
- (iii) a Development Framework.
- (iv) a Masterplan.

- 20 The attachment describes the proposed development as:

"Outline application together with certain Reserved Matters for a proposed Business Park including buildings on Plots C to X inclusive as identified on the masterplan for:

General and light industrial uses in classes B1 and B2.

- Offices in use Class B1.
- Distribution and storage use in Class B8.
- Research and development facilities in use Class B1.

Uses ancillary to the Business Park uses including:

- Retail in use Classes A1, A2 and A3.
- Leisure in use Classes D2 and *sui generis*.
- Housing in use Class C1.
- Hotels in use Class C3.

Other commercial and local service uses."

- 21 Details of landscaping, design and external appearance of all the buildings were reserved. The application sought approval for siting and means of access to seven out of the 20 plots (there is no plot V). Thus, on 13 of the 20 plots all matters were reserved. It has been explained that access requirements dictated the need to fix the siting of and means of access to the buildings on the seven plots where approval was sought for those matters. Reference is made to the schedule of development, and Note 1 says this:

"This Outline Planning Application also includes a masterplan and a framework document showing the overall design and layout of the whole site."

- 22 Other notes refer to the environmental statement, to traffic impact assessments and to the full applications for the spine road and estate roads and other infrastructure.
- 23 The Schedule of Development lists each of the plots, dividing them into those plots where approval is sought for siting and means of access and those plots where those matters are reserved for detailed approval. A summary of the total hectareage and floorspace is given, which is then broken down by reference to use class.
- 24 Using plot T (which is proposed to contain the largest building in the business park) as an example: the schedule sets out the hectareage, 19.46; the use, B8; the floorspace, 80,412 square metres; the unit size, in the case of plot T 80,412 since there is proposed to be only one very large building on this plot; the height of the building, 25 metres; and the car parking numbers, 804. Assessments are also provided of traffic flows and employment generation.
- 25 More than one plan is described as a "Masterplan" in the application, but the plans build up to "The Masterplan", which is identified in and annexed to the development framework. It shows, within the framework provided by the spine and estate roads, the buildings proposed on each

plot together with their associated car parking and servicing areas, levels, the areas set aside for landscaping within and structural landscaping around, each plot, and areas to be left undeveloped along the Stanney Brook corridor, and the surface water attenuation measures proposed in that corridor.

- 26 Having described the site, the development framework (63 pages) sets out the "Development Concept" under a number of subheadings, such as, "Land uses", "Urban design framework", "Open space network", etc. ERM's assessment of the environmental effects of the proposed business park was based on the development described in these documents. The 1998 environmental statement was reviewed where necessary and new information was provided. Subject only to the criticisms advanced in the applicant's grounds of challenge, which I consider below, the new environmental statement would appear to be a model of its kind, meeting in full measure the aim set out in directive 97/11: to provide the Council with relevant information to enable it to take a decision on the business park project "in full knowledge of the project's likely significant impact on the environment", (see page 89G for the full text of the directive).

- 27 Similarly, apart from the matters raised in the applicant's grounds, Mr Beckwith's report to the Council is not, and in my judgment could not fairly be, criticised. In a comprehensive report running to 116 pages he deals with all relevant aspects of the three applications and recommends a series of conditions which are intended, *inter alia*, to tie the outline planning permission for the business park to the documents which comprise the application and which I have set out above. These recommendations were accepted, so in addition to incorporating the masterplan and the application and documents submitted therewith into the description of the development permitted, the following conditions, *inter alia*, were imposed:

- 28 Condition 1.7:

"The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework document submitted as part of the application and shown on (a) drawing entitled 'Master Plan with Building Layouts'."

- 29 The reason given for the imposition of this condition was:

"The layout of the proposed Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process."

- 30 Condition 1.8:

"No building within any plot shall exceed the height specified for

buildings within that plot as set out in the 'Schedule of Development ... submitted with and forming part of the application.'

- 31 Conditions 1.9 and 1.10 modified this by reducing the maximum eaves height of certain buildings in the interests of the amenity of residents in adjacent dwellings.

1.11:

"The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application unless provided for in any other condition attached to this permission."

1.12:

"The development shall be carried out in accordance with the principles and proposals contained in the Development Framework document submitted as part of the application unless provided for in any other condition attached to this permission."

1.13:

"The phasing of works within the site shall be carried out in accordance with the details set out in the Section entitled 'Phasing' in the Development Framework document, subject to the detailed requirements of other conditions in this permission."

- 32 In respect of the Stanney Brook Corridor, condition 1.15 said:

"The area of the Stanney Brook Corridor (as defined on (a) drawing and described in the Development Framework Document) shall remain undeveloped apart from the construction of surface water attenuation areas and footpaths/cycleways."

- 33 The reason given was:

"To ensure that an area of undeveloped open space is retained in the interests of amenity."

- 34 Conditions 1.16 to 1.18 effectively divided the corridor into three parts and required the different parts of the corridor to be enhanced and landscaped in accordance with the principles shown on three application drawings and in accordance with detailed treatment to be approved in writing by the local planning authority, concurrently with the construction of buildings on certain of the plots. The reasons given were:

"In order to ensure the maintenance of areas of nature conservation interest and to create areas of wildlife habitat in a phased order prior to the loss of existing habitat within the application site."

- 35 Under the subheading "Policy Setting" Mr Beckwith set out the terms of policy EC/6 in the UDP in full. He added that other policies in the UDP

were also relevant in assessing the applications. Having concluded that the distribution of uses within the application accorded with the uses set out in policy EC/6 he examined each of the 16 criteria in the policy in turn and advised that, "The proposals accord with the relevant policies of the UDP and are not departures from the development plan".

- 36 His report responded to representations made by third parties. In response to a letter from the applicant's solicitor, which alleged that the proposal was a departure from the UDP. He said this:

"In my view, it is only that part of criterion (d) relating to the creation of formal rights of access by the public which is not being achieved at this stage. I consider that this is not material to make the application contrary to the UDP. Recommended condition 1.15 requires that land within the Stanney Brook Corridor shall remain undeveloped, apart from the construction of water attenuation areas and footpaths and cycleways. Following on from that, recommended conditions 1.16, 1.17 and 1.18 require phased enhancement and landscaping of the corridor in accordance with the general principles in the submitted drawings. Therefore, the retention of the open nature of the land within the corridor, together with its enhancement and landscaping, would be secured by the recommended conditions. The securing of the formal rights of public access to the land cannot be achieved at this stage. This has been raised with applicants and North West Development Agency, which now encompasses English Partnerships, have commented as follows."

- 37 He then set out the text of the NWDA's letter. In summary, NWDA were supportive of the proposal to provide public open space and said this, in conclusion:

"We will undertake that once we have control of the land we will then offer to transfer the ownership of the Stanney Brook Corridor to the Council, at no cost and in its improved state, so that the Council can secure public access, as appropriate, to the open space and thereby satisfy the requirements of this sub-section of UDP policy and allow the Council to decide on the management regime for the open space."

The legislative and policy framework

- 38 For practical purposes the legislative framework remains unchanged from that described in *Tew*. As from March 14, 1999 the assessment regulations referred to in *Tew* were replaced by the Town and Country Planning, (Environmental Impact Assessment) (England Wales) Regulations 1999, (the 1999 assessment regulations), which apply to any application received after that date. It is common ground that the estate roads application falls under the 1999 assessment regulations. The parties are not agreed as to whether the amended business park and spine roads applications fall under the assessment regulations or the 1999 assessment

regulations. It is not necessary to resolve that dispute since the parties are agreed that nothing turns on the minor differences of phraseology between the two sets of regulations. For convenience I will continue to refer to the assessment regulations which are set out in *Tew*.

- 39 Policy guidance on the implementation of the 1999 assessment regulations is contained in Circular 2/1999 entitled "Environmental Impact Assessment", which replaces Circular 15/88. For present purposes, the guidance remains substantially unchanged, paragraphs 48 and 82 of Circular 2/99 are as follows:

"48. Where EIA is required for a planning application made in outline, the requirement of the Regulations must be fully met at the outline stage since reserved matters cannot be subject to EIA. When any planning application is made in outline, the local planning authority will need to satisfy themselves that they have sufficient information available on the environmental effects of the proposal to enable them to determine whether or not planning permission should be granted in principle. In cases where the Regulations require more information on the environmental effects for the Environmental Statement than has been provided in an outline application, for instance, on visual effects of a development in a National Park, authorities should request further information under regulation 19. This may also constitute a request under article 3(2) of the GDPO.

...

82. Whilst every E.S. should provide a full factual description of the development, the emphasis of Schedule 4 is on the 'main' or 'significant' environmental effects to which a development is likely to give rise. In many cases, only a few of the effects will be significant and will need to be discussed in the ES in any great depth. Other impacts may be of little or no significance for the particular development in question and will need only very brief treatment to indicate that their possible relevance has been considered. While each ES must comply with the requirements of the Regulations, it is important that they should be prepared on a realistic basis and without unnecessary elaboration."

The grounds of challenge

- 40 These fall under two heads: failure to comply with the requirements of the assessment regulations and failure to comply with UDP policy EC/6d.
- 41 Under the former, it is submitted that, notwithstanding the amendments to the form of the business park application, it still does not provide "a description of the development proposed", which is sufficient for the purposes of paragraph 2(a) of Schedule 3 to the assessment regulations, because although information is provided in respect of the size or scale of the development, design is a reserved matter. The submission that an application for outline planning permission may not be made for

development which requires environmental assessment is renewed and it is further contended that if this submission is not accepted, the description of the development provided in the 1999 outline application was insufficiently detailed to comply with the requirements of Schedule 3.

- 42 Under the second ground of challenge it is argued that criterion (d) was not satisfied, because the business park planning permission did not require the creation of new public open space and informal recreation areas or the extension and improvement of Stanney Brook Park. Since the UDP required the criteria in policy EC/6 to be "strictly applied", failure to meet criterion (d) meant that the development was not in accord with the development plan, even though it did not infringe other policies. Even if the failure to meet criterion (d) did not have that consequence, Mr Beckwith's report should have referred to the fact that the UDP inspector had specifically rejected a request made during the course of the UDP inquiry that (*inter alia*) what is now criterion (d) should be omitted, saying that the open spaces proposed in the policy "are an essential element of the scheme and of the plan's proposals for South Rochdale". Moreover, the Council failed to consider imposing a negative condition preventing the erection of some or all of the proposed buildings until such time as the relevant land had been made available for use as an open space by the public, and instead relied on the NWDA's offer which, since it was unenforceable, was an immaterial consideration.

- 43 I find it convenient to deal with this ground at the outset.

Ground 2

- 44 Section 54A of the 1990 Act is in the following terms:

"Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

- 45 Section 70 deals with the determination of applications for planning permission. Subsection (2) provides:

"In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

- 46 Since development plans contain numerous policies, the local planning authority must have regard to those policies (or "provisions") which are relevant to the application under consideration. The initial judgement as to which policies are relevant is for the local planning authority to make. Inevitably some policies will be more relevant than others, but section 70

envisages that the Council will have regard to all, and not merely to some of the relevant provisions of the development plan.

- 47 In my judgment, a similar approach should be applied under section 54A. The local planning authority should have regard to the provisions of the development plan as a whole, that is to say, to all of the provisions which are relevant to the application under consideration for the purpose of deciding whether a permission or refusal would be "in accordance with the plan".

- 48 It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: "is this proposal in accordance with the plan?". The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. In *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] 1 W.L.R. 1447, Lord Clyde (with whom the remainder of their Lordships agreed) said this as to the approach to be adopted under section 18A of the Town and Country Planning (Scotland) Act 1972 (to which section 54A is the English equivalent):

"In the practical application of section 18A, it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it."

- 49 In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be "in accordance with the plan". Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes etc., it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the

development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

- 50 For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.

- 51 Mr Howell points to the fact that policy EC/6 requires criterion (d) to be "strictly applied". He accepts that some policies may be expressed in somewhat less forthright terms. They may, for example, merely "encourage" certain kinds of development. Other policies may say that certain forms of development will "normally" be refused. In the green belt planning permission will not be given for most kinds of development save in "very special circumstances". I accept that the terms of the policy—how firmly it favours or sets its face against—the proposed development is a relevant factor, so too are the relative importance of the policy to the overall objectives of the development plan and the extent of the breach. These are essentially matters for the judgement of the local planning authority. A legalistic approach to the interpretation of development plan policies is to be avoided: see *R. v. Secretary of State for the Environment, ex p. Webster* [1999] J.P.L. 1113 at 1118.

- 52 In the present case, policy EC/6 was the most, but not the only relevant policy in the UDP. The application was assessed against 23 separate policies in the UDP, one of which was EC/6. The introduction to EC/6 is as follows:

"Land is allocated between the A664 Kingsway, M62 motorway, B6194 Broad Lane and the Rochdale-Oldham Railway line for high quality general and light industry, offices, distribution and storage, research and development, and associated and complementary uses.

The Council will strictly apply the following criteria to the development of the site (to be known as the Kingsway Business Park)."

- 53 The criteria are then set out, including criterion (d):

"The creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park."

- 54 No complaint is made about the Council's judgement that the proposal was in accordance with the remaining policies and with all of the criteria in EC/6 save for criterion (d). Mr Beckwith correctly advised the Council that the business park planning permission, subject to conditions 1.16 to 1.18 (above), would achieve all that was required by criterion (d) save for the creation of formal rights of public access. An extensive area of land along Stanney Brook Corridor, where Stanney Brook Park is located, would not merely be left open, it would be appropriately landscaped.

55 Pausing there, it could not sensibly be concluded that failure to achieve part of what was required by criterion (d) meant that the proposal was not “in accordance” with the UDP or was a departure from that plan. Indeed, such a conclusion by the Council would have been vulnerable to a challenge on the grounds of *Wednesbury* unreasonableness. Mr Beckwith was not required to draw the Council’s attention to the views of the UDP inspector, since that inspector’s recommendations had been incorporated into the text of the policy EC/6 as adopted, which was set out in full in Mr Beckwith’s report.

56 Dedication of the open land along Stanney Brook Corridor as a public open space could not have been achieved by the imposition of a condition. It is true that the Council could have considered whether dedication should be secured by the imposition of a negative condition, but it was not required to do so, because it was fully entitled to place reliance upon the assurance given by the NWDA, which is a non-departmental public body with a statutory responsibility to promote sustainable economic development and social and physical regeneration in the north-west of England under the Regional Development Agencies Act 1998. Planning conditions should not be imposed on a “belt and braces” basis, but only if they are required. There is no suggestion that the NWDA will fail to honour its undertaking. Mr Howell makes the point that a planning permission runs with the land. That is true, but the background to the NWDA’s undertaking was that the application site is in a number of ownerships and, as was foreshadowed in 1998, the Council has authorised the making of a compulsory purchase order to facilitate the carrying out of the business park development, see page 102G.

57 Of course, those compulsory purchase order proceedings might fail, in which case the business park would not be able to proceed, but if the development does proceed the Council will be in a position to dispose of the necessary land to the NWDA, which will then be in a position to honour its undertaking. For all of these reasons I reject ground 2.

Ground 1

58 Turning to ground 1, Mr Howell submits, correctly, that the conclusion at page 96C to D of *Tew* (which is set out above) was *obiter*, because in that decision I was dealing with a bare outline application where all matters had been reserved.

59 He referred to the directive. In addition to the provisions set out between pages 88D to 89 H, he referred to a number of the recitals, laying particular stress upon the 10th:

“Whereas, for projects which are subject to assessment, a certain minimum amount of information must be supplied concerning the project and its effects.”

- 60 As mentioned on page 89C, Article 5.2 of the directive requires the developer of a project subject to assessment to provide "at least":

"a description of the project comprising information on the site, design and size of a project."

- 61 It is this minimal amount of information which must, in all cases, subject to environmental assessment, be provided by the developer, according to Mr. Howell's skeleton argument which, "the information specified in paragraph 2 of Schedule 3 to the assessment regulations is intended to specify".

- 62 Mr Howell referred to regulations 2 and 3 of the applications regulations (page 80D to G)) emphasising that whereas a "full" application for planning permission must include the information "necessary to describe the development", an outline application did not have to describe the development in respect of any matter reserved for subsequent approval. It cannot be said that reserved matters, that is to say siting, design, external appearance, means of access and landscaping, can have no significant effect on the environment.

- 63 The purpose of the directive is "to ensure that planning decisions which may affect the environment are made on the basis of full information": see *per* Lord Hoffmann at page 404 of *R. v. North Yorkshire C.C., ex p. Brown* [2000] 1 A.C. 397, as amplified on page 430 of *Berkeley v. Secretary of State for the Environment* [2000] 3 W.L.R. 420.

- 64 Lord Hoffmann's speech in the latter case stressed the importance, both of the public being able to participate in the environmental assessment process, and of the need for "a single and accessible compilation, produced by the applicant at the very start of the application process", see pages 430H to 431E, and 432F.

- 65 A partial description of the development proposed, omitting a description of a reserved matter, does not enable that objective to be achieved. A description of the development proposed is also required to ensure that the project which is executed is the project which has been comprehensively assessed: see *Tew* at page 99D.

- 66 Mr Howell argued that one should not be influenced by the "commercial imperative" for there to be a measure of flexibility in applications for industrial estate developments, or urban development projects, even though he recognised that such projects might well be developed over a period of many years. He submitted, in effect, that all details of a project had to be described at the outset. If, subsequently, it was desired to change those details, then a fresh application for planning permission, accompanied by a fresh environmental statement, should be submitted. In this context he said that assistance could be derived from the decision of

the European Court in *World Wildlife Fund v. Bozen* [2000] 1 C.M.L.R. 149. The respondents in that case had contended that the project for the restructuring of Bolzano Airport (transforming it from a military to a commercial civil airport) had been authorised by "a specific act of national legislation" falling within Article 1(5) of the directive and did not therefore require environmental assessment. The extent to which modifications to projects could be excluded from environmental assessment was also in issue. Citing the *Dutch Dykes* case [1999] 3 C.M.L.R. 1, the European Court said this:

"[40] Thus observing that the scope of the Directive was wide and its purpose very broad, the Court held that the Directive covered 'modifications to development projects' even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment.

...

[49] In view of the foregoing considerations, the answer to the first and second questions must be that Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

...

[62] It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project."

67 Mr Howell derives two propositions from *Bozen*:

- (1) Any development consent for the purposes of the Directive must be defined in detail, so as not to omit any element which could be capable of having a significant effect on the environment.
- (2) Any later modification to a project must be subject to a further environmental assessment unless it is not likely to have a significant effect on the environment.

68 It follows, he says, that to comply with the requirements of paragraph 2(a) of Schedule 3 the development proposed must be described in such detail that nothing is omitted which may be capable of having a significant effect on the environment if comprehensively assessed.

69 Since it is impossible to say that the ultimate treatment of any of the reserved matters in an outline application is incapable of having a significant effect on the environment, the outline application procedure is inconsistent with the requirements of environmental assessment. Put shortly, the Directive's aim is that decisions should be taken "in full knowledge of the project's likely significant effects on the environment" (see the first recital of Directive 97/11 which is set out in full on page 89G of *Tew*). It is not aimed at permitting decisions to be taken "in principle" on relevant projects, but only after a comprehensive assessment of them.

70 Assessment on a "worst case" basis is no answer, because the assessment regulations require the "likely significant effects" to be assessed. The objective of environmental assessment is not to see whether the "worst case" is tolerable but to optimise effects on the environment: see the 11th recital of the Directive which refers to the contribution "of a better environment to the quality of life" and Article 174 of the Treaty which states that "community policy on the environment shall contribute to the pursuit of the following objectives ... preserving, protecting and improving the quality of the environment".

71 If the submission that an outline application is in principle incompatible with the requirements of paragraph 2(a) of Schedule 3 to the assessment regulations is not accepted, it is argued that this particular outline application did not provide a sufficient description of the development proposed, because notwithstanding the information supplied about size and scale, information on "the design ... of the development" was not provided. Mr Howell accepts that "design" in paragraph 2(a) of Schedule 3 may extend to more than the design of individual buildings within an industrial estate project. It may, for example, encompass such matters as the layout shown on the masterplan, but he submits that it includes their detailed design. In the case of all the plots details of design, external appearance and landscaping were reserved and in the case of the majority of plots, siting and means of access will also be reserved. Mr Howell

examined the implications of this under a number of headings: Design, Landscaping, effect on listed buildings, the larger building on plot T and the mitigation measures proposed.

- 72 Under "Urban Design Framework" the Development Framework mentions the need for "Landmark buildings" to be located at the locations which form "gateways" to the park. Important views are identified. For example, it is important to ensure that the development "becomes a landmark along the motorway". Under "Building Design" it is said that "A high quality of design of buildings will be required". Among the design and layout principles is a desire to encourage "innovative roof forms and profiles" where appropriate. One finds the following under "Materials":

"External materials should be of a high quality, commensurate with the use of each building. Consideration should be given to the use of masonry at low level and on principal elevations in combination with cladding and glazing.

The use of colours that blend with the surrounding landscape will be necessary and therefore dense dark or bright colours will be discouraged. Primary colours should be restricted to window and door frames and will not be allowed for major elevational treatment. A preferred colour range will be made available to ensure continuity within the overall development.

Particular attention should be paid to the design of the elevational treatment of larger scale buildings, which are required to be of high quality and design. The articulation of the facade through the use of contrasting tone, colour and texture is required to provide an attractive appearance."

- 73 In describing the developments proposed on the defined plots table 2.3 in the environmental statement relies on high quality design. Thus, for plot T we find:

"A single building for B8 use. The building is located on the flattest and least intrusive part of the development site and the layout incorporates large setbacks from the plot boundaries and the Stanney Brook Corridor. The elevational treatment of the building will be of high quality and design with articulation of the facade by use of a contrasting tone, colour and texture to provide an attractive appearance."

- 74 Under "Mitigation of impacts" the environmental statement acknowledged that "The phasing and external landscaping will be critical to reducing potential landscape and visual impacts and this is shown in figure 6.9. The principal mitigation measures which will be adopted are also listed in table 6.3". It is said that table 6.3 is far too general, thus under "Mitigation Description" we find such entries as:

"Create integrated structural, infrastructure and plot landscape throughout the site in accordance with the Development Framework."

- 75 Under "Building design and materials" we find in paragraph 6.59:

"The visual impact, particularly of high sided warehouse buildings can be substantially reduced by appropriate detailed design choices. Each elevation needs to be considered in the context of both short, middle and long distance views. Dark coloured finishes should generally be used for those buildings (or parts of buildings) which will be seen against a landscape or urban backdrop, with light colours where the building will be seen against the sky. Potential nuisance from reflective materials must be avoided. White (as against pale) finishes are also generally unsatisfactory."

- 76 Both the impact on the setting of three listed buildings within the development site and the mitigation measures proposed are also dealt with in very general terms. That, says Mr Howell, is because design and landscaping on adjoining plots are reserved matters. Without detailed information about those reserved matters the public cannot make any meaningful representations about the effects of the project on the listed buildings. The B8 building proposed on plot T, at over 80,000 square metres, will be a very large building indeed and the environmental statement acknowledges that it will have "a significant impact" on certain views from within the development site, although the impact on views from outside the site is assessed as moderate. It is submitted that without details of the design and elevational treatment of this building one cannot sensibly assess its impact on the environment.

- 77 Finally, in respect of mitigation measures, Mr Howell points to the Outline Ecology Management Plan which formed part of the environmental statement. It contains a table which summarises, "Key management proposals" under three headings: "Objective", "Outline management prescription" and "Timetable". By way of example, the first objective is:

"Ensure that all affected areas have been appropriately surveyed for protected species."

- 78 The prescription is:

"Undertake further bat survey work in all buildings to be demolished and inspect all appropriate trees which are to be removed. The findings will be discussed with English Nature to determine the need for any specific mitigation measures.

Re-survey the site for great crested newts. The findings to be discussed with English Nature to determine the need for mitigation measures."

- 79 Timescales are given for both surveys.

- 80 It is submitted that paragraph 2(d) of Schedule 3 to the assessment regulations requires a description of mitigation measures. The environ-

mental statement does not describe measures. It is said it merely sets out objectives.

- 81 I have set out the submissions made on behalf of the applicant in some detail. I find it unnecessary to rehearse the submissions made by Mr Straker Q.C. on behalf of the Council, the first respondent, and Mr Ash Q.C. on behalf of Wilson Bowden and the NWDA, the second respondents. No discourtesy is intended. It is unnecessary to rehearse their submissions, because, in substance, I accept them and their principal points are reflected in my own conclusions which I now set out.

My conclusions

- 82 Although Mr Howell laid great stress on the Directive, the proper starting point is the assessment regulations themselves, since it is not suggested that they do not fully and accurately transpose the directive into our domestic law: see the decisions of the Court of Appeal in *R. v. London Borough of Hammersmith and Fulham, ex p. the Trustees of the London Branch of the CPRE* June 12, 2000 paragraphs 24 and 39 to 41 (unreported) and Jackson J. in *R. v. London Borough of Bromley, ex p. Barker* April 3, 2000 paragraph 105 (unreported).

- 83 I accept that the assessment regulations should be construed, so far as possible, to accord with the objectives of the directive. If one looks to see what the relevant objectives are, it was plainly not the objective of the Council in including "industrial estate development projects" or "urban development projects" in annex II to the directive, to frustrate the carrying out of such important projects. The intention was that the likely significant environmental effects of such projects should be comprehensively assessed before development consent was granted. The technique of environmental assessment is an important procedural tool whose underlying purpose is to help secure the Community's environmental policies. As Article 174 of the Treaty makes clear, in preparing its policy for the environment, which includes the objective of "preserving, protecting and improving the quality of the environment", the Community:

"Shall take account of ... the economic and social development of the Community as a whole and the balanced development of its regions", see Article 174.3.

- 84 The directive does not require environmental assessment of every industrial estate, or urban development project, only those "where Member States consider that their characteristics ... require" assessment. In general terms, it is likely that assessment will be required for substantial projects of this kind. The test adopted in the assessment regulations is

whether such a project "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location", see the definition of Schedule 2 application in regulation 2(1).

- 85 Save in an old style Soviet command economy, such as would not have been in the contemplation in the framers of the directive, a substantial industrial estate development project is bound to be demand-led to a greater or a lesser degree. The second respondent's evidence explains in some detail why this is so in the case of Kingsway Business Park. Mr Ward, a Director of Wilson Bowden explains:

"For a scheme such as the Kingsway Development to succeed commercially, it is necessary to have an outline planning permission which establishes the principle of development on the whole site. Indeed, this is necessary to give the developer, the occupiers, the grant agencies and the investment institutions the certainty which they require to proceed. For some smaller sites it may be possible, in particular where end users have been identified, to submit a detailed planning application for the whole development. However with a scheme of the size of the Development this would not be possible as it is anticipated that the whole Development will not be completed for approximately 15–20 years. Within that forecast period, it is inevitable that a variety of end users will seek plots to suit their own business requirements and it is therefore necessary for the scheme to remain sufficiently flexible to cater for such users if it is to meet its planning objectives. If one were required to submit a detailed permission for the whole site it would simply be a paper exercise, for at this stage, it is quite impossible to anticipate what the matter can bring forward in future years."

- 86 I have already mentioned the fact that it is not expected that the business park will be completely occupied until 2013. There is no challenge to this evidence and no reason has been advanced as to why the points made by the respondents should not hold good for other substantial projects of this kind.

- 87 At pages 96G to 97H of *Tew* I mentioned the contrast between projects such as this and most of the other descriptions of development that are listed in annex II to the directive and repeated in Schedule 2 to the assessment regulations. The other projects are either industrial projects for particular processes, or "one off" infrastructure projects, such as the construction of roads, tramways, dams or pipelines, which will, by their very nature, have to be defined in considerable engineering detail at the outset.

- 88 Article 2(2) of the directive allows Member States to integrate environmental impact assessment into their existing procedures for giving development consent, or to devise new procedures. Article 3 (which is set out on page 88H) states that the environmental impact assessment will

identify, describe and assess the environmental effects of projects "in an appropriate manner, in the light of each individual case".

- 89 Since the "description of the project" required by Article 5(2) is a means to that end, in that it provides the starting point for the assessment process, there is no reason to believe that the directive was seeking to be unduly prescriptive as to what would amount to an appropriate description of a particular project. The requirement in Article 5(2) (see page 89C to E) to provide "information on the site, design and size of the project" is, and is intended to be, sufficiently flexible to accommodate the particular characteristics of the different types of project listed in annexes I and II (Schedules 1 and 2 to the assessment regulations). It may be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed.

- 90 If a particular kind of project, such as an industrial estate development project (or perhaps an urban development project) is, by its very nature, not fixed at the outset, but is expected to evolve over a number of years depending on market demand, there is no reason why "a description of the project" for the purposes of the directive should not recognise that reality. What is important is that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of flexibility. The assessment process may well be easier in the case of projects which are "fixed" in every detail from the outset, but the difficulty of assessing projects which do require a degree of flexibility is not a reason for frustrating their implementation. It is for the authority responsible for granting the development consent (in England the local planning authority or the Secretary of State) to decide whether the difficulties and uncertainties are such that the proposed degree of flexibility is not acceptable in terms of its potential effect on the environment.

- 91 In *Tew* I said at page 97C that projects such as industrial estate developments and urban development projects have been placed "in a legal straitjacket" by the assessment regulations, in transposing the requirements of the directive into domestic law. The directive did not envisage that the "straitjacket" would be drawn so tightly as to suffocate such projects.

- 92 It has to be recognised that even if it was practical (despite the commercial realities described by Mr Ward) to prepare detailed drawings showing siting, design, external appearance, means of access and landscaping for every building within the proposed business park, the resulting environmental statement would be an immensely detailed work of fiction, since it would not be assessing the effect on the environment of any project that was ever likely to be carried out. All concerned with the

process would have to recognise that in reality such details could not be known until individual occupiers came forward for particular plots.

- 93 In my judgment, integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directive. There is no analogy between the procedure for obtaining outline planning permission, with certain matters reserved for detailed approval, and the procedure which was in issue in *Bozen*. In that case, not only was there no environmental assessment, the legislative act which authorised the project was generalised in the extreme, amounting to little more than a proposed programme, which was subject to preliminary feasibility assessments, see paragraphs 5, 71 and 79 of the Advocate General's opinion in that case. The European Court was also concerned with proposed "modifications to development projects". If such modifications have not been subjected to environmental assessment, the Court's conclusion that they should be "when by reason of their nature, size or location they were likely to have significant effects on the environment" (see paragraphs 40 and 49) is readily understandable. Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with "modifications" to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed.

- 94 Much stress has been laid on the words: "In full knowledge of the project's likely significant impact on the environment..." in Directive 97/11, see page 89H. These words should not be regarded as imposing some abstract state or threshold of knowledge which must be attained in respect of all projects, but should be applied to the particular project in question. For some projects it will be possible to obtain a much fuller knowledge than for others. The directive seeks to ensure that as much knowledge as can reasonably be obtained, given the nature of the project, about its likely significant effect on the environment is available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, "full knowledge" (in the sense of an abstract threshold level of detail) is not available at the outset.

- 95 This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for

issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has "full knowledge" of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse consent.

96 Having stated that the proper starting point was the assessment regulations, I am conscious of the fact that I have spent some time discussing the directive. I have done so to demonstrate that there is no basis for the submission that the application by a Member State of a procedure such as the United Kingdom's procedure for obtaining outline planning permission for projects which require environmental assessment is in some way inimical to the objectives of the directive.

97 With that introduction, I turn to the assessment regulations.

98 The full text of the relevant paragraphs in Schedule 3 is set out on pages 87E to 88C. The flexibility inherent in the directive's approach to "a description of the development proposed" is faithfully transposed into paragraph 2(a): the description must comprise "information about the site and design and size or scale of the development".

99 On any sensible interpretation of those words, one may provide "information about" those matters without providing every available piece of information about them.

100 That the description of the proposed development which must be provided under paragraph 2(a) need not to be exhaustive in terms of the information supplied is reinforced by paragraph 3(a) which enables, but does not require, the developer to include by way of explanation or amplification of (*inter alia*) the description of the development further information in the environmental statement about "the physical characteristics of the proposed development and the land use requirements during the construction and operational phases".

101 The role of the public in contributing to the "environmental information" which must be considered by the local planning authority (see regulation 2(1)) was emphasised in *Berkeley* above. Members of the public with local knowledge may well be able to add significantly to the information about the site, thus supplementing the "description of the development" provided by the developer in the environmental statement.

102 If the local planning authority or the Secretary of State is dissatisfied with the amount of information provided in the environmental statement about the site, design, size or scale of the project, they may under regulation 21 require such:

"Further information (as) is reasonably required to give proper consideration to the likely environmental effects of the proposed development."

- 103 The fact that the developer then has to supply such further information does not mean that he will have failed to provide "a description of the development proposed" and thus failed to provide an environmental statement.
- 104 If one asks the question "how much information about the site, design, size or scale of the development is required to fall within 'a description of the development proposed' for the purposes of paragraph 2(a)?", the answer must be: sufficient information to enable "the main", or the "likely significant" effects on the environment to be assessed under paragraphs 2(b) and (c), and the mitigation measures to be described under paragraph 2(d).
- 105 In addition, the development which is described and assessed in the environmental statement must be the development which is proposed to be carried out and therefore the development which is the subject of the development consent and not some other development. An assessment of an illustrative masterplan, accompanying a "bare outline" application, which is not tied by condition to the resulting outline planning permission could not meet these requirements: see page 99C to E (cited above).
- 106 Whether the information provided about the site, design, size or scale of the development proposed is sufficient for these purposes is for the local planning authority, or on appeal or call in, the Secretary of State, to decide. I reject Mr Howell's submission that the issue is one for the court to decide, as a question of primary fact. That would be contrary, not merely to the structure of the regulations, but to the statutory Town and Country Planning framework of which they are but a part. Under the regulations it is for the local planning authority, or the Secretary of State, to decide whether a proposed development falls within the descriptions of the development set out in schedules 1 and 2, and in the case of the latter whether it would be likely to have significant effects on the environment: see the speech of Lord Hoffmann at page 429H to 430A in *Berkeley*. The local planning authority's or the Secretary of State's decision is subject to review on *Wednesbury* grounds. Regulation 4(2) requires the local planning authority or the Secretary of State to take the environmental information (which includes the environmental statement) into consideration before granting planning permission. Against this background the regulations plainly envisage that the local planning authority or the Secretary of State will also consider the adequacy of the environmental information, including any document or documents which purport to be an environmental statement.
- 107 The assessment regulations are part of a statutory planning framework which requires the local planning authority in dealing with an application to have regard to all material considerations: see section 70(2) of the 1990 Act above.

- 108 It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authority's judgment in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; "environmental information" which has been provided pursuant to the assessment regulations.
- 109 There is no reason why the adequacy of this information, which includes the sufficiency of information about the site, design, size and scale of development should not be determined by the local planning authority: see paragraph 48 of circular 2/99 above.
- 110 The question whether such information does provide a sufficient "description of the development proposed" for the purposes of the assessment regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, of local planning policies and the essential characteristics of the various kinds of development project that have to be assessed.
- 111 I do not accept the applicant's argument based on regulations 2 and 3 of the applications regulations, see page 80D to G. Reserved matters as defined in those regulations are not "information necessary to describe the development" which may, as a matter of concession, be omitted from an outline application. Such details may be omitted precisely because they may not be necessary to describe some developments for the local planning authority's purposes. The local planning authority will need to be satisfied that the description of the proposed development in the outline planning permission is adequate, given that it will be able to impose conditions in respect of reserved matters so that matters of detail can be dealt with at a later stage.
- 112 It will be noted that an outline planning permission is defined as a planning permission for the erection of a building which contains "one or more reserved matters". Thus, a planning permission which simply reserves one matter, for example details of means of access or landscaping is still an outline planning permission. It is difficult to see why an application for outline planning permission that includes details of siting, design and external appearance, should not be able to provide the basis for an environmental statement containing "a description of the development proposed, comprising information about the site and design, size or scale of the development".
- 113 Mr Howell submits that reserved matters, details of the means of access or landscaping, are capable of having an effect on the environment, that is why they are reserved for subsequent approval. That ignores the fact that

the environmental statement does not have to describe every environmental effect, however minor, but only the "main effects" or "likely significant effects". It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, "losing the wood for the trees". What is "significant" has to be considered in the context of the kinds of development that are included in Schedules 1 and 2. Details of landscaping in an application for outline planning permission may be "significant" from the point of view of neighbouring householders, and thus subject to reserved matters approval, but they are not likely to have "a significant effect on the environment" in the context of the assessment regulations

114 The local planning authority are entitled to say, "We have sufficient information about the design of this project to enable us to assess its likely significant effects on the environment. We do not require details of the reserved matters because we are satisfied that such details, provided they are sufficiently controlled by condition, are not likely to have any significant effect".

115 That is the conclusion which was reached by the local planning authority in the present case. Mr Beckwith says this in his witness statement:

"My judgment and that of the Council was that the information given enabled assessment of all the significant effects of the Kingsway Business Park development, and that it amounted to a description of the development comprising information on its site, design and size.

The design information given was adequate for the significant environmental effects to be considered. The information included size and mass of the buildings, and the location of the structural planning. In the case of a substantial business park, I consider that such information is key to an understanding of the significant visual impacts of the development. While the number and position of apertures and choice of construction materials are all liable to affect visual impact to some slight degree, they will not alter the appraisal of the significant impacts of development. The simple point is that one can clearly envisage the design and size of the development."

116 ERM's expertise in conducting environmental assessment is not challenged. Mr Gilder, its Technical Director and Head of Planning, has provided a detailed witness statement to explain why, in his professional opinion, the environmental statement:

"Considers a development proposal which was sufficiently well defined to enable a robust assessment of the potential significant impacts."

117 He said this:

"The environmental statement considers an almost fully defined development. Given the overall scale of the development, any significant visual impacts will arise from the overall massing of the buildings not from the details of their elevational treatments. With the nature of the development clearly defined in the applications, I could make sensible assumptions about the minor details of the elevations, the colour of the surface finishes and the likely growth of the landscaping and hence the residual visual impacts that might affect nearby residents ...

Across the whole proposed development, the level of detail defined was more than sufficient to identify the 'likely significant effects', both in relation to design and the worst case that could arise in relation to other environmental effects, for example, archaeology, ecology, traffic, noise, water and air pollution. In my view, only minor matters have been reserved for subsequent approval. The Council, when it considered the applications, was fully informed about the worst environmental impact that could arise and was able to make a decision in the knowledge that only minor matters of design and implementation were to be left as reserved matters."

118 The approach of Mr Beckwith and Mr Gilder accords with the advice in paragraph 82 of circular 2/99 above. Whilst it is important that a "full factual description" of the development is provided, it is equally important that an environmental statement should be prepared "on a realistic basis and without unnecessary elaboration".

119 It has to be remembered that the project which required assessment was an "industrial estate development", in this case a business park. Plainly, there is a great deal of information about the design of the business park in the documents forming part of the application, see above. Whether information should also be provided about the detailed design of the individual buildings that are to comprise the park is a separate question. In some circumstances such details might be required because they could reasonably be expected to have a significant effect on the environment. The local planning authority concluded that this was not so in the present case. That is not a surprising conclusion. The extent of the information supplied about the site, size and scale of the project is not criticised. The local planning authority had as much information about "the design" of an industrial estate development project of this kind as could reasonably have been expected.

120 Acknowledging the uncertainties that are inherent in a project of this nature and scale Mr Gilder explained that the environmental statement had considered "the worst environmental impacts which would arise from the development, the so-called worst case".

121 He explained that although the definition of the worst case might differ according to which environmental effect was being assessed:

"Where details were to be reserved for subsequent approval by the local planning authority, the worst case was defined as the minimum standards which a reasonable local planning authority might require, taking account of all other matters already fully defined in the applications.

In the case of construction impacts, such as noise and dust, the worst case was taken to be the minimum standards which would be required by the regulatory authorities under, for example, the Control of Pollution Act 1974 and/or the relevant British Standards."

- 122 Mr Howell criticised this approach, even though, as Mr Gilder explained, it is regarded as a "proper professional approach", which is regularly used by those engaged in the process of environmental assessment. Both the directive and the regulations recognise the uncertainties in assessing the likely significant effects, particularly of the major projects, which may take many years to come to fruition. The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the "likely" effects, it is entirely consistent with the objectives of the directive to adopt a cautious "worst case" approach. Such an approach will then feed through into the mitigation measures envisaged under paragraph 2(c). It is important that they should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment.

- 123 Mr Howell pointed to the passage at page 98A of *Tew*:

"If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a 'full' knowledge of the likely significant effects of the project."

- 124 He submitted that the environmental impact of the project could be significantly affected by detailed design at the reserved matters stage, for example, by the materials used—reflective glass, by the colours adopted, by a particularly "innovative" form of roof design, or a particularly striking "landmark" building.

- 125 The passage in *Tew* continues:

"That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The directive and the assessment regulations require the likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms of Schedule 3, would conflict with the public's right to make an impact into the environmental

information and would therefore conflict with the underlying purpose of the directive."

126 Whilst the Council has deferred a decision on some matters of detail, which, as Mr Beckwith acknowledges, may have some environmental effect, it has not deferred a decision on any matter which is likely to have a significant effect, or on any mitigation measures in respect of such an effect.

127 It is true that at the reserved matters stage the council might theoretically approve a building in a particularly shocking colour, or with a particularly visually intrusive roof design, but that is not the test, since it can be satisfied that it is not likely to do so, hence the effect, for example, of a rainbow coloured building T, or a bizarre "landmark" building is not a "likely effect", let alone a "likely significant effect" on the environment.

128 Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority: see, for example, the assumptions made in respect of construction impacts, above. The same approach should be adopted to the local planning authority's power to approve reserved matters. Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the "likely significant effects", not every conceivable effect, however minor or unlikely, of a major project.

129 For all these reasons, I am satisfied that Mr Howell's primary submission that an application for outline planning permission does not satisfy the requirement in paragraph 2(a) of Schedule 3 to the assessment regulations because it does not provide "a description of the development proposed" is not well-founded.

130 I can deal very shortly with the remaining argument that the 1999 application for outline planning permission did not contain sufficient information about the design of the development. As is explained above, a great deal of information was provided in the application documents about the design of the business park, even though details of the design and external appearance of individual buildings were not given. Taking building T as a convenient example, since it is the largest proposed building in the business park, its proposed use (B8), its siting, its size and scale are all known. In particular its principal dimensions, including its height to eaves from a defined plateau level are known. The plot size is known, together with the number of car parking spaces that are to be accommodated with the building on that plot. The position of the spine

and estate roads, from which it will obtain access, are fixed. The area that is left for landscaping within the plot once access, servicing and car parking requirements have been met, can be seen on the masterplan and other plans contained in the Development Framework. Those plans also identify areas for structural landscaping around the boundaries of the plot. The Development Framework describes in some detail how these areas are to be treated. It also describes the kinds of materials, colours and elevational treatments that are likely to be adopted, see above.

- 131 The Council has power to ensure that the details which come forward at the reserved matters stage are in "substantial accordance" with the Development Framework: see condition 1.7 above. It will be noted that the effect of condition 1.7 is that even where siting and means of access are reserved they will have to be substantially in accord with the Masterplan. Armed with all of this information about the proposed building on plot T, ERM were able to carry out a comprehensive assessment of its likely significant effects on the environment including, for example, its likely effect on the setting of listed buildings, and the public were able to make informed comments about the reliability of that assessment and to suggest further mitigation measures if they wished.

- 132 Mr Howell's criticisms of the proposed mitigation measures illustrates the unreality of the applicant's approach. It is said, that there is no "description of the measures proposed", merely a statement of objectives. This criticism stems from an overliteral interpretation of the words in paragraph 2(d). In the case of the bats and the greater crested newts that may be on this site (see above), I do not see why the "measures envisaged to avoid, reduce or remedy" possible harm to them should not comprise the undertaking of further surveys, discussion of the findings of those surveys with English Nature and devising detailed mitigation in the light of those discussions. Where there are well established mitigation techniques for dealing with disturbance to the habitat of certain creatures, such a description will be perfectly adequate. Indeed, it is difficult to see what more could be done. As Mr Beckwith says:

"The areas where further survey work is required are areas in which survey work had already been carried out and the results published, for example for the presence of badgers, bats or voles. But nature is dynamic and the presence or population of such species could (and does) vary over time. Bats do not permit themselves to the spot where they happen to be seen at a particular point in time. It is entirely appropriate, responsible and reasonable to ensure that surveys are carried out prior to the commencement of work on each development plot. The involvement of expert bodies such as English Nature is a reasonable approach and one that I would have thought most reasonable members of the public would expect."

- 133 It is to be noted that neither English Nature nor the Greater Manchester Ecology Unit objected to the application. They expressed certain detailed concerns. The Outline Ecology Management Plan was then prepared as a response to those concerns. Mr Beckwith's report explains that those bodies were satisfied with the response, together with the conditions that were imposed on the outline planning permission.
- 134 In short, there was "full knowledge", in the sense of there being available as much information as could reasonably be expected at this stage, about this kind of mitigation measure.
- 135 I repeat the view expressed in *Tew* that "full knowledge" does not mean "every conceivable scrap of information" about a project. Such an approach would not assist local planning authorities in identifying the likely significant environmental effects of major projects, and would merely serve to obstruct the development of such projects to no good purpose.
- 136 I therefore declare the respondents the victors in round 2 and dismiss this application for judicial review.
- 137 In conclusion I would like to pay tribute to the very able submissions of all leading counsel.

H17 *Solicitors*—Fatema Patwa, Smethwick; Borough Council; Pinsent Curtis.

APPENDIX 9 – 9

SMITH v SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT AND THE REGIONS

COURT OF APPEAL (CIVIL DIVISION)

(Waller and Sedley L.JJ. and Black J.): March 5, 2003¹

[2003] EWCA Civ 262; [2003] Env. L.R. 32

- H1 *Environmental assessment—planning permission for quarrying followed by landfilling—permission granted on appeal and made subject to conditions—whether lawful for Inspector to leave extent of obligation to carry out mitigation measures to local planning authority—whether rational to impose condition with respect to dust but leave odour and vermin to control by IPPC regime*
- H2 The appellant (“S”) sought to quash the grant of planning permission, following a public inquiry, which extended the time and scope permitted under an earlier permission for quarrying activities, with permission also granted for landfilling once quarrying had been completed. A first planning application had been made in April 1998, accompanied by an environmental statement (“ES”), which was refused in July 1999. An appeal was lodged and a second planning application made. S claimed that the local planning authority had considered the first ES to be defective as it failed to set out mitigating measures (as required by Directive 85/337/EEC on environmental assessment (as amended) and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199)). The planning authority received a second ES (including the mitigation information) with the second planning application. Following the grant of outline permission by the Inspector on appeal against refusal of the first application, S’s application for judicial review was rejected. The grounds for that application had included that the Inspector had failed to comply with reg.21 of the 1988 Regulations as he incorporated a part of the second ES as part of the environmental information before the public inquiry, without invoking or complying with the Regulation.
- H3 S then appealed, the main grounds concerning the extent to which the Inspector had to, in granting planning permission, make it an obligation of the applicant to carry out measures which would mitigate the impact on the environment, and the extent to which the Inspector could leave the extent of the obligation to carry out mitigation measures to a third party (in this instance the Local Planning Authority). Conditions had been imposed in the Inspector’s Decision Letter which S argued were defective, those conditions including:

¹ Paragraph numbers in this judgment are as assigned by the court.

“3. Unless otherwise agreed in writing by the Local Planning Authority mineral extraction, landfilling, restoration and aftercare of the site shall be carried out in accordance with the following plans:

. . . [List of Plans] . . .

Save where measures are required by the conditions set out elsewhere on this permission which shall take precedence over the above approved plans.”

“5. No development shall take place until a detailed scheme for the landscaping of the site has been submitted to and approved in writing by the Local Planning Authority. Such scheme shall included details of:

- (a) the positions, species and sizes of all existing trees, shrubs and hedgerows on the site which are to be retained and the proposals for their protection throughout all operations on site,
- (b) the position, species, density and initial sizes of all new trees and shrubs,
- (c) the method of planting to be used including any protection measures,
- (d) the programme for implementation and carrying out of the scheme.

The scheme as approved shall be carried out in full accordance with the agreed programme of implementation following the date of such approval in writing.”

“6. A landscape management plan including management responsibilities and maintenance schedules for all landscaped areas shall be submitted to the Local Planning Authority for approval in writing concurrent with the landscaping scheme required by condition 5 above. The landscape management plan shall be carried out as approved by the Local Planning Authority for the duration of the landfilling site restoration works.”

“9. No development shall take place until a scheme to suppress dust generated on site, has been submitted to and approved in writing by the Local Planning Authority. Once approved such scheme shall be implemented in full until site restoration is completed in accordance with condition 19 below.”

H4 S submitted that these conditions left the planning authority free to give consent to proposals which departed from those set out in the (second) ES, and that it had been irrational to impose a condition with respect to dust, but leave odour and vermin to control by the Integrated Pollution Prevention and Control regime.

H5 **Held**, in dismissing the appeal:

H6 (1) A condition could not lawfully be so wide as to permit the subsequent renegotiation of an element of the planning permission of which it formed part. If the conditions had in fact provided the degree of latitude submitted, and so had allowed for a total reassessment of the impact on the environment, that would have been contrary to Art.4(2) of Directive 85/337/EEC (as amended). However, the wording of the Decision Letter as a whole was such that the Local Planning Authority was not free to go outside the constraints imposed by the plans submit-

ted in respect of the ES. It had not been intended that that the planning authority could in effect reconsider the impact on the environment and vary the conditions imposed by the approved plans.

H7 (2) It had been permissible for the Inspector to leave details such as species of trees, and planting of the same, to the planning authority, and to rely on the fact that the adverse impact on the environment would be dealt with by approved Landscape and Landscape Management Plans. Having set the parameters of the planning permission, including contours of the land and the provision of trees, the Inspector had been entitled to consider how the planning authority was likely to deal with the details and to conclude that the way in which the details would be dealt would mitigate the environment. In doing so, he had complied with his obligations under Art.4(2) of the Directive.

H8 (3) As there were two aspects to the proposed development—extraction of minerals and landfill—and only the latter would be subject to the IPPC regime, it had been logical to distinguish between the relevant impacts and to leave control of odour and vermin to IPPC (the odour and vermin impacts potentially arising from the second phase of the development, which was subject to IPPC).

H9 **Legislation referred to:**

Directive 85/337/EEC on Environmental Assessment

Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199), regs 2(1) and 4(2) and Sch.3

Town and Country Planning Act 1990, ss.78(1) and 288

H10 **Cases referred to:**

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2000] 3 All E.R. 897; [2001] 2 C.M.L.R. 38; [2001] Env. L.R. 16; (2001) 81 P. & C.R. 35; [2000] 3 P.L.R. 111; [2001] J.P.L. 58; [2000] E.G.C.S. 86; [2000] N.P.C. 77

Gateshead MBC v Secretary of State for the Environment [1995] Env. L.R. 37; (1996) 71 P. & C.R. 350; [1994] 1 P.L.R. 85; [1995] J.P.L. 432; [1994] E.G.C.S. 92

R. (on the application of Barker) v London Borough of Bromley [2001] EWCA Civ 1766; [2002] Env. L.R. 25; [2002] 2 P. & C.R. 8; [2001] 49 E.G.C.S. 117; [2001] N.P.C. 170

R. v Cornwall County Council Ex p. Hardy [2001] Env LR 25; [2001] J.P.L. 786

R. v Rochdale Metropolitan Borough Council Ex p. Tew [2000] Env. L.R. 1; [1999] 3 P.L.R. 74; [2000] J.P.L. 54; [1999] E.G.C.S. 70; (1999) 96(20) L.S.G. 41

R. v Rochdale Metropolitan Borough Council Ex p. Milne [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note); [2001] J.P.L. 470; [2000] E.G.C.S. 103

Policy referred to:

H11 DoE Circular 11/95 on “The Use of Conditions in Planning Permissions”

- H12 *Mr R. Clayton Q.C.* and *Mr C. Zwart*, instructed by Patwa solicitors, for the appellant.
Mr T. Corner Q.C., instructed by the Treasury Solicitor, for the first respondent.
Mr J. Barrett, instructed by Walker Morris, for the second respondent.

JUDGMENT

- 1 **WALLER L.J.:** This is an appeal from the decision of Silber J. given on December 19, 2001 whereby he dismissed an appeal, brought under s.288 of the Town and Country Planning Act, 1990 ("the 1990 Act"), by Maureen Smith ("the claimant"). By that appeal and the appeal to this court the claimant seeks to challenge the decision of the first defendant, the Secretary of State for the Environment, Transport and the Regions ("the Secretary of State"), who by his Inspector in a Decision Letter dated March 14, 2001 ("the Decision Letter") granted planning permission in respect of a proposed development at Buck Park Quarry, Whalley Lane, Denholme ("Buck Park Quarry") subject to certain conditions.
- 2 The effect of the decision was to extend planning permission (90/9/02224) ("the 1992 permission") granted on March 26, 1992 for the extraction of stone from Buck Park Quarry so as to extend the period for which permission had been granted, permit an increase in the depth of extraction at the quarry, and at the same time to facilitate the use of the quarry for the landfill disposal of up to 250,000 tonnes per annum of controlled waste for a period of ten years.
- 3 There were in fact two applications seeking the extension, the first of which was the subject of the appeal to the Inspector, and the second of which was not. Each was supported by an Environmental Statement ("ES"). The first point dealt with by Silber J. related to the question whether the Inspector on the appeal from the first refusal, was entitled to treat the ES relating to the second application as subsumed in the evidence before him. Silber J. decided that the Inspector was so entitled. That point was to be the subject of an appeal, but at the commencement of the hearing Mr Clayton Q.C. for the claimant abandoned that aspect of the appeal. For the purposes of this appeal it is accordingly possible to concentrate on the first application and its history.
- 4 The main point argued on the appeal did still concern the ES. An Environmental Statement was required by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations, 1988, as amended ("the 1988 Regulations"), which were made pursuant to the Council Directive 85/337/EEC ("the Directive"). There are now some new regulations, but it is common ground that it is the 1988 Regulations that apply to this application. Certain of the authorities cited to us deal with the later regulations. It is not suggested that any change in language makes consideration of those authorities inapposite to the points that arise on this appeal. Certain important provisions of the Regulations and the Directive are matters to which I will return, but in broad terms an ES requires identification of any significant impact on the environment, and identification of mitigating measures to deal with that impact, and the Regulations require the planning authority or the Inspector on an appeal to take into

consideration the ES. The main point raised on the appeal requires consideration of the extent to which the Inspector must in granting planning permission make it an obligation of the applicant to carry out measures which will mitigate the impact on the environment, and the extent to which the Inspector can leave the extent of the obligation to carry out mitigation measures to a third party, in this instance the Local Planning Authority.

The History

5 The applicant and second respondent to this appeal is Integrated Waste Management Limited (“IWM”), 90 per cent of which is owned by the local authorities of Hull, East Riding, North Lincolnshire and North East Lincolnshire. By planning application (98/01089/FUL) dated April 9, 1998 (“the planning application”), IWM applied to their Local Planning Authority, the City of Bradford Metropolitan District Council, (“the LPA”). The planning application sought to achieve three objectives:

- (1) to vary conditions 2 and 24 of the 1992 permission,
- (2) to landfill the quarry with controlled waste (that is, domestic, commercial and industrial waste),
- (3) to introduce access improvements to the site.

6 Condition 2 had provided for a period of ten years, and the extension was for a further four years; Condition 24 permitted quarrying to a certain depth, and the application sought an extra eight metres.

7 The application was supported by an ES setting out the details of the development, the likely impact on the environment, and the measures proposed in mitigation. The application was also supported by the Report of the Head of Transportation and Planning [Tab 4 Core Bundle] (“the Report”).

8 The planning application was opposed by, amongst others, an action Group of which the claimant was one. The claimant has lived in the village of Denholme for many years and she lives less than a mile from the proposed development. She with others contended that she was directly affected by the existing quarrying operation at the site and was likely to be substantially affected by the proposed development. The claimant’s concern was, and still is, that the grant of planning permission to extend time, to increase the depth of workings at Buck Park Quarry and to permit the site to be used for the landfill disposal of controlled waste might generate considerable traffic, noise and other nuisance damage particularly from dust, odours or vermin.

9 The application was refused by the LPA by notice dated July 23 1999, on the grounds that:

“The proposal will be contrary to GP2 (I), (II), (IV) and policy W1 (I) of the approved Unitary Development Plan, particularly by reason of the smell which would be generated, the visual impact on the surrounding environment and to the detriment of pedestrian safety along the A629 through Denholme Village”.

10 IWM appealed that decision. Mr Keith Durrant was appointed to hear the appeal. IWM was represented by Mr Barrett as they were before Silber J. and before us. The claimant, through her action group, was represented (we were told) by a Planning Consultant Advocate. The LPA took very little part, only appearing in relation to the question as to what conditions should be imposed if the Inspector allowed the appeal, and on the question of costs. The LPA, although defendants to these proceedings, have not been represented either before Silber J. or before us.

11 The hearing took place over 10 days. There was before the Inspector obviously the ES (and the subsumed ES) and the Report. By a Decision Letter dated March 14, 2001 the Inspector allowed the appeal granting permission subject to certain conditions.

12 The terms of the Decision Letter are critical to the points that arise on this appeal. The Inspector by para.6 identified the main issues:

“Given this site context, I have come to the view that the main issues in this appeal are whether:

filling the quarry with waste would harm the visual amenities of the Green Belt, having regard to the proximity of a Special Landscape Area to the west and to the setting of Park Farm, a Grade II listed building;

a continuation of quarry working and a phased restoration by landfill could be carried out without polluting the local environment and disrupting the lives of local residents to an unacceptable degree;

and, in the light of my conclusions on the above, whether:

the proposed development would be inappropriate in the Green Belt (and if so, whether there are any very special circumstances that would justify it);

there is a need for a new landfill site proximate to Bradford conurbation, involving additional stone extraction, to which appropriate weight should be given in balancing any benefits against harm (having regard to the Best Practical Environmental Option—the BPEO).”

Impact on the environment was therefore identified by the Inspector as the key issue.

13 He then, by paras 13 to 18, dealt with the first issue “the visual impact of the development”. It is sufficient to quote paras 14 to 17:

“14. The phasing and restoration proposals have however been carefully designed, both to screen most of the workings during the extraction and landfill phases and to create a land form appropriate to the grazed and wooded moorland fringe slopes of the areas. Although local climatic conditions are not favourable to fast tree growth, a sensible choice of species and planting techniques can achieve a degree of impact that would help absorb the development into the landscape. In the two key locations of visual impact, I believe therefore that the character of the local landscape would be sustained and that the end result would be attractive. Those locations are

firstly, along Whalley Lane and in views towards the southern site boundary from Denholme Edge, and secondly from the end of Hewenden Reservoir and its eastern slopes.

15. In the first case, although for relatively short periods the top of the landfill and/or noise attenuation mounds would be seen during the operational and surcharge phases, set against the broader sweep of the landscape beyond or in passing down Whalley Lane its impact would be slight. In the second example, although there would for short periods be views into the landfall area that would be less pleasant than looking at a stone extraction face, that would be a receding and partially screened experience in the middle distance, again set within a strong land form that can absorb it. After restoration, the landform and its associated woodland planting would, I conclude, be seen as an integral part of the local landscape.

16. At Buck Park Farm (a listed building), the existing screening bund would have, behind it, an admittedly high but temporary additional earthwork and (possibly) a stone wall both acting as noise attenuation barriers. I conclude below in respect of noise that I see no need for a permanent wall (which could be oppressive immediately above the farmhouse on the skyline). The profile of the temporary bund would slope steeply away from viewpoints on Whalley Lane and be beyond the present high bund at the back of the farmhouse. Subject to noise attenuation being achieved only by temporary earthworks, I conclude that the setting of the farmhouse would not be changed by the development.

17. The site design and management regime that can be exercised, through landscaping and aftercare planning conditions, through the legal agreements submitted and through the Integrated Pollution Control and Prevention and Control (IPPC) permit under the jurisdiction of the Environment Agency is extensive. I therefore have no reason to doubt that the appellant company is capable of ensuring that the visual impact of the development on the Green Belt, during and after development, would be acceptable.”

I draw particular attention to the reliance by the Inspector in coming to his decision, so far as trees were concerned, on there being in the future “a sensible choice of species and planting techniques” (para.14), and on the degree of control that could be exercised “through landscaping and aftercare planning condition . . . (para.17).

14 He then dealt with “Water, gas, noise, traffic and other pollution from the development” from paras 19 to 33. The only paragraph of relevance and then only to the second issue on this appeal, is para.32 which states:

“32. Finally in this issue, I turn to other potential pollutants: dust, odour and vermin. I agree with the appellant that the latter two are more properly matters for site management and would be controlled on a day-to-day basis through the operation of an IPPC permit using the best available technique. Although I do not underestimate the concerns of residents after their well-documented local experience at Manywells, such techniques are proven

to be effective when properly and speedily applied on a well-run site. I do however accept that the proximity of Buck Park Farm to potential dust generating activities is a material land use consideration that deserves attention at this stage. I consider nonetheless that any potential harm can be overcome by requiring a dust suppression scheme to be agreed and implemented as a planning condition.”

- 15 He then dealt with the Green Belt issue, the need for the development and other matters before turning to “Conditions and Legal Agreements” under which he said:

“48. In my reasoning above, I have referred directly or indirectly to a number of planning conditions that will need to be imposed and the reasons for them. Overall, I shall impose conditions that seek to:

- define the development and its methods and hours of operation;
- describe the details and procedures that are needed to ensure that the various phases of development are implemented in a way that mitigates their environmental impact and ensures a high and safe standard of working, set out the arrangements (and where appropriate standards) for the control of the access, noise, dust, odour and water pollution consistent with the controls that are the province of the Environment Agency under LPPC;
- control the restoration and aftercare of the site and its associated landscaping;

and in doing so incorporate and update those conditions which are still relevant from the 1990 permission. They are based on those discussed and generally (but not totally) agreed at the inquiry between the appellant and the Local Planning Authority, having considered also the suggestions also made by the third parties.

49. The appellant has submitted a unilateral undertaking under s.106 of the Act. This provides for additional controls over the adequacy of site engineering works, for the provision of highway improvements, for a contribution to Bradford City Council of £40,000 for traffic safety measures in Denholme, and for the landscape management of the site and its immediate surroundings. A local liaison committee would also be established. I regard these obligations on the appellant and the landowner as providing significant environmental and community benefits which would mitigate the impact of the development, as already discussed above.

50. I also note that other agreements and a deed between the appellant and the landowner define the respective responsibilities of the two parties in working the site (the appellant being responsible for the landfill, the owner for stone extraction). Importantly, they provide for the appellant to take control in the event of the landowner not complying with best environmental practice in working the quarry. Given the history of the site, this adds confidence to my conclusions as to the acceptability of the overall development.”

16 He then expressed his overall conclusions in these words, and formal decision in these words:

“51. I have concluded above that the development as whole would be appropriate in the Green Belt. With the imposition of suitable planning conditions and giving weight to the provisions of the s.106 Obligation and other legal safeguards, I am satisfied that the site can be worked and filled to high environmental standards and can be restored to fit in with the local landscape. I have also concluded that, whilst the outcome of the deliberations on need and proximity is not entirely clear cut, there are strategic advantages to locating a landfill site in this part of Bradford. For these and the more detailed reasons given above and having regard to all other matters raised, I therefore conclude overall that the appeal should be allowed.

52. In exercise of the powers transferred to me, I allow the appeal and grant planning permission for (1) the continuation of mineral extraction without complying with conditions numbered 2 and 24 of planning permission 90/9/02224 granted by Bradford City Council on March 26, 1992, (2) the improvement of the access arrangements and (3) the disposal of controlled waste, all at Buck Park Quarry, Whalley Lane, Denholme; in accordance with the terms of the Application No.98/01809/FUL dated July 23, 1999, as amended by the letter dated December 3, 1998, and the plans listed below, subject to the following conditions: . . .”

17 The conditions he imposed included conditions 3, 5, 6, and 9 which are as follows:

“3. Unless otherwise agreed in writing by the Local Planning Authority mineral extraction, landfilling, restoration and aftercare of the site shall be carried out in accordance with the following plans:

Amended plan referenced 13/5059/4 and titled ‘Application Boundary and Land Ownership’ as received by the Local Planning Authority on December 1998

Plan titled ‘Site configuration and Phasing’ as referenced 16/5059/4 as revised in February 2000

Plan titled ‘Junction improvements (Ghost Island Junction) and Footpath Alterations’ referenced ref NL 02785 as revised in December 2000

Plan titled ‘General Layout of Site facilities’ referenced and dated 30/5059/4 January 1998

Plan titled ‘Restoration Plan Pre-settlement (Worst Case Scenario) Contours Shown’ referenced NL02785/49 and dated Feb 2000

Plan titled ‘Restoration and Pre-Settlement Contours’ referenced 25/5059/4 and dated Nov 1997

Plan titled ‘Site topography & Proposed Access Road’ referenced 34/5059/4 and dated September 1997

Save where measures are required by the conditions set out elsewhere on this permission which shall take precedence over the above approved plans.

5. No development shall take place until a detailed scheme for the landscaping of the site has been submitted to and approved in writing by the Local Planning Authority. Such scheme shall included details of:
 - (a) the positions, species and sizes of all existing trees, shrubs and hedgerows on the site which are to be retained and the proposals for their protection throughout all operations on site,
 - (b) the position, species, density and initial sizes of all new trees and shrubs,
 - (c) the method of planting to be used including any protection measures,
 - (d) the programme for implementation and carrying out of the scheme. The scheme as approved shall be carried out in full accordance with the agreed programme of implementation following the date of such approval in writing.
6. A landscape management plan including management responsibilities and maintenance schedules for all landscaped areas shall be submitted to the Local Planning Authority for approval in writing concurrent with the landscaping scheme required by condition 5 above. The landscape management plan shall be carried out as approved by the Local Planning Authority for the duration of the landfilling site restoration works.
9. No development shall take place until a scheme to suppress dust generated on site, has been submitted to and approved in writing by the Local Planning Authority. Once approved such scheme shall be implemented in full until site restoration is completed in accordance with condition 19 below.”

18 The first issue which arises on this appeal was identified by the judge in the following terms:

- (i) Whether condition 5 of the Inspector’s Decision Letter was defective as it failed to require the proposed development to comply with the proposed tree planting and grassland seeding schemes and mitigation measures set out in the Landscape Proposals contained in the Second ES (“*the Landscaping Issue*”);
- (ii) Whether condition 9 of the Inspector’s decision was defective as it, failed to require the proposed development to comply with the proposed dust mitigation measures set out in the second ES (“*the Dust Issue*”);

19 The only expansion of the above which is necessary so far as identifying the issue in the court of appeal is concerned, would be to include a reference to the wording with which condition 3 commences *i.e.* “unless otherwise agreed in writing”, and the proviso to that condition “Save where measures are required by the conditions set out elsewhere . . . which shall take precedence over the approved plans”. Mr Clayton placed considerable reliance on these aspects of condition 3 as supporting his argument that by virtue of the conditions imposed IWM were not tied to implementing the mitigation measures in so far as they were identified in the plans set out under condition 3. His argument was that

the LPA were free to give written consent to any departure from the plans and thus free to vary the mitigation in so far as it was identified in the plans.

20 In the Court of Appeal Mr Clayton has also raised a further issue not argued before Silber J. by reference to para.32 of the Decision Letter, and condition 9. He suggested that it was irrational for the Inspector to impose a condition in relation to the suppression of dust, but so far as odour and vermin was concerned leave it to the IPPC. He submitted that the Inspector should have imposed a condition in relation to odour and vermin as well as dust.

21 Mr Corner Q.C., for the Secretary of State, submitted that it was not right to allow this point to be taken for the first time in the Court of Appeal, but in addition he and Mr Barrett gave their suggested answer to the point. In my view their answer was a complete one, and I would propose to deal with the point without considering whether technically Mr Clayton should be free to argue the matter as he did.

The Statutory provisions and authorities

22 The starting point is the Directive to which the United Kingdom gave effect by the 1988 Regulations. I will quote the relevant provisions of the 1988 Regulations, but the approach to the Regulations is coloured by the Directive, the purpose of which is described in the speech of Lord Hoffman in *Berkley v Secretary of State for the Environment* [2001] 2 A.C. 603 at 615 in the following terms:

“I said in *R. v North Yorkshire County Council Ex p. Brown* [2000] 1 A.C. 397, 404 that the purpose of the Directive was ‘to ensure that planning decisions which may affect the environment are made on the basis of full information’. This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the ‘environmental statement’ by the developer should have been ‘made available to the public’ and that the public should have been ‘given the opportunity to express an opinion’ in accordance with Art.6(2) of the Directive. As Advocate General Elmer said in *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] E.C.R. 1–2189, 2208–2209, para.35:

‘It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be given shall be adopted on an appropriate basis.’

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive

issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (*Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] E.C.R. 1-5403, 5427, para.70), Advocate General Elmer made this point again:

‘Where a member state’s implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard.’”

23 Regulation 4(2) of the 1988 Regulations provides:

“24 The local planning authority . . . shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration [and state in their decision that they have done so]”.

According to Reg.2(1):

“‘environmental information’ means:
 . . . such a statement as is described in Sch.3.”

Schedule 3 describes an “environmental statement” as comprising, with emphasis added:

“1. . . . a document or series of documents providing, for the purposes of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in para.2 (referred to in this Schedule as ‘the specified information’);

2. The specified information is—

- (a) a description of the development proposed, comprising information about the site and design and size or scale of the development;
- (b) the data necessary to identify and assess the *main* effects which that development is likely to have on the environment;
- (c) a description of the *likely significant* effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on—
 human beings; flora; fauna; soil; water; air; climate; the landscape;
 the inter-action between any of the foregoing; material assets the cultural heritage;
- (d) where significant adverse effects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects; and
- (e) . . .”

24 We have also been referred to the following decisions: *R. v Rochdale Metropolitan Borough Council Ex p. Tew* [1999] 3 P.L.R. 74 and *R. v Rochdale*

Metropolitan Borough Council Ex p. Milne [2001] J.P.L. 470 decisions of Sullivan J.; *R. v Cornwall County Council Ex p. Hardy* [2001] Env. L.R. 26 a decision of Harrison J. which followed Sullivan J.'s approach in *Tew* and *Milne*; *R. (on the application of Barker) v London Borough of Bromley* [2002] Env. L.R. 631 CA in which Sullivan J.'s approach in *Milne* and *Tew* was approved.

25 Principles which those authorities establish seem to me to be the following: First, where outline planning consent is being applied for (and *Tew* and *Milne* were cases concerned with outline planning consent, *Milne* being round two of a battle over the same development), it is at the outline consent stage that the planning authority must have sufficient details of the proposed development, sufficient details of any impact on the environment, and sufficient details of any mitigation to enable it to comply with its Art.4(2) obligation.

26 Second, the reason for that is that once outline planning consent has been given there is effectively no going back without (at the very least) the payment of compensation. As Sullivan J. said in *Tew*:

“Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding” [97F].

There will accordingly be no proper opportunity when the planning authority considers the matters reserved to reappraise the environmental issues. Indeed *Barker* held that the obligation under Art.4(2) is not an obligation on the planning authority at the consideration of the reserved issue stage.

27 Third, the planning authority or the Inspector will have failed to comply with Art.4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given. As Harrison J. put it in *Hardy*:

“Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions, it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in para.2(c) of Sch.3, and the reference to mitigation measures in para.2(d), that it is intended that in accordance with the objectives of the Directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken ‘in full

knowledge' of the project's likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a 'full knowledge' of the likely significant effects of the project. That is not to suggest that full knowledge requires an environmental information statement to contain every conceivable scrap of environmental information about a particular project. The Directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms in Sch.3, would conflict with the public's right to make an input into the environmental information and would therefore conflict with the underlying purpose of the Directive."

28 Fourth, (and here as it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case.

29 The above quotation from Harrison J. in *Hardy* refers to the ES not having to contain "every conceivable scrap of environmental information". This reflects a passage in the judgment of Sullivan J. in *Tew* at 98B. Sullivan J, dealing with the same kind of point in *Milne*, and with the argument that where an ES was required Outline Planning Consent which contemplates landscaping as a reserved matter simply could not be granted said this at para.113:

"Mr Howell submits that reserved matters, details of the means of access or landscaping, are capable of having an effect on the environment, that is why they are reserved for subsequent approval. That ignores the fact that the environmental statement does not have to describe every environmental effect, however minor, but only the 'main effects' or 'likely significant effects'. It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, 'losing the wood for the trees'. What is 'significant' has to be considered in the context of the kinds of development that are included in schs 1 and 2. Details of landscaping in an application for outline planning permission may be 'significant' from the point of view of neighbouring householders, and thus subject to reserved matters approval, but they are not likely to have 'a significant effect on the environment' in the context of the assessment regulations."

Then at para.126 he said:

“Whilst the Council has deferred a decision on some matters of detail, which, as Mr Beckwith acknowledges, may have some environmental effect, it has not deferred a decision on any matter which is likely to have a significant effect, or any mitigation measures in respect of such an effect.”

At para.131 he said:

“The Council has power to ensure that the details which come forward at the reserved matters stage are in ‘substantial accordance’ with the Development Framework: see condition 1.7 above. It will be noted that the effect of condition 1.7 is that even where siting and means of access are reserved they will have to be substantially in accord with the Masterplan. Armed with all of this information about the proposed building on plot T, ERM were able to carry out a comprehensive assessment of its likely significant effects on the environment including, for example, its likely effect on the setting of listed buildings, and the public were able to make informed comments about the reliability of that assessment and to suggest further mitigation measures if they wished.”

- 30 The reference to condition 1.7 is of some interest. In the planning permission being considered in *Tew* three conditions appeared and were quoted by the judge at 78G to 79B:

“Condition 1.3 states:

The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application, unless otherwise agreed in writing by the Local Planning Authority and unless otherwise provided for in any other condition attached to this planning permission.

Condition 1.7:

No development shall be commenced until a scheme (the Framework Document) has been submitted to and approved by the Local Planning Authority showing the overall design and layout of the proposed Business Park, including details of the phasing of development and the timescale of that phasing. The Framework Document shall show details of the type and disposition of development and the provision of structural landscaping within and on the perimeters of the site. The Business Park shall be constructed in accordance with the approved Framework Document unless the Local Planning Authority consent in writing to a variation or variations.

Condition 1.11

This permission shall be not construed as giving any approval to the Illustrative Masterplan accompanying the application.”

- 31 On the renewed application details, although landscaping, design and external appearances of all buildings were reserved, the Outline Planning Application included a “masterplan and a framework document showing the overall design and layout of the whole site”, and the judge deals with the conditions proposed in paras 28 to 34 as follows:

“28. 1.7:

‘The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework documents submitted as part of the application and shown on (a) drawing entitled “Master Plan with Building Layouts”.’

29. The reason given for the imposition of this condition was:

‘The layout of the proposed Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process.’

30. Condition 1.8:

‘No building within any plot shall exceed the height specified for buildings within that plot as set out in the “Schedule of Development . . . submitted with and forming part of the application”.’

31. Conditions 1.9 and 1.10 modified this by reducing the maximum eaves height of certain buildings in the interests of the amenity of residents in adjacent dwellings.

1.11: ‘The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application unless provided for in any other condition attached to this permission.’

1.12: ‘The development shall be carried out in accordance with the principles and proposals contained in the Development Framework document submitted as part of the application unless provided for in any other condition attached to this permission.’

1.13: ‘The phasing of works within the site shall be carried out in accordance with the details set out in the section entitled “Phasing” in the Development Framework document, subject to the detailed requirements of other conditions in this permission.’

32. In respect of the Stanney Brook Corridor, condition 1.15 said:

‘The area of the Stanney Brook Corridor (as defined on (a) drawing and described in the Development Framework Document) shall remain undeveloped apart from the construction of surface water attenuation areas and footpaths/cycleways.’

33. The reason given was:

‘to ensure that an area of undeveloped open space is retained in the interests of amenity.’

34. Conditions 1.16 to 1.18 effectively divided the corridor into three parts and required the different parts of the corridor to be enhanced and landscaped in accordance with the principles shown on three application drawings and in accordance with detailed treatment to be approved in writing by the local planning authority, concurrently with the construction of building on certain of the plots. The reasons given were:

‘In order to ensure the maintenance of areas of nature conservation interest and to create areas of wildlife habitat in a phased order prior to the loss of existing habitat within the application site.’”

The conditions in *Milne* as I understand it in the view of the judge placed constraints on the degree to which any decision at the reserved stage could have any environmental impact, and the constraints ensured that no decision should have a significant impact.

32 In addition, at para.128 of his judgment in *Milne* Sullivan J. said this:

“Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority: see, for example, the assumptions made in respect of construction impacts, above. The same approach should be adopted to the local planning authority’s power to approve reserved matters. Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the ‘likely significant effects’, not every conceivable effect, however minor or unlikely, of a major project.”

33 In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.

Application of the principles

34 In this case Mr Clayton did not argue that the ES did not contain sufficient details of the development; nor did he argue that the significance of the impact on the environment was not sufficiently identified; nor did he argue that the mitigation features were not fully set out; nor did he argue that the Inspector was not entitled to reach the conclusion that if the mitigation as set out was carried out the Inspector was entitled to reach the view he did as to the granting of permission. His complaint related to the conditions imposed. His first argument was that by virtue of the opening words of condition 3, the proviso at the end of condition 3 and condition 5 and condition 6, IWM, if it could persuade the LPA to consent, would in fact be free to do many things that would have a significant impact on the environment, and be free not to mitigate them. If that were so, his argument ran, it would follow that the actual impact on the environment of what IWM wished to do would not have been the subject of an ES, and would not have

been considered by the Inspector as required by Art.4(2). That would make the permission granted unlawful.

35 This argument led to a considerable debate as to the meaning of the words at the commencement of condition 3, and as to whether there were any limits on what the LPA could consent to under condition 5 and condition 6. If the conditions in effect allowed the LPA to reassess the impact on the environment and alter the features of the plans which were intended to mitigate any adverse effect, that would appear to be a contravention of Art.4(2) of the 1988 Regulations.

36 Mr Clayton's second argument was that by leaving for example the details of the species and planting of the trees etc to a landscape plan to be approved by the LPA, and by relying on the fact that that plan and the landscape management plan under condition 6 would have to be approved by the LPA, the Inspector was in breach of Art.4(2), in that the Inspector was not taking the decision on matters which could have an impact on the environment.

37 Let me deal first with the proper construction of the conditions. Do the conditions allow the LPA to approve a deviation from the plans which might have a significant adverse impact on the environment, or are the LPA constrained when considering the landscape scheme to dealing with details within the parameters identified by the plans? Mr Clayton suggested that the opening words of condition 3 could be read as entitling the LPA to agree in writing that one of the plans should no longer have to be complied with at all, or that some significant aspect of a plan should now be altered including some aspect of the plan that affected the impact on the environment. Thus he submitted that condition 5 can be read as giving the LPA a totally free rein as to landscaping and condition 6 a free rein over the landscape management plans.

38 At one point Mr Corner appeared to accept that the LPA could agree in writing that no trees as shown on the plans would need to be planted at all. His submission was however, that that would simply lead to the LPA not being able to enforce the condition for breach thereof. His argument was that that would not stop the LPA arguing that if no trees at all were planted, that the planning permission had not been complied with as the planning permission was being identified as "in accordance with the plans listed." His submission that nothing apart from a further planning application could alter the planning permission granted was the foundation of this argument.

39 On reflection he retreated from that argument. The concept of IWM gaining written consent to something on which they could rely for not being in breach of a condition, but on which they could not rely if it was alleged they had no planning permission was difficult to sustain. His argument, and that of Mr Barrett, became on refinement that nothing in the conditions could allow for a significant deviation from the plans forming the essentials of the planning consent. The conditions were designed simply to leave matters of detail to the LPA, but all within the concept as identified in the plans including the provision of trees even if the species had not been identified. The submission remained that a condition could not give the power to vary a planning permission.

40 As for the proviso to condition 3, Mr Corner, supported by Mr Barrett, submitted that those words simply allowed for the express wording of a further condition to take precedence, *e.g.* if condition 32 as to depth was inconsistent with the plans, that condition would take precedence.

41 In his response Mr Clayton did not, as I understood him, feel able to refute Mr Corner's submission that a condition cannot give the power to vary a planning consent. I did not understand him therefore to go so far as to say that a plan or an essential feature of a plan could be removed under condition 3 with the written consent of the LPA. My view on construction is as follows.

42 Mr Corner and Mr Barrett's construction of the proviso "Save where measures are required by the conditions set out elsewhere . . ." is clearly right. It is only dealing with conditions that expressly contradict an aspect of a plan to which the proviso applies. Those words if they stood alone would not allow a landscape scheme approved by the LPA to override the approved plans.

43 But I have been troubled by the first words of condition 3 in the context of which conditions 5 and 6 must be construed, and also by what at first sight seem the very general words requiring a "detailed scheme for the landscaping . . . to be approved in writing by the Local Planning Authority." Would this allow a landscape scheme without matters provided for on the plans to be approved by the LPA, and for the LPA to consent in writing to the removal of aspects from the plans? If so, this would seem to allow for a total reassessment of the impact on the environment by the LPA, which would, in my view, be contrary to Art.4(2). Mr Corner and Mr Barrett say clearly not. They say that the words at the commencement of condition 3 relate only to details and could not allow the LPA to consent to IWM not complying with the plans in any substantial way, and in particular, in any way which might have a significant impact on the environment. They submit that condition 5 also allows for a detailed scheme for landscaping, but would not allow a scheme which entailed any substantial non-compliance with the plans, and in particular which allowed for any significant impact on the environment contrary to the plans.

44 It might have made for greater clarity if the first words of condition 3 had stated that what was envisaged was consent as to details and that no consent could be given to any aspect of the plans that affected the substance of the permission granted or the significance of the impact on the environment or the significance of the mitigating measures contained in the plans. Condition 5 could have made clear that a landscape scheme could not allow for anything which had a significant adverse effect on the environment unconsidered by the Inspector. Condition 6 also could have been so limited. The conditions considered in *Milne* to which I have referred above, appear to have such express wording. Does the absence of such express wording lead to the conclusion for which Mr Clayton argues? I think not.

45 If one reads the Decision Letter, and in particular para.48, and if one has regard to the details of the plans which set the contours of the land and the position of trees, it seems to me that it simply cannot have been contemplated that by imposing conditions the Inspector was intending the LPA to go outside the constraints

placed by the plans. It was not intended that the LPA could in effect reconsider the impact on the environment and vary the conditions imposed by the plans.

46 The next question is whether it was permissible for the Inspector to leave details such as species of trees and planting of the same to the LPA, and to rely on the fact that the adverse impact on the environment would be dealt with by an approved Landscape Plan (condition 5) and a Landscape Management Plan (condition 6).

47 It was the LPA who proposed conditions 3, 5 and 6. The reasons they gave for proposing them was as follows:

“Condition 3:

‘To ensure the planning permission is implemented in all respects in accordance with the submitted details.’

Condition 5:

‘The provision and maintenance of landscaping [around the site] is required in the interests of visual amenity.’

Condition 6:

‘The provision and maintenance of landscaping [around the site] is required in the interests of visual amenity.’”

48 Mr Clayton would argue that the Inspector was leaving the assessment of impact to the LPA by virtue of the fact that the details identified in condition 5, and the approval of a landscape plan and a landscape management plan was left to the LPA. Mr Corner and Mr Barrett argued that what has been left are the details and the Inspector can and has legitimately assessed the impact by reference to the likelihood of the way which the LPA will act.

49 In my view, the Inspector having set the parameters of the planning permission, including contours of the land and the provision of trees, was entitled to consider how the LPA was likely to deal with the details and to conclude that the way the details would be dealt with would mitigate the adverse effect on the environment. In so doing he complied with his obligations under Art.4(2).

50 Mr Clayton did not address any separate argument on condition 9. The point is once again that the Inspector having made it a condition that a dust suppression scheme be introduced, was entitled to leave the details to the LPA.

Paragraph 32 —distinction between dust, odour and vermin

51 This point was dealt with concisely by Mr Barrett. He pointed out that there were two aspects of the development, landfill and the extraction of minerals. So far as landfill was concerned that would be the subject of the IPPC regime. The extraction of minerals is not subject to that regime. There was thus a logical basis for leaving odour and vermin to the IPPC regime and making dust the subject of a condition. If, and in so far as Mr Clayton was pursuing an argument that even though vermin and odour were the subject of the IPPC regime it was still incumbent on the Inspector to impose a condition, it was not pursued with any

vigour. *Gateshead MBC v Secretary of State for the Environment* [1994] 1 P.L.R. 85, CA is authority for the proposition that it is open to the planning authority to leave matters within an agency such as the IPPC to that statutory body. Once again the principle identified in para.33 above applies.

52 I would accordingly dismiss the appeal.

53 **SEDLEY L.J.:** This contentious new phase of quarrying was correctly regarded by the inspector as involving a significant adverse effect on the environment. It followed that it was his duty to set conditions which would appropriately mitigate the effect; in fact, if he had not been able to do so he would arguably have been precluded from granting planning permission at all.

54 Yet anybody reading items 3, 5, 6 and 9 of the conditions which the inspector decided to set could be forgiven for concluding that instead of fulfilling this obligation he had simply passed the buck to the local planning authority, with two apparent results. One was that the content of the conditions could thereafter be set by private negotiation between developer and local authority and become known to the public only when they were a *fait accompli*. The second was that the negotiated content might modify significant elements of the consent.

55 If either of these were the true effect of the conditions which form part of the grant I would have had little hesitation in holding the decision to constitute an abdication of the inspector's functions. It is only if what is left over is so defined that it cannot modify or disrupt the terms on which planning permission is being granted that, in my judgment, the handover of responsibility to the local planning authority is permissible. Not without some doubts, I am prepared to agree with Waller and Black L.J.J. that, carefully and narrowly construed, the conditions imposed by the inspector in the present case are contained in this box. They are to be read, in other words, as operating within not only the plans which the inspector is giving permission to implement but the conditions set by him for remedying the consequent impact on the environment. (I confess in this connection that I have been entirely unable to follow the distinction which Mr Corner Q.C. has sought to make between the variation or enforcement of a condition and the variation or enforcement of the planning permission of which it is part. I am consoled by the fact that Mr Barrett appeared to share my difficulty.)

56 In argument, sensing the proximity of the wall to their backs, counsel for both the Secretary of State and the developer stressed how little was being left by the inspector in the local planning authority's hands—matters only of detail, said Mr Corner, none of them capable of aggravating the environmental impact of the development or impeding its remediation. I am prepared to agree with the other members of the court that counsel are right—but the now accepted modesty of the reserved matters does not exactly leap from the page, and if it had not been for its emergence as a serious issue in this court, I doubt whether the chorus of self-denial would have been quite so plangent. Unglossed, the conditions would have constituted an invitation to the developer to press the local planning authority for relaxation of significant elements of the permission granted by the inspector, and no doubt also an invitation to the local planning authority to try to tighten them up. Such elastic wording, capable of being narrowed only by lega-

listic construction, has no place in decisions on which the public, the developer and the local planning authority are entitled to depend with some expectation of legal certainty.

57 It is evident that, apart from the rider to condition 3, the conditions adopted by the inspector follow the model conditions appended to Circular 11/95. Since the circular is directed principally, though not solely, to local planning authorities it is unsurprising that the model conditions provide for held over matters to be reserved to those authorities. But one apparent result of the absence of a distinction in the circular between local planning authorities and the inspectorate in relation to the framing of the model conditions is that inspectors, we are told, commonly remit matters (landscape management plans, for example) to the local planning authority.

58 If there are significant environmental elements (not, that is, matters of detail arising within a comprehensive grant of permission) it might seem on principle more appropriate that the Secretary of State, through his inspectorate, should reserve them to himself and thereby keep the public in the picture. It may be for consideration whether the full extent of the practice, which appears for many years to have been to remit the amplification of conditions to the local planning authority, is appropriate under the modern regime of environmental protection. It would be odd if such a carefully structured regime could be circumvented in this way by the surrender of public judgment to private negotiation. The point which has been put to us, that on the grant of outline planning permission it is to the local planning authority that outstanding matters are reserved, is not only not an answer: it reinforces the proposition that it is to the decision maker, and not to somebody else, that such matters should be reserved. On the other hand, s.78(1)(b) of the 1990 Act contemplates an appeal to the Secretary of State against, among other things, a local planning authority's refusal of approval required by a condition imposed on a grant of planning permission. This does not in terms include a condition imposed by an inspector, but neither does it exclude it.

59 The issue needs fuller debate than has been possible before us. What is clear for the present is that, remitted or retained, a condition cannot lawfully be so wide as to permit the subsequent renegotiation of an element of the planning permission of which it forms part. This I understand to be a premise of what is spelt out in para.33 of the judgment of Waller L.J.

60 So far as concerns provision for tree cover, my reason for agreeing that this too was made within the inspector's powers is the same as the foregoing—namely that on its proper construction it is limited to the carrying into effect of the elements of landscaping and planting recognised as necessary in the inspector's decision letter.

61 As to odour and vermin control, I agree that it was a proper compliance with the inspector's duty to leave these to the IPPC system, and that there was nothing inconsistent with this in making dust control subject to a distinct condition.

62 I wish lastly to record my concern at the reliance placed by the inspector on a purported s.106 Agreement tendered by the developer and stated on its title page to be unilateral. The inspector noted this but wrote (para.49) that he regarded

some of the obligations it contained as “providing significant environmental and community benefits which would mitigate the impact of the development”. What he appears to have overlooked is that this unilateral undertaking purports at several points to bind the local planning authority. For example, para.5.3 purports to oblige the authority not unreasonably to withhold or delay approval of the developers’ landscape management plan, and para.5.8 purports to bind the council, “acting reasonably”, to determine outstanding works of maintenance and management. Reasonableness has many registers, the contractual one frequently more interventionist than the public law one. The adoption of a document of this kind, purporting to place obligations of reasonableness upon a public authority which is not a party to it, is capable of causing much dispute and confusion. Mr Barrett did not seek to suggest that its framing was other than unfortunate. Inspectors for their part need to be on the lookout for such Trojan horses.

- 63 **BLACK L.J.:** For the reasons given by Waller L.J. I agree that this appeal should be dismissed.

APPENDIX 9 – 10

A

Supreme Court

Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council

[2010] UKSC 20

B

2010 Feb 1, 2;
May 12

Lord Phillips of Worth Matravers PSC, Lord Hope of
Craighead DPSC, Lord Walker of Gestingthorpe,
Baroness Hale of Richmond, Lord Brown of
Eaton-under-Heywood, Lord Mance,
Lord Collins of Mapesbury JJSC

C

Compulsory purchase — Development — Competing proposals — Planning authority determining how to exercise compulsory purchase powers — Whether entitled when considering benefits of rival schemes to have regard to benefits accruing to site not within proposed development area — Town and Country Planning Act 1990 (c 8) (as amended by Planning and Compulsory Purchase Act 2004 (c 5), s 99, Sch 9), ss 226(1)(a)(1A), 233

D

The claimant supermarket company owned or controlled 86% of site A and another supermarket company, T Ltd, owned or controlled most of the remainder of the site. Both companies wished to develop site A but, unless the defendant local authority used its compulsory purchase powers in respect of that site, neither of the proposed developments could take place. T Ltd also owned site B, about 850 metres away, which contained a number of listed buildings which were in poor condition. For many years it had been an objective of the local authority to secure the regeneration of site B. T Ltd, who considered that it was not financially viable to develop site B on its own, offered to link its scheme for site A with the redevelopment of site B on the basis that that would amount to a subsidy at least equal to the loss it would sustain in carrying out the development of site B.

E

The local authority approved in principle the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990¹ in respect of the claimant's land at site A to facilitate a development of the site by T Ltd. In resolving to make that order, the local authority took into account T Ltd's commitment to develop site B. The claimant sought judicial review of the local authority's decision on the ground that it was illegitimate for the local authority, in resolving to make the compulsory purchase order, to have regard to the regeneration of site B. The judge dismissed the claim. On the claimant's appeal, the Court of Appeal held that section 226(1)(a) required the local authority to be satisfied that the compulsory purchase order would facilitate the redevelopment of site A but that section 226(1A) required it to consider whether and to what extent the redevelopment of site A would bring well-being benefits to a wider area and that, if a redevelopment was likely to act as a catalyst for the redevelopment of some other site, such catalytic effects were capable of falling within the scope of section 226(1A) and it dismissed the appeal.

F

On the claimant's appeal—
Held, (1) that the principles which applied to the determination of planning applications could apply, by analogy, to compulsory acquisition for development purposes, provided that (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of those principles was adopted; that, therefore, a local authority

G

On the claimant's appeal—
Held, (1) that the principles which applied to the determination of planning applications could apply, by analogy, to compulsory acquisition for development purposes, provided that (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of those principles was adopted; that, therefore, a local authority

H

¹ Town and Country Planning Act 1990, as amended, ss 226(1)(a)(1A), 233: see post, para 108.

could take into account off-site benefits of a proposed development provided that such benefits were related to or connected with the development for which the compulsory acquisition was made; and that (per Lord Phillips of Worth Matravers PSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapebury JJSC) such a connection had to be a real rather than a fanciful or remote one and (Lord Brown of Eaton-under Heywood JSC dissenting) in the absence of any other connection a cross-subsidy from the acquisition site to another site would not suffice (post, paras 70, 71–72, 80, 82, 83, 84, 89, 90, 97, 98, 120, 127–128, 134–135, 137–138, 151, 168, 173, 181).

(2) That (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapebury JJSC) the power of compulsory acquisition had to be capable of being exercised under section 226(1)(a) of the 1990 Act before the limitation in section 226(1A) applied; that (Lord Brown of Eaton-under-Heywood JSC dissenting) the claimed financial connection between the two developments did not amount to a relevant matter for the purposes of section 226(1)(a); and that (Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC dissenting) no different result was required by the fact that T Ltd and the claimant co-owned and were in competition for site A and the council was proposing to dispose of the land to T Ltd under section 233 (post, paras 74, 75, 76, 80, 83, 90, 91, 96, 97, 100, 106, 151).

(3) Allowing the appeal (Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC and Lord Brown of Eaton-under Heywood JSC dissenting), that, accordingly, there should be a declaration that the opportunity for redevelopment of site B was not a lawful consideration in deciding whether to make a compulsory purchase order in relation to site A (post, paras 79, 80, 89, 90, 97, 106).

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87, CA, *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78, CA, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, HL(E) and *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, HL(Sc) considered.

Decision of the Court of Appeal [2009] EWCA Civ 835; [2009] 3 EGLR 94 reversed.

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bradford (City of) Metropolitan Council v Secretary of State for the Environment (1986) 53 P & CR 55, CA

Brighton Borough Council v Secretary of State for the Environment (1978) 39 P & CR 46

Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117

Clunies-Ross v Commonwealth of Australia (1984) 155 CLR 193

Galloway v Mayor and Commonalty of London (1866) LR 1 HL 34, HL(E)

Grampian Regional Council v Secretary of State for Scotland 1984 SC (HL) 58, HL(Sc)

Hall & Co Ltd v Shoreham-by-Sea Urban District Council [1964] 1 WLR 240; [1964] 1 All ER 1, CA

Hanks v Minister of Housing and Local Government [1963] 1 QB 999; [1962] 3 WLR 1482; [1963] 1 All ER 47

Kelo v City of New London, Connecticut (2005) 554 US 469

Municipal Council of Sydney v Campbell [1925] AC 338, PC

Newbury District Council v Secretary of State for the Environment [1981] AC 578; [1980] 2 WLR 379; [1980] 1 All ER 731, HL(E)

Prest v Secretary of State for Wales (1982) 81 LGR 193, CA

- A *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554; [1958] 2 WLR 371; [1958] 1 All ER 625, CA
R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd (1993) 67 P & CR 78; [1993] JPL 538, CA
R v Secretary of State for Transport, Ex p de Rothschild [1989] 1 All ER 933; 87 LGR 511; sub nom *de Rothschild v Secretary of State for Transport* 57 P & CR 330, CA
- B *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87; [1989] 3 WLR 408; [1989] 2 All ER 74, CA
R v R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12; 237 CLR 603
Rugby Joint Water Board v Shaw-Fox [1973] AC 202; [1972] 2 WLR 757; [1972] 1 All ER 1057, HL(E)
Simpsons Motor Sales (London) Ltd v Hendon Corpn [1964] AC 1088; [1963] 2 WLR 1187; [1963] 2 All ER 484, HL(E)
- C *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806
Soumots Investments Ltd v Secretary of State for the Environment [1977] QB 411; [1976] 2 WLR 73; [1976] 1 All ER 178; [1977] QB 411; [1976] 3 WLR 597; [1976] 3 All ER 720, CA; [1979] AC 144; [1977] 2 WLR 951; [1977] 2 All ER 385, HL(E)
Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) 2005 SLT 144; [2006] UKHL 50; 2007 SC (HL) 33, HL(Sc)
- D *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)
Waters v Welsh Development Agency [2004] UKHL 19; [2004] 1 WLR 1304; [2004] 2 All ER 915, HL(E)
Westminster Renslade Ltd v Secretary of State for the Environment (1983) 48 P & CR 255

The following additional case was cited in argument:

- E *Belfields Ltd v Secretary of State for Communities and Local Government* [2007] EWHC 3040 (Admin); [2008] JPL 954

APPEAL from the Court of Appeal

- The claimant, Sainsbury's Supermarkets Ltd, appealed, with permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Collins of Mapesbury JJSC) granted on 5 November 2009, from a decision of the Court of Appeal (Ward, Mummery, Sullivan LJ) [2009] 3 EGLR 94 given on 31 July 2009, dismissing its appeal against a decision of Elias J [2009] EWHC 134 (Admin) given on 3 February 2009 whereby he had dismissed its claim for judicial review of the decision of the defendant local authority, Wolverhampton City Council, given on 30 January 2008 to give approval in principle to the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990 in respect of land owned by the claimant. Tesco Stores Ltd was an interested party

The facts are stated in the judgment of Lord Collins of Mapesbury JSC.

Christopher Lockhart-Mummery QC, Eian Caws and Charles Banner (instructed by CMS Cameron McKenna LLP) for the claimant.

- H Compulsory purchase powers should only be exercised as a last resort, where the interference with property rights is necessary to achieve the relevant objectives. The court must carefully scrutinise the exercise of compulsory purchase powers to ensure that the statutory authority has been properly exercised: see *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198, 211. In deciding whether, and how, to exercise

compulsory purchase powers in relation to a site under section 226 of the Town and Country Planning Act 1990, as amended, a local authority may only lawfully take into account those factors relevant to the achievement of the statutory purpose. A proposal to cross-subsidise development elsewhere is entirely unrelated to the achievement of the statutory purpose and, in making its decision by reference to that factor, the local authority was pursuing a purpose outside the statutory scheme and/or was taking into account an immaterial consideration.

The Court of Appeal's construction of section 226(1A) was fundamentally flawed because it treated the terms of subsection (1A) as an enlargement, rather than as a restriction, of the powers under subsection (1)(a). The power under subsection (1)(a) may be exercised by a local authority if it thinks that the acquisition will facilitate, inter alia, the carrying out of redevelopment on the land to be acquired. However, by virtue of subsection (1A), it may only proceed to exercise that power if it thinks that the redevelopment is likely to contribute to one of the specified well-being objects. Subsection (1A) does not, therefore, confer any power on the local authority to acquire a site under subsection (1)(a) *because* such acquisition is likely to contribute to the well-being objects, but it prevents such acquisition if those benefits are not considered likely to arise as a result of the acquisition: see *Belfields Ltd v Secretary of State for Communities and Local Government* [2008] JPL 954. The exercise of the power of acquisition is rooted in subsection (1)(a) and requires the authority to decide that the acquisition will facilitate the redevelopment of the land that it proposes to acquire rather than some other unrelated land in a wholly different location. The Court of Appeal wrongly treated the limitation on the exercise of the power provided by subsection (1A) as providing a new class of material considerations which may be taken into account by a local authority in deciding whether to exercise its power compulsorily to acquire land under section 226. The ministerial advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, gives no support to the Court of Appeal's approach to the construction of subsection (1A). The claimant's approach to section 226 reflects the approach adopted by Parliament in section 3 of the Local Government Act 2000, under which the power to promote well-being in section 2 of that Act is curtailed by any prohibition, restriction or limitation imposed by another statute. In the field of compulsory purchase, subsections (1)(a) and (1A) of section 226 of the 1990 Act set such constraints on a local authority's powers of acquisition.

Irrespective of the provisions of section 226(1A), an acquiring authority, when making a compulsory purchase order of a site under section 226(1)(a), and the Secretary of State when authorising that order, may not have regard to a commitment to secure through cross-subsidy the development of an unrelated site, thereby seeking to achieve well-being benefits from such development. The lawfulness of the exercise of a statutory discretion is to be determined by looking at the relevant legislation and its scope and object in order to assess whether irrelevant considerations have motivated or influenced the decision. It is also fundamental to the exercise of discretionary powers that decision-makers must not pursue collateral purposes or ends which are outside the objects and purposes of the statute. Where compulsory purchase is concerned, the courts have consistently confined the exercise of such powers strictly to the stated statutory purpose:

- A see *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43. Where a plurality of purposes is pursued, but one purpose is unauthorised by the statute, the power will have been invalidly exercised. Subsection (1)(a) does not authorise the acquisition of land in order to facilitate the development of some other, unrelated land: see *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117, 125. The
- B contentions of the local authority and the interested party are contrary to the intention of Parliament as expressed in the clear language of section 226. Parliament has provided that the power of subsection (1)(a) is not to be exercised unless the authority thinks that well-being will result from the carrying out of development on the site to be acquired. If Parliament had contemplated that the achievement of the wider well-being of the local authority's area was to be a relevant factor in the overall discretion arising
- C under section 226(1)(a), it would have expressed subsection (1A) differently. A local authority cannot use its powers for an ulterior object, however desirable that object may seem to it to be in the public interest: see *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772.
- D In the context of planning permission, an offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, is not a material consideration and is regarded as an attempt to buy planning permission: see the *Tesco Stores* case, at p 770. Benefits which are embellishments of the development itself or by way of appropriate mitigation to offset the impacts arising from the development can lawfully be taken into account: see *R v Plymouth City*
- E *Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538. The possibility of one development cross-subsidising another highly desirable development is capable of being a material consideration under section 70(2) of the 1990 Act if the two developments form part of one composite development project: see *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. Whilst there is not an exact parallel
- F between the scope of the material considerations under section 70(2) and those under section 226, there is no proper basis for distinguishing the approach taken in the planning cases from that involving the exercise of compulsory powers of acquisition. The Court of Appeal's suggestion that, unlike section 70(2), section 226(1A) imposes an express obligation to have regard to off-site benefits, is incorrect. The effect of section 226(1A) is to require consideration of the well-being benefits resulting from the physical
- G development of the site to be acquired, which may in some cases also be experienced off-site, but not to have regard to benefits that might flow from the development of another unrelated site, purely because the prospective developer of the acquired site has chosen to create a financial link between the two developments. The Court of Appeal also erred in attaching weight to the fact that the financial viability of an application for planning
- H permission is unlikely to be a material consideration for the purposes of determining an application under section 70(2) but that it was a highly material factor in the consideration by the Secretary of State of the merits of authorising compulsory acquisition. A distinction has to be made between the viability of the development for which the compulsory purchase order is being acquired and the viability of the development of some other unrelated

land. The former is a material consideration but that does not support the proposition that the latter is also material. The Court of Appeal also wrongly attached significance to the distinction between the scrutiny given to a compulsory purchase order compared with that given to a grant of planning permission. The scope of the power under section 226 cannot be affected by the fact that its purported exercise may be subject to subsequent scrutiny. The courts have defined the legitimacy of off-site benefits by reference to their direct relationship to the development in question in order to avoid a regime whereby planning permission can be granted to the highest bidder. There is an equal need to draw the same dividing line in the case of compulsory purchase, if not a greater need in view of its consequences. A comparison of the statutory language supports that position. The courts have carved out of the phrase “material considerations” in section 70(2) the principle of benefits related to the development. The far more specific language of subsections (1)(a) and (1A) of section 226 compels the same conclusion. There is no discernible justification or logic for treating as material in the context of a compulsory acquisition brought under the 1990 Act a consideration to which it would be unlawful for a planning authority to have regard when deciding whether to grant planning permission for the development which the compulsory purchase order is to facilitate. *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2005 SLT 144; 2007 SC (HL) 33 concerns a different statutory provision and can be distinguished.

Neil King QC and Guy Williams (instructed by *Wragge & Co LLP, Birmingham*) for the local authority.

In order lawfully to exercise its powers of compulsory acquisition under section 226(1)(a) of the 1990 Act a local authority must think that (i) the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land; and (ii) the development is likely to contribute to the achievement of the promotion or improvement of the economic, social and/or environmental well-being of their area. Thus, subsection (1)(a) is concerned with the purpose for which land may be compulsorily acquired and subsection (1A) is concerned with the consequences, in terms of achieving specific objects, which may flow from the acquisition; but the requirements of both provisions must be met before a compulsory purchase order can be made. The purpose of the acquisition of the claimant's land falls squarely within section 226(1)(a). The development which will be facilitated by the acquisition will then, via a cross-subsidy to the related development, also result in well-being benefits within section 226(1A). ODPM Circular 06/2004 correctly advises that the statutory concept of well-being extends to the whole of the relevant local authority area: see Appendix A, para 6.

The words of section 226(1A) should be given their ordinary meaning. If Parliament had wished to confine consideration to the economic, social and environmental well-being of only the land being acquired, it would have done so, although that would have made little sense. Section 226(1A) requires an acquiring authority to satisfy itself that the proposed acquisition will have beneficial consequences in terms of the well-being of its area. The nature of those consequences will vary widely depending on the circumstances; but there is no reason why bringing forward the beneficial

- A development of other land in its area is incapable, as a matter of law, of constituting such a consequence. The claimant's argument ignores the requirements of subsection (1A), by virtue of which the authority must think that the proposed development "is likely to contribute to the achievement of" the well-being objects of its area, and it is inconsistent with Government policy as set out in ODPM Circular 06/2004 that the benefit to be derived from exercising the power is not restricted to the area subject to the order, as
- B the concept is applied to the well-being of the whole, or any part, of the acquiring authority's area. The words "contribute to" are wide. As a matter of ordinary language the proposed development will contribute to well-being objectives through the economic, social and environmental benefits which will result from the development of both sites. There is no difference in principle, in terms of the requirements of section 226(1A), between the
- C benefits resulting from the proposed development itself and the benefits resulting from the related development. Section 226 is drafted in broad terms to encompass wide ranging well-being benefits. The necessary connection between the well-being benefit in question and the development of the compulsory purchase order land is clearly set out within subsection (1A). There is no reason to restrict the ordinary meaning of those words. Without the cross-subsidy which the related development will
- D provide, the development of the compulsory purchase order site is unlikely to happen. Thus the development of the compulsory purchase order site is likely to contribute to the objects set out in section 226(1A) through both the development of that site and the consequential development of the other site. Accordingly, the benefits of the related development may lawfully be taken into account by the local authority by reference to section 226(1A) in
- E exercising its powers under section 226(1)(a).

It is not appropriate to carry across dicta in cases which are concerned with the lawfulness of planning conditions and section 106 agreements directly and without any modification to the power to make compulsory purchase orders under section 226. The reasoning of the Court of Appeal, in drawing a distinction between the considerations material to the grant of planning permission under section 70(2) and the approach to the compulsory acquisition of land under section 226, is endorsed. The

F relevance of the well-being benefits which will be secured through the cross-subsidy which one development will provide for the other is not a matter of law but of weight for the decision-maker. The lawfulness of the considerations taken into account by the local authority should be resolved by reference to the plain wording of section 226 without more.

- G However, if it is appropriate to apply, in some way, the principles established in relation to section 70(2), it must be done in such a way as properly to reflect the different context and statutory purpose of compulsory acquisition, namely to facilitate development and to promote the well-being of the authority's area. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 does not address, nor does it therefore seek to prescribe, what matters may, or may not, be taken into account by a local
- H authority when deciding whether to exercise its powers of compulsory acquisition in order to facilitate the carrying out of one or other of two, or more, rival schemes of development on a site. In deciding whether to make a compulsory purchase order in such circumstances, there can be no reason in principle why the local authority should be precluded as a matter of law

from taking into account all the benefits to its area which will result from the making of the order: see *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33, paras 39, 70. The authority is deciding whether to use its powers of compulsory acquisition in order to facilitate development which would not take place without intervention and so bring about well-being benefits to its area as a whole. Regard must be had to the statutory obligation to take wider well-being benefits into account, and the significance of viability and well-being. [Reference was also made to *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538.]

The weight to be attributed to the cross-subsidy is a matter for the authority, subject to a challenge for unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* [1948] 1 KB 223. The potential materiality of cross-subsidy and financial considerations in the planning permission context is established by *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87: see also *Brighton Borough Council v Secretary of State for the Environment* (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 and *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411.

Even if the well-being benefits which would result from the related development could not lawfully be taken into consideration under section 226(1A), in choosing between the two development proposals in the context of deciding which one, if either, to facilitate through the exercise of its powers of compulsory acquisition, the authority was entitled to take account of the overall benefits to its area which each scheme would provide. Such an approach does not enable a developer to buy the exercise of compulsory purchase powers, rather it means that the authority may take all material considerations into account in determining whether, and in whose favour, to exercise powers of compulsory acquisition.

Christopher Katkowski QC and *Scott Lyness* (instructed by *Ashurst LLP*) for the interested party.

The arguments of the local authority are adopted.

Under section 226(1A) the question is not whether the development is *likely to contribute* to the achievement of any one or more of the specified objects but whether the local authority *think that* it is likely to so contribute. The decision-maker is the local authority and it is then for the Secretary of State, if objection is made, to decide whether the development is likely to contribute to the achievement of one or more of the specified objects. A discretion is therefore given to the decision-maker and there are no clear grounds for interfering with it in this case.

In any event, the statutory purpose is not to be determined from subsection (1)(a) exclusively but from subsections (1)(a) and (1A) together. Even if the benefits of the related development do not fall within subsection (1A), where there is a competition between two rival contenders there is no public law reason not to allow additional benefits put forward by one contender to be taken into account.

Lockhart-Mummery QC replied.

The court took time for consideration.

A 12 May 2010. The following judgments were handed down.

LORD COLLINS OF MAPESBURY JSC

Introduction

B 1 This appeal is about compulsory acquisition of private property by local authorities under the Town and Country Planning Act 1990 in connection with the development or redevelopment of land. It raises for the first time, in the context of compulsory acquisition, a number of controversial issues which have arisen in the context of planning permission, including these: how far a local authority may go in finding a solution to problems caused by the deterioration of listed buildings; to what extent a local authority may take into account off-site benefits offered by a developer; C and what offers (if any) made by a developer infringe the principle or policy that planning permissions may not be bought or sold.

D 2 The Raglan Street site is a semi-derelict site situated immediately to the west of, and just outside, the Wolverhampton Ring Road, which encircles the Wolverhampton city centre retail, business and leisure core. Sainsbury's Supermarkets Ltd ("Sainsbury's") owns or controls 86% of the site and Tesco Stores Ltd ("Tesco") controls most of the remainder. Sainsbury's and Tesco each wish to develop the Raglan Street site. Outline planning permission has been granted to Tesco, and the local authority has resolved to grant outline planning permission to Sainsbury's.

E 3 Tesco controls a site in the Wolverhampton city centre known as the Royal Hospital site, which is about 850 metres away from the Raglan Street site on the other side of the city centre. The Royal Hospital site is a large site with a number of listed buildings which are in poor condition. It has been an objective of Wolverhampton City Council ("the council") over several years to secure the regeneration of the Royal Hospital site. Tesco's position has been that it was not financially viable to develop the Royal Hospital site in accordance with the council's planning requirements and its space requirements on the site for the primary care trust. It offered F to link its scheme for the Raglan Street site with the redevelopment of the Royal Hospital site and said that this would amount to a subsidy at least equal to the loss it would sustain in carrying out the Royal Hospital site development.

G 4 The council accepted that the Royal Hospital site would not be attractive to developers if it were restricted to the council's scheme. Even on optimistic assumptions, there did not appear to be a level of profit available which would make the site an attractive proposition when weighed against the risks. Development was unlikely to take place for the foreseeable future unless Tesco's proposals were brought forward through a cross-subsidy from the Raglan Street site.

H 5 In January 2008 the council approved in principle the making of a compulsory purchase order ("CPO") under section 226(1)(a) of the 1990 Act in respect of the land owned by Sainsbury's at the Raglan Street site to facilitate a development of the site by Tesco. In resolving to make the CPO, the council took into account Tesco's commitment to develop the Royal Hospital site (and indeed passed a resolution which indicated that one of the purposes of the CPO was to facilitate the carrying out of the Royal Hospital site development).

6 Sainsbury's wishes to develop the Raglan Street site and claims that it is illegitimate for the council, in resolving to make a CPO of the Sainsbury's land on the Raglan Street site, to have regard to the regeneration of the Royal Hospital site to which Tesco will be committed if it is able to develop the Raglan Street site. Elias J dismissed the claim by Sainsbury's for judicial review of the council's decision, and the Court of Appeal [2009] 3 EGLR 94 dismissed an appeal in a judgment of Sullivan LJ, with whom Ward and Mummery LJ agreed.

Compulsory purchase

7 Section 226 of the 1990 Act, as amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, provides:

“(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land, or (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

“(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area.”

8 CPOs made by a local authority under section 226 must be confirmed by the Secretary of State. If the owner of the land which is the subject of a CPO objects to the order, the Secretary of State will appoint an independent inspector to conduct a public inquiry. The inspector's report and recommendation will be considered by the Secretary of State when a decision whether or not to confirm the CPO is taken. Where land has been acquired by a local authority for planning purposes, the authority may dispose of the land to secure the best use of that or other land, or to secure the construction of buildings needed for the proper planning of the area: section 233(1).

9 Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, “Expropriation, Public Purpose and the Constitution”, in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, (1998) ed Forsyth & Hare, p 91.

10 In *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 Lord Denning MR said:

“I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is

A expressly authorised by Parliament and the public interest decisively so demands . . .”

and Watkins LJ said, at pp 211–212:

B “The taking of a person’s land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.”

C 11 Recently, in the High Court of Australia, French CJ said in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, paras 40, 42, 43:

“40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights.”

D “42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights . . .

E “43. The terminology of ‘presumption’ is linked to that of ‘legislative intention’. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights.”

The facts

F 12 It was originally envisaged by Tesco that the Royal Hospital site would be a suitable location for a scheme which made provision for a superstore whilst retaining and restoring much of the fabric of the former Royal Hospital buildings.

G 13 In January 2001, Sainsbury’s applied for outline planning permission to redevelop the Raglan Street site for a mixed use development comprising retail uses, residential, leisure, parking and associated highway and access works. The application was called in by the Secretary of State and, following a public inquiry, planning permission was granted on 12 November 2002.

H 14 In early 2005 Sainsbury’s informed the council that it no longer intended to develop the Raglan Street site, because it had agreed to sell its interests in the Raglan Street site to Tesco, which was developing a revised scheme. Sale documentation was agreed and engrossments circulated for execution. In addition, Tesco acquired interests in the Raglan Street site owned by third parties.

15 On 28 June 2005 the council’s cabinet (resources) panel reported on the proposed Tesco scheme, and said that the grant of permission would be linked to obligations relating to the Royal Hospital site. The panel approved in principle the use of compulsory purchase powers to assemble the Raglan Street site should the need arise. This was on the then understanding that the

interests of Sainsbury's would be transferred to Tesco by agreement and that any CPO would be required only to acquire minor interests within the site.

16 On 3 November 2005 Tesco entered into a conditional sale agreement with the council, which provided for the sale of the council's interest in the Raglan Street site to Tesco and for the council to use its compulsory purchase powers, if necessary, to facilitate the acquisition of outstanding interests in the site. The agreement also imposed an obligation on Tesco to carry out and complete works of demolition and repairs at the Royal Hospital site before the commencement of works at the Raglan Street site. This agreement was replaced in July 2009 by a conditional agreement for lease.

17 Following exchange of the agreement with the council and its acquisition of third party interests in the Raglan Street site, Tesco sought an exchange of its agreement with Sainsbury's. This did not happen because Sainsbury's decided that it did in fact wish to redevelop the Raglan Street site, and to submit a fresh planning application for redevelopment of the site.

18 In accordance with its obligations in the agreement with the council, Tesco submitted planning applications to the council for the development of both the Royal Hospital site (in April 2006) and the Raglan Street site (in July 2006). In October 2006, Sainsbury's submitted a planning application for a new scheme for redevelopment of the Raglan Street site. Both applications for the redevelopment of the Raglan Street site proposed a supermarket with parking and a petrol filling station, private flats, sheltered housing and small commercial units. The main differences between the schemes were that the Tesco supermarket was more than 50% larger than Sainsbury's, and the Sainsbury's scheme proposed retail warehouses and a leisure centre. Outline planning permission was recommended for both schemes.

19 On 6 December 2006 the council's cabinet noted that Tesco and Sainsbury's were unable to agree on how the site should be developed and resolved to approve in principle the use of CPO powers in relation to the Raglan Street site if necessary, subject to a further report to cabinet setting out all relevant factors including the criteria for selecting the preferred redevelopment scheme.

20 Each of the applications by Sainsbury's and Tesco for development of the Raglan Street site came before the council's planning committee on 13 March 2007 when it was resolved to grant both applications subject to various requirements. In the report to committee concerning the application by Tesco, the case officer said:

"Initially Tesco indicated that they wished the development of the Royal Hospital site to be linked to the grant of permission for the development of Raglan Street. However, when their agents were asked how such a linkage could legitimately be made, they were unable to make a suggestion. There is therefore no such linkage for committee to consider."

21 Tesco's application for planning permission for development of the Raglan Street site was therefore considered without reference to the benefits of redevelopment of the Royal Hospital site. Planning permission for the Tesco proposal at the Raglan Street site was granted on 22 July 2009, which was also the date of a new conditional agreement for lease between the council and Tesco replacing the conditional agreement for sale of

A 3 November 2005. The agreement gives the council an option to purchase Tesco's interest in the Royal Hospital building. One of the terms is that, once certain works have been carried out by Tesco, then Tesco will make a balancing payment to the council which is to be used solely in connection with the completion of the Royal Hospital building works: schedule 1.

B 22 On 27 June 2007, in order to decide whose land to acquire compulsorily to facilitate the development of the Raglan Street site, the council's cabinet resolved to invite both Sainsbury's and Tesco to demonstrate the extent to which their respective development proposals met the council's objectives for the Raglan Street area. It also resolved that Sainsbury's and Tesco be advised that the council's preferred outcome remained that the parties would negotiate with each other to resolve the impasse.

C 23 On 30 January 2008 a report was presented to the council's cabinet which, having set out the statutory background and relevant advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, stated:

D "The remaining sections of this report consider the two schemes against the legal and policy tests set out in the Act and the circular and compare them with each other. There is no doubt that both the Tesco and Sainsbury's schemes would fulfil the statutory purpose of 'facilitating the carrying out of development, redevelopment or improvement on or in relation to the land'."

E 24 The report noted that both schemes for the Raglan Street site were acceptable in planning terms. The report went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco. Tesco was no longer seeking planning permission for a retail store on the site. The council had promoted a proposal by Tesco for a mixed use development comprising housing, offices, primary care centre and administrative offices, retail, financial services and professional offices and food and drink uses, together with associated parking. It would provide
F accommodation for a primary care centre and offices for the primary care trust.

G 25 The report said that Tesco's position was that a Royal Hospital site development in accordance with the council's aspirations was not viable and that the return to a developer in a scheme according with the council's aspirations (including 20% affordable housing content) would involve a substantial loss, which would mainly be caused by the refurbishment of the listed building element for the primary care trust. The scheme would be viable only through a cross-subsidy from the development of the Raglan Street site.

H 26 The report went on to say that whilst there was disagreement between Tesco and Sainsbury's about the viability of the Royal Hospital site development, it was clear that Tesco was unlikely to carry out its scheme unless it was selected as the operator of the store at Raglan Street and were thus able to cross-subsidise the Royal Hospital site development.

27 The report concluded:

"both schemes would bring appreciable planning benefits and would promote and improve the economic, social and environmental well-being

of the city. However, the Tesco scheme enjoys a decisive advantage in that it will enable the development of the RHS to be brought forward in a manner that is consistent with the council's planning objectives for that site. Making a CPO for the Tesco scheme will therefore result in a significantly greater contribution to the economic, social and environmental well-being of the council's area than would making a CPO for the Sainsbury's scheme. On this basis, and subject to the satisfactory resolution of the matters identified in the recommendations set out at the beginning of this report, there is a compelling case in the public interest to make a CPO to enable the Tesco scheme to proceed."

28 In accordance with the recommendation made in the report, the council's cabinet resolved to approve the principle of the making of a CPO of land owned by Sainsbury's to facilitate the carrying out of (i) Tesco's development proposals for the Raglan Street site and (ii) a mixed use retail, office and residential development of the Royal Hospital site, subject to, amongst other matters, Tesco producing satisfactory evidence of a commitment to the carrying out of the development of the Royal Hospital site before consideration be given to a resolution to authorise the making of the CPO. The cabinet decision of 30 January 2008 was referred to the council's scrutiny board and on 19 February 2008 the board resolved that the report be received and noted.

The issues

29 In the absence of agreement between Sainsbury's and Tesco, the only way in which the Raglan Street site can come forward for redevelopment is through the exercise of compulsory purchase powers. Section 226(1)(a) provides that the local authority has power to acquire compulsorily any land in its area if it thinks "that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". A local authority may use its powers of compulsory purchase to assemble a site for development by a preferred developer: *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33, para 6. It is common ground that the compulsory acquisition of the outstanding interests in the Raglan Street site would facilitate the carrying out of development, redevelopment or improvement on the land under either the Tesco scheme or the Sainsbury's scheme such that the test in section 226(1)(a) is met.

30 So also it is common ground that both schemes of redevelopment on the Raglan Street site would promote and improve the economic, social and environmental well-being of the city and therefore satisfy the requirement in section 226(1A) that a local authority must not exercise the power unless it thinks that "the development, redevelopment or improvement is likely to contribute to the achievement" of the well-being objects set out in the subsection. It is also agreed that the redevelopment of the Royal Hospital site as proposed would bring well-being benefits to the council's area, but Sainsbury's says that, contrary to the approach of the Court of Appeal, those well-being objects are not within section 226(1A), because they do not flow from the proposed redevelopment of the Raglan Street site.

31 The issues on this appeal are these. (1) Whether, on a proper construction of section 226(1A), the council was entitled to take into

A account, in discharging its duty under that subsection, a commitment by the developer of a site part of which was to be the subject of a CPO to secure (by way of cross-subsidy) the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. (2) Whether the council was entitled, in deciding whether and how to exercise its powers under section 226(1)(a), to take into account such a commitment by a developer.

B 32 On the first issue, relating to the interpretation and application of section 226(1A), the Court of Appeal, differing from Elias J, found in favour of the council and Tesco. On the second issue, relating to section 226(1)(a), Elias J found in favour of the council and Tesco, but the Court of Appeal did not find it necessary to decide the point because of its conclusion on section 226(1A).

C *The judgments of Elias J and the Court of Appeal*

Section 226(1A)

D 33 Elias J decided that, contrary to the argument of the council and Tesco, on a proper construction of section 226(1A), the Royal Hospital site benefits did not fall within its ambit. They would have been well-being benefits in relation to a CPO of that site, but in order to fall within section 226(1A) in relation to the development of the Raglan Street site, the benefits must flow from the development of the Raglan Street site alone, since that was the site covered by the CPO. The fact that a link between the two developments could be achieved by an agreement under section 106 of the 1990 Act did not entitle the council to treat what were in reality well-being benefits resulting from development of the Royal Hospital site as if they were generated by development of the Raglan Street site.

F 34 The Court of Appeal held that the council was entitled to take the Royal Hospital site benefits into account because they fell within section 226(1A). Whilst section 226(1)(a) focused the local authority's attention on what was proposed to take place on the CPO site itself and required the authority to be satisfied that the CPO would facilitate the redevelopment of the CPO site, section 226(1A) required it to look beyond the benefits that would accrue on the CPO site and to consider whether and to what extent the redevelopment of the CPO site would bring well-being benefits to a wider area. If the carrying out of the redevelopment of a CPO site was likely to act as a catalyst for the development or redevelopment of some other site or sites, then such catalytic effects were capable of falling within the scope of section 226(1A).

G 35 The financial viability of a proposed redevelopment scheme would be a highly material factor, and the proposed redevelopment of a CPO site might have to be cross-subsidised. It would be surprising if the potential financial implications of redeveloping the CPO site, including the possibility of cross-subsidy as a result of facilitating its redevelopment, were immaterial for the purposes of any consideration of the extent to which the carrying out of the redevelopment would be likely to contribute to wider "well-being" benefits.

H 36 The possibility of one development cross-subsidising another highly desirable development was capable of being a material consideration in the determination of a planning application under section 70(2) of the 1990 Act:

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87. The proposed cross-subsidy was a material consideration in the light of the council's obligation under section 226(1A) to take wider, off-site "well-being" benefits into account and in the light of the significance of financial viability and economic well-being in the CPO context.

Section 226(1)(a)

37 Elias J held that for the purposes of section 226(1)(a), when choosing between two developments either of which would in principle be facilitated by a CPO, the council was entitled to have regard to all the benefits which would flow from the development when determining in whose favour the CPO should be exercised, including any off-site benefits achieved by means of an agreement linking the development of the Raglan Street site to development of the Royal Hospital site. The Court of Appeal decided that it was not necessary to rule on the alternative submission by the council and Tesco that the Royal Hospital site benefits were material considerations under section 226(1)(a) in any event.

The CPO context

38 There is no doubt that where a body has a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose: *Simpsons Motor Sales (London) Ltd v Hendon Corpn* [1964] AC 1088, 1118, per Lord Evershed. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43, Lord Cranworth LC said that persons authorised to take the land of others "cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers". In *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193, 199 the High Court of Australia said that the statutory power to acquire land for a public purpose could not be used to "advance or achieve some more remote public purpose, however laudable". See also *Municipal Council of Sydney v Campbell* [1925] AC 338, 343.

39 So also the familiar rules on the judicial control of the exercise of legislative powers apply in the CPO context as elsewhere: see e.g, among many others, *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (Megaw J); *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (as explained in *de Rothschild v Secretary of State for Transport* (1988) 57 P & CR 330; *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117 (Laws J)).

40 Nor can it be doubted that off-site benefits may be taken into account in making a CPO. *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33 was a decision on the Scottish compulsory purchase provisions in the Town and Country Planning (Scotland) Act 1997, which are similar to, but not identical with, the equivalent provisions in the 1990 Act. Section 191 provided in substance that where land is acquired or appropriated by a planning authority for planning purposes, the authority might dispose of such land to any person to secure the best use of the land, and that the land could not be disposed of

- A otherwise than at the best price or on the best terms that could reasonably be obtained. The property in question was in a run down part of Bath Street and Buchanan Street, Glasgow. Proposals for redevelopment of the site by the developer contained a strong element of planning gain. The issue was whether the planning authority, exercising its compulsory purchase powers to redevelop a site, had acted ultra vires by entering into a back-to-back agreement with the developer in which the council had agreed to transfer the land to the developer in return for the developer indemnifying the council for the money expended in assembling the site and making it available. In effect the developer was to be put in the same position as if it had itself exercised the power of compulsory acquisition: para 14. It was held that the words “best terms” permitted disposal for a consideration which was not the “best price”, and so terms that would produce planning benefits and gains of value to the authority could be taken into account as well as terms resulting in cash benefits. It was accepted that the local authority could use its powers to assemble the site for development by a preferred developer: para 6. Lord Hope of Craighead (at para 39) and Lord Brown of Eaton-under-Heywood (at para 70) also accepted that account could be taken by a planning authority of the wider, off-site planning gains which would result from the exercise of its compulsory purchase powers. But these were benefits directly related to the site, and directly flowing from the development, and the decision does not help in the solution of the present appeal.

Other contexts

- 41 All parties, especially Sainsbury's, relied on authorities relating to planning applications, and in particular on those relating to the extent to which conditions attached to a planning permission must relate to the development; and the extent to which off-site benefits (whether under a section 106 agreement or not) are “other material considerations” to which the authority must have regard under section 70(2) of the 1990 Act in deciding whether to grant or refuse planning permission (or to impose conditions). In the Court of Appeal Sullivan LJ did not think that a “read-across” from the limitations on the exercise of the section 70(2) power was appropriate in the context of section 226.

- 42 In summary, Sainsbury's position was (a) the cases on the legitimate scope of planning conditions were relevant, from which it followed that the only off-site benefits which could be taken into account were those which fairly and reasonably related to the development in relation to which the CPO power was being exercised, that is the Raglan Street development; (b) the cases on section 70(2) also proceeded on the basis that there had to be a connection between the benefits and the permitted development; (c) a potential cross-subsidy was relevant only where there was a composite development. The position of the council and Tesco was that the Court of Appeal was right to say that there should not be a read-across from the planning permission cases to CPO cases, but in any event the authorities showed that financial considerations, including off-site benefits through cross-subsidies, were relevant, and were essentially a matter for evaluation by the planning authority.

43 It is necessary to note, at the outset, the relevant legal differences between this case and the cases in which similar questions have previously arisen. The first is that there is a difference between the exercise of powers of

compulsory acquisition and the exercise of powers to control development and grant planning permission, which is rooted in the deep-seated respect for private property reflected in the decisions cited above. The second is that both compulsory acquisition and planning control are solely creatures of statute, and that while the provisions which are relevant on this appeal are contained in one statute, the 1990 Act, the statutory provisions are different. The relevant provisions of section 226 have been set out above, and it is only necessary to repeat that section 226(1)(a) gives the local authority power to acquire compulsorily if "the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land" and does not contain, by contrast with section 70(2) on planning applications, any express reference to the authority having regard to "any other material considerations". Nevertheless the policies underlying planning permission and acquisition for development purposes are similar, and considerable assistance can be obtained from the learning in the case law on planning permissions.

"Fairly and reasonably relate" and "material considerations"

44 In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (reversed on other grounds [1960] AC 260) Lord Denning said (at p 572) in relation to what is now section 70(1)(a) of the 1990 Act:

"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

Pyx Granite had the right to quarry in two areas of the Malvern Hills. The company required permission to break fresh surface on one of the sites. Conditions attached to the planning permission relating to such matters as the times when machinery for crushing the stone could be used and the control of dust emissions were held valid. The facts do not appear fully in the judgments, but it seems that the equipment was on the part of the land under the control of the company which was not the land in respect of which the application for permission related, but they could properly be regarded (for the purposes of the Town and Country Planning Act 1947, section 14) as "expedient . . . in connection with" the permitted development. Lord Denning said, at p 574: "It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away."

45 Lord Denning's formula that "the conditions must [be] fairly and reasonably [related] to the development" was approved in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599 (Viscount Dilhorne), 607 (Lord Fraser of Tullybelton), 618 (Lord Scarman), 627 (Lord Lane). Viscount Dilhorne said, at p 599:

"It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that 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 . . ."

- A As Lord Hoffmann said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772, as a general statement this formulation has never been challenged. See eg *Grampian Regional Council v Secretary of State for Scotland* 1984 SC (HL) 58, 66. In the *Newbury* case itself it was held that the Secretary of State was entitled to come to the conclusion that a condition imposed by a local authority requiring the removal of existing substantial buildings was not sufficiently related to a temporary change of use for which permission was granted.

- B 46 The effect of the adoption of the *Pyx Granite/Newbury* formula was to put severe limits on the powers of planning authorities: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772–723. Conditions requiring off-site roadway benefits were held to be unreasonable in, for example, *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 (ancillary road condition held to be *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223)); *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55 (where it was suggested that it would make no difference if they were included in a section 106 agreement); cf *Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255 (not legitimate to refuse a planning application because it did not contain provisions for the increase of the proportion of car parking space subject to public control: the absence of a benefit not a reason for refusing planning permission where the benefit could not have been lawfully secured by means of a condition).

- D 47 Section 70(2) of the 1990 Act provides that in 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 to the application, and to any other material considerations”.

- E 48 There are two decisions of the Court of Appeal, and a decision of the House of Lords, which have a bearing on the questions on this appeal: *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87; *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. They deal with one or more of the following questions: the extent to which financial considerations are “material considerations” in planning decisions; what connection (if any) is required between the development site and off-site benefits for the purpose of material considerations; and the respective roles of the planning authorities and the courts in determining what considerations are relevant and what connection with off-site benefits is necessary.

- G 49 *R v Westminster City Council, Ex p Monahan* and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* are both cases in which Lord Denning’s “fairly and reasonably relate” formula in relation to conditions was extended to, or discussed in connection with, the issue of material considerations under section 70(2). In that context the decisions have been superseded by the decision in the *Tesco* case, but they contain valuable discussion by some distinguished members of the Court of Appeal on questions of some relevance to the determination of this appeal.

- H 50 In *Ex p Monahan* Lord Denning’s formula was discussed in a case involving enabling development, ie development which is contrary to established planning policy, but which is occasionally permitted because it

brings public benefits which have been demonstrated clearly to outweigh the harm that would be caused. The decision also discusses the question of the extent to which the provision of off-site benefits by the developer may be material. In the *Plymouth* case one of the issues was the extent to which off-site planning benefits promised by a section 106 agreement were material considerations.

R v Westminster City Council, Ex p Monahan

51 In *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 the Royal Opera House, Covent Garden Ltd, applied for planning permission and listed building consents to carry out a redevelopment, the central objective of which was to extend and improve the opera house by reconstruction and modernisation to bring it up to international standards, and to develop the surrounding area consistently with that project. Parts of the site were proposed to be used for the erection of office accommodation, which would be a departure from the development plan. The planning authority granted permission for the whole proposed development on the basis that the desirable improvements to the opera house could not be financed unless the offices were permitted. The applicants sought judicial review of that decision on the ground, inter alia, that the fact that a desirable part of a proposed development would not be financially viable unless permission were given for the other part was not capable of being a "material consideration" for the purposes of what is now section 70(2) of the 1990 Act in granting planning permission for the development as a whole.

52 It was held that financial considerations which fairly and reasonably related to the development were capable of being material considerations which could be taken into account in reaching that determination; and that the local planning authority had been entitled, in deciding to grant planning permission for the erection of the offices, to balance the fact that the improvements to the opera house would not be financially viable if the permission for the offices were not granted against the fact that the office development was contrary to the development plan.

53 On this appeal Sainsbury's accepts that in the context of section 70(2) the possibility of one development cross-subsidising another desirable development is capable, in limited circumstances, of being a material consideration, and that *Ex p Monahan* is such a case, where both developments formed part of one composite development. The council and Tesco say that *Ex p Monahan* supports their position because the Court of Appeal held the consequence of the financial viability of the proposed opera house development to be a relevant factor in the planning authority's determination.

54 Kerr LJ's reasoning was essentially this: (1) in composite or related developments (related in the sense that they can and should properly be considered in combination) the realisation of the main objective may depend on the financial implications or consequences of others; (2) provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation; (3) financial considerations may be treated as material in appropriate cases: *Brighton Borough Council v Secretary of State for Environment*

A (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806. He concluded, at p 117, by agreeing with Webster J's conclusion at first instance. Webster J had said:

B "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and to the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal."

55 The "fairly and reasonably related to the development" formula was applied by Kerr LJ (at pp 111–112), and Staughton LJ (at p 122) (who also agreed that there was a composite or related development).

D 56 There was some discussion in the *Ex p Monahan* decision of the limits of what could be taken into consideration, by reference to two hypothetical examples. The first example (which Kerr LJ said was an extreme example) was the case of the development of an undesirable office block in Victoria which was said to be necessary to generate the finance for a desirable development in Covent Garden. Kerr LJ said that a combination of this nature would be unlikely to be properly entertained as a single planning application or as an application for one composite development, and that such a case would involve considerations of fact and degree rather than of principle: at p 117. Nicholls LJ dealt with this point by saying, at p 121:

F "I am not persuaded by this *reductio ad absurdum* argument. Circumstances vary so widely that it may be unsatisfactory and unwise to attempt to state a formula which is intended to provide a definitive answer in all types of case. All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites, in Russell Street and elsewhere, and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme. It was open to the authority to treat the consequence, for the opera house works, of granting or withholding permission for offices as a material consideration in considering the part of the application which related to offices."

57 The second hypothetical example, the swimming pool at the other end of the city, was dealt with by Staughton LJ, at p 122:

H "The other extreme arises from the axiom of Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* [1986] 1 EGLR 199, 202G that planning permission cannot be bought and sold. Suppose that a developer wished to erect an office building at one end of the town A, and offered to build a swimming-pool at the other

end B. It would in my view be wrong for the planning authority to regard the swimming-pool as a material consideration, or to impose a condition that it should be built. That case seems to me little different from the developer who offers the planning authority a cheque so that it can build the swimming-pool for itself—provided he has permission for his office development . . . Where then is the line to be drawn between those extremes? In my judgment the answer lies in the speech of Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599, which Kerr LJ has quoted. Conditions imposed must ‘fairly and reasonably relate to the development permitted’, if they are to be valid. So must considerations, if they are to be material.”

58 The ratio of the decision in *Ex p Monahan* is that where there are composite or related developments (related in the sense that they can and should properly be considered in combination), the local authority may balance the desirable financial consequences for one part of the scheme against the undesirable aspects of another part. In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78, 88, Hoffmann LJ observed that the *Ex p Monahan* decision concerned what was treated as a single composite development, and held that there was a sufficient nexus between the office development and the opera house improvements to entitle the planning authority to say that the desirability of the latter fairly and reasonably related to the former, because of (1) the financial dependency of the one part of the development on the other and (2) their physical proximity.

59 The *Ex p Monahan* decision demonstrates, if demonstration were necessary, that financial considerations may be relevant in planning decisions. In *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 (cited on this point with approval by Kerr LJ in *Ex p Monahan*, at p 116) Woolf J accepted that the consequences of the financial viability or lack of financial viability of a development were a potentially relevant factor: the true question was not whether a development would be viable but what the planning consequences would be if it were not viable: see at p 807. See also *Soumots Investments Ltd v Secretary of State for the Environment* [1977] QB 411, 425, per Forbes J (for further proceedings see [1977] QB 411; [1979] AC 144).

R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd

60 The restrictive approach of the courts to conditions was one of the factors which led planning authorities to rely on planning obligations in attempting to secure planning gain. This led directly to the question whether planning authorities were entitled to treat benefits secured by way of a planning obligation as a material consideration in deciding whether to grant planning permission.

61 In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78 it was held that the planning authority could (against the opposition of the Co-op) take into account offers by Tesco and Sainsbury's to enter into section 106 agreements providing for substantial off-site benefits. The off-site benefits included an offer by

- A Sainsbury's of a payment of £1m for infrastructure which would enable a separate site to be made available for industrial use, and an offer by Tesco of a park and ride facility on another site. The Co-op's position was that a consideration was only material to the question of whether to grant planning permission, if it was necessary to the grant of permission, i.e., overcame some to the proposed development which would otherwise mean that permission could not be granted. It was held that although the benefits had to be
- B planning benefits and fairly and reasonably relate to the development, they did not have to be necessary.

- 62 This is a decision in which there was a connection between the development and the off-site benefits. All members of the court (Russell, Evans and Hoffmann LJ) accepted (at pp 82, 84, 87–88) that the off-site benefits related to the superstore development applications. The offer of
- C £1m by Sainsbury's for infrastructure would help to compensate for the reduction in the pool of resources for employment land. The park and ride facility offered by Tesco would counteract the increase in traffic caused by the superstore development: at pp 82–83; 90–91.

Tesco Stores Ltd v Secretary of State for the Environment

- D 63 But, although it has not been expressly overruled and the result would be the same today, the reasoning of the *Plymouth* decision can no longer stand, based as it was on the “fairly and reasonably related to the development” test: see at pp 81–82, 87, 89–90. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 there were rival plans for the development of superstores on different sites in Witney, Oxfordshire, by Tesco and Sainsbury's (in conjunction with Tarmac). At an
- E inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, the inspector approved the proposal for a link road and rejected that for a town centre superstore. Tesco offered to provide full funding for the link road. The Secretary of State allowed the Sainsbury's/Tarmac appeal, and dismissed Tesco's application: the funding offer was not fairly and
- F reasonably related in scale to the development; although there was a tenuous relationship between the funding of the link road and the proposed foodstore because of a slight worsening of traffic conditions (a 10% increase) the link was not needed. But if it were to be taken into account, then because of the tenuous nature of the connection, the partial contribution was too limited to affect the ultimate decision.

- 64 The House of Lords confirmed that the Secretary of State had
- G fulfilled his duty by taking the offer into account but according it very little weight. It was held that a planning obligation offered under section 106 of the 1990 Act by a developer was a material consideration for the purposes of section 70(2) of the Act if it was relevant to the development; and that the weight to be given to such an obligation was a matter entirely within the discretion of the decision-maker. Tesco's offer to fund the link road was sufficiently related to the proposed development to constitute a material
- H consideration under section 70(2). For the purposes of this appeal, the importance of this decision is the light it throws on the nature of the necessary link between the development and the off-site benefit.

65 The House of Lords held that the *Pyx Granite/Newbury* test for planning conditions was not applicable in the context of the question

whether section 106 obligations were material considerations under section 70(2). Lord Keith of Kinkel said, at pp 764, 770: A

“Sir Thomas Bingham MR in the course of his judgment in this case said that ‘material’ in [section 70(2)] meant ‘relevant,’ and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision-maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense . . . An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker and in exercising that discretion he is entitled to have regard to his established policy.” B
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66 All members of the appellate committee agreed with Lord Keith’s opinion, and the ratio of the decision is that for the purposes of section 70(2) any benefit whose connection with the development is more than de minimis will be a material consideration, but that the weight to be given to any particular material consideration is entirely a matter for the decision-maker.

67 It has often been said that planning permissions should not be bought or sold: see *City of Bradford Metropolitan Council v Secretary of State for the Environment* 53 P & CR 55, 64, per Lloyd LJ (on which see the *Plymouth* case, at p 84, per Evans LJ; *Ex p Monahan*, at p 122, per Staughton LJ; the *Tesco* case, at p 765, per Lord Keith, and p 782, per Lord Hoffmann); and accepted as a matter of policy in ODPM Circular 05/2005, *Planning Obligations*, para B6 (reflecting its predecessors): E
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“The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms . . .”

68 Responding to the point that the approach in the *Plymouth* decision leads to the prospect of the sale and purchase of planning permissions, Lord Hoffmann contrasted cases in which there was a “sufficient connection” between the development and a planning obligations and those in which they were “quite unconnected”. He said [1995] 1 WLR 759, 782: G

“This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* H

- A 67 P & CR 78, was such a case, leading to concern among academic writers and Steyn LJ in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term 'auction' rather than 'competition' to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits . . ."
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Conclusions

- 69 There is no doubt that in the light of the report of 30 January 2008, the council had purportedly resolved in principle to make the CPO for the purpose of facilitating both the development of the Raglan Street site and that of the Royal Hospital site. That would be sufficient to vitiate the resolution. But Elias J and the Court Appeal accepted that there would be no point in quashing the resolution on that ground alone, since a more felicitously worded resolution could be passed if the benefits to be derived from the development of the Royal Hospital site were relevant under section 226(1)(a) or section 226(1A).
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- 70 What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Ex p Monahan* [1990] 1 QB 87 about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.
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- H 71 Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather

than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made.

72 What is the connection in the present case? The expression “cross-subsidy” has been much used by Tesco and the council. The expression bears a special meaning in this case. Its most common use is in the competition field, where it usually connotes improper allocation of costs in different product or geographic markets, which may result in predatory pricing or other anti-competitive activity. Here all it means is that Tesco says that (a) the council’s requirements for the Royal Hospital site have the result that Tesco cannot develop it profitably; and (b) Tesco will undertake its development if it can develop the Raglan Street site. Tesco says that the consequence of (a) and (b) is that the Raglan Street site development will “cross-subsidise” the Royal Hospital site development. But the only connections between the proposed Raglan Street site and Royal Hospital site developments are that (a) Tesco says that it will develop the latter if it can develop the former; (b) it has contractually agreed to perform building works on the Royal Hospital site if it acquires the Raglan Street site. The commercial effect will be that the deficiency on the Royal Hospital site will be made up, or “cross-subsidised”, by the Raglan Street site development. Nothing in the papers before the court suggests that this will be done by any direct subvention from the income or capital proceeds of the Raglan Street site, but this would not in any event make a difference. It is entirely a matter for Tesco how it funds any loss from, or presents any lower return from, the Royal Hospital site. This is only a connection in the sense that either (a) the council is being tempted to facilitate one development because it wants another development; or (b) Tesco is being tempted to undertake one uncommercial development in order to obtain the development it wants.

73 The crucial question is whether that is a connection which the council is entitled to take into consideration under section 226(1)(a) or section 226(1A). To take the latter first, Elias J was right to hold that section 226(1A) was not the crucial provision for the purposes of this case. It does not answer the prior question of what matters can be taken into consideration.

74 The power of compulsory acquisition must be capable of being exercised under section 226(1)(a) before the limitation in section 226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. The council was entitled to come to the view for the purposes of section 226(1A) that the Raglan Street site development would contribute to well-being in its area, but not on the basis of the benefits which would derive from the Royal Hospital site development. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.

75 But that matters little since the crucial question is whether the council was entitled to take it into account under section 226(1)(a). There can be no doubt that, even if there is no express reference in section 226(1)(a)

A to the local authority taking into account material considerations (by contrast with section 70(2)), only relevant matters may be taken into account. For the reasons given above, the claimed financial connection between the two sites was not such as to amount to a relevant matter. It is true, as Sullivan LJ said (at para 34), that the financial viability of a proposed redevelopment scheme would be a highly material factor, and that a proposed redevelopment of a CPO site might have to be cross-subsidised.

B But Sullivan LJ was wrong to conclude that it followed that a cross-subsidy from a CPO site to another site was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant connection.

76 Nor do I consider, despite the views of Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC to the contrary, that a different result on this appeal is required by the fact that Sainsbury's and Tesco were in competition for the site, and that the council is proposing to dispose of the land to Tesco under section 233. They accept that the council was not entitled to take the benefits from the Royal Hospital site development into account in making the CPO, but consider that the opportunity for redevelopment of the Royal Hospital site would be a relevant matter to be taken into account by the council in exercising the power of disposal to Tesco under section 233.

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77 First, as a matter of principle it is impossible to put into separate compartments the exercise by the council of its power of compulsory purchase of Sainsbury's property, and the exercise of the council's power to dispose of Sainsbury's property to Tesco, and then to conclude that the Royal Hospital site development may not be taken into account for the former, but can be taken into account for the latter. It is wrong for the council to deprive Sainsbury's of its property because the council will derive from disposal of that property benefits wholly unconnected with the acquisition of the property.

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78 Second, although it is plain that the power of compulsory purchase may be used to assemble a site for a preferred developer, there is nothing in *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33 which supports the proposition that unconnected benefits may be taken into account by a local authority in deciding whether property should be compulsorily acquired for the purpose of disposing of it to a preferred developer. The background to the appeal was a competition between developers for the right to develop a run down part of Buchanan Street, Glasgow. Two developers in particular were keen to develop the site, Atlas Investments and Standard Commercial, each of which owned part of the site. The council, when inviting all the owners and occupiers of the land on the site to submit proposals for redevelopment, said that successful submissions should seek a mix of activities and functions which would bring added activity to the area outside normal retailing hours, and encouraged applicants to allocate a budget to the cost of integrating public art into the development and include improvements to the relevant areas of adjoining streets, and so contribute to the transformation of Glasgow city centre. Those were the wider planning gain benefits to which Lord Hope referred in his opinion: para 39. Similarly Lord Brown of Eaton-under-Heywood (at para 70) referred to the council's desire to obtain economic and social benefits for Glasgow. But it is clear from Lord Hope's opinion

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in that decision, as he accepts in his judgment on this appeal, that the benefits which the developers were invited to confer were related to the site, and the immediately adjoining area. There is nothing in the decision to support the conclusion that in this case the promise to develop the Royal Hospital site would have been a material consideration in a disposal under section 233.

79 I would therefore allow the appeal, and make an order declaring that the opportunity for redevelopment of the Royal Hospital site is not a lawful consideration in deciding whether to make a CPO in relation to the Raglan Street site.

LORD WALKER OF GESTINGTHORPE JSC

80 In agreement with Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC, I would allow this appeal. I agree with the reasons set out in the full judgment of Lord Collins JSC, supported by the shorter judgments of Baroness Hale and Lord Mance JJSC. But in view of the difference of opinion within the court I will try to summarise my reasons in my own words.

81 This appeal is concerned with compulsory acquisition of land for *planning purposes* (that being the general ambit of both paragraphs (a) and (b) in section 226(1) of the Town and Country Planning Act 1990). The land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential. Economic regeneration brought about by urban redevelopment is no doubt a public good, but “private to private” acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive. To the authorities mentioned by Lord Collins JSC in paras 9–11 of his judgment might be added the famous split of the United States Supreme Court in *Kelo v City of New London, Connecticut* (2005) 545 US 469, discussed in *Gray & Gray, Elements of Land Law*, 5th ed (2009), paras 11.2.6 and 11.2.7. *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12 mentioned by Lord Collins JSC was also in substance largely a “private to private” acquisition, although the local authority used a declaration of trust to give the acquisition a better appearance.

82 Where a local authority is considering exercising powers of compulsory purchase for planning purposes, planning considerations must be central to the decision-making process. The public purse is to be protected against improvidence, but the local authority should not be exercising its powers in order to make a commercial profit. In *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33, Lord Brown of Eaton-under-Heywood, at para 75, described that proposition as “deeply unattractive”. Section 233 of the 1990 Act differs from its Scottish counterpart in that subsection (3) expressly contemplates a disposal “for a consideration less than the best that can reasonably be obtained”, though only with the consent of the Secretary of State. But both in Scotland and in England a “back-to-back” arrangement (under which the local authority makes neither a commercial loss nor a commercial gain from its participation, using section 226 powers, in a scheme of comprehensive urban redevelopment) is standard practice. The dominant aim is betterment in planning terms.

A 83 That to my mind is why the issue of what would be material
considerations for the purposes of deciding an application for planning
permission is also relevant to a decision to exercise powers of compulsory
acquisition under section 226. The quality of the proposed redevelopment
of the site is of crucial importance. Its larger impact on the authority's area
is also an essential element in the decision-making process, because of
B section 226(1A). In common with all the members of the court I consider
that section 226(1A) has the effect of imposing an extra requirement which
is a necessary but not a sufficient condition for the exercise of powers under
226(1). Section 226(1A) does not qualify, still less act as a substitute for, the
requirements of the preceding subsection.

84 But the exercise of powers of compulsory acquisition, especially in a
"private to private" acquisition, amounts to a serious invasion of the current
C owner's proprietary rights. The local authority has a direct financial interest
in the matter, and not merely a general interest (as local planning authority)
in the betterment and well-being of its area. A stricter approach is therefore
called for. As Lord Collins JSC says in his conclusions at para 71 of his
judgment, a real (rather than a fanciful or remote) connection must be
shown between any off-site benefits and the proposed redevelopment for
D which a compulsory purchase order is proposed.

85 Lord Brown JSC has posed a rhetorical question in para 182 of his
judgment. After referring to the *Standard Commercial* case he has
commented:

E "it is surely implicit in that decision—and, indeed, in the respective
legislative requirements in both England and Scotland in effect to get
what I called there (para 68) 'the best overall deal available'—that, by the
same token as a cash bidding match would have been possible, so too
would have been an offer of other benefits, however extraneous. Why
ever not?"

With great respect to Lord Brown JSC I think that he has answered his own
question in the passage of his speech in the *Standard Commercial* case, at
F para 75:

"I find deeply unattractive the proposition that, almost inevitably at
the expense of some beneficial aspect of the development scheme, the
authority should be seeking to make a profit out of the exercise of its
statutory powers of acquisition."

G 86 A cash bidding match, or the exaction of extraneous benefits, has
superficial attractions as a tie-breaker, especially if there are two contenders,
both with very deep pockets, like Tesco and Sainsbury. The merits of their
respective schemes are closely matched, as appears from the summary in
para 11 of the officers' recommendation document dated 30 January 2008.
It is true that the Tesco scheme is said in the summary to offer more jobs, but
the Sainsbury scheme might create an unspecified number of extra jobs
H through re-use or development of its St George's Parade site: para 6.6. The
Tesco scheme would be delivered "by a well resourced operator" but the
detailed consideration of delivery (para 7) ranked the two contenders as
equally capable. Tesco's only apparently decisive advantage was (para 11.3)
the offer of cross-funding for the RHS development.

87 Since their proposals are such that there is little, if anything, to choose between them in planning terms, why should not the local authority look to some substantial extraneous benefit which one contender offers, rather than having to make the difficult choice of a winner between contenders whose proposals are equally satisfactory on planning grounds? The answer is simply that it is not the right way for a local authority to make a decision as to the exercise of its powers of compulsory purchase, any more than it could choose a new chief executive, from a short list of apparently equally well qualified candidates, by holding a closed auction for the office. As Lord Keith of Kinkel said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770:

“An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission.”

88 The fact that an exercise of powers of compulsory acquisition and a “back to back” disposal to a developer are prearranged is unable: see Lord Rodger of Earlsferry in the *Standard Commercial* case, at para 53. But that does not mean that the proper consideration of the exercise of powers of compulsory acquisition under section 226 of the 1990 Act can be telescoped into the exercise of powers of disposal under section 233. On this point I am in full agreement with the judgment of Baroness Hale JSC.

89 For these reasons I would allow this appeal and make the declaration proposed by Lord Collins JSC.

BARONESS HALE OF RICHMOND JSC

90 I agree that this appeal should be allowed, for the reasons given by Lord Collins of Mapesbury JSC, together with the further reasons given by Lord Walker of Gestingthorpe and Lord Mance JJSC. Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC also agree with the reasoning of Lord Collins JSC, on the points upon which he differs from Lord Brown of Eaton-under-Heywood JSC, but they disagree in the result. As I understand it, they consider that the extraneous benefit offered by Tesco, although it would not normally be a relevant consideration in the compulsory purchase decision, would be a relevant consideration when the council came to dispose of the land under section 233(1) of the Town and Country Planning Act 1990. Accordingly, as in practice the decisions may be taken simultaneously, that consideration can be read back into the decision compulsorily to purchase the Sainsbury land under section 226(1).

91 For the reasons given by Lord Mance JSC, I find it difficult to accept that proposition. It puts the cart before the horse. The council have nothing to dispose of unless they have acquired the land, whether voluntarily or compulsorily. They can only acquire the land compulsorily under section 226(1)(a) “if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land”. The matters to be taken into account in making that decision have to be relevant to that purpose.

92 I agree, as Lord Mance JSC puts it at para 98 of his judgment, that the considerations admissible in relation to compulsory purchase are “no wider” than those admissible in relation to the grant of planning permission.

- A Although the grant of planning permission is a “useful analogy”, it is a different exercise. The considerations material to that exercise are also material, but in a rather different way, to the compulsory purchase decision. Thus, under the former version of section 226(1) (quoted by Lord Phillips PSC at para 121 of his judgment), the considerations which would be material to the grant of planning permission for development on the land were also material to whether the land was “suitable for development”.
- B That was a sine qua non for compulsory purchase to “secure” development. This seems obvious. It cannot be proper to deprive a person compulsorily of his land in order to secure something which will not be allowed to take place. Under the new version of section 226(1), the permissibility of *some* development (together with a reasonable prospect of its actually taking place) should be a sine qua non for compulsory acquisition in order to
- C “facilitate” it. The question does not arise in this case, because we are agreed that the extraneous benefit to the Royal Hospital site would not be relevant to the grant of planning permission for this site, any more than it is relevant to the compulsory purchase decision.

- 93 Acquiring the whole of the Raglan Street site *would* facilitate the development of *that* site (although it is worth noting that Sainsbury have so much of the site that they could carry out a development, albeit a less satisfactory one, without further compulsory acquisition). Persuading Tesco to carry out a wholly unrelated development upon another site elsewhere in the city, desirable though that may be for the city and people of Wolverhampton, does nothing to facilitate the development of the Raglan Street site. Rather, it is the other way round.
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- 94 It is difficult to understand why the fact that Sainsbury also wish to develop the Raglan Street site should make any difference. If it would not be permissible to take into account the extraneous benefit when deciding compulsorily to purchase land from an unwilling owner who did *not* himself wish to develop it, it seems even less permissible to take it into account as against an unwilling owner who *does*. In the former situation, a development which would not otherwise take place would be facilitated; in the latter, it would not be facilitated because the development would take place in any event. (I might comment that Sainsbury would probably never have found themselves in this mess if they had not twice changed their mind about whether to develop this site.)
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- 95 The case of *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33 is entirely consistent with this view. A council can agree to assemble a site for development, using their compulsory purchase powers if necessary, and to sell it to their chosen developer. It makes sense, but it is not essential, to conduct the two exercises in tandem. But the considerations relevant to the selection of the developer in that case were all relevant to the development of that site. The selection criteria adopted (and carefully graded) by the council were all directly related to the quality of the development of the site and the feasibility of the would-be developers' carrying it out: see Lord Hope of Craighead, at para 22. There were no subsidiary planning obligations involved, still less any wholly extraneous benefits offered. In any event, the battle was not about the selection criteria, but about whether the proposed terms of disposal were the best obtainable and there was no evidence that they were not. Even if it were permissible to take a wholly extraneous benefit into
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account when deciding to whom to sell the land, it does not follow that it is permissible to take that benefit into account when deciding compulsorily to deprive a person of their land.

96 Finally, I agree that section 226(1A) operates as a limitation on the power defined by section 226(1)(a). It is therefore necessary first to consider whether the acquisition will facilitate the development of the land; and only if it will do that, to consider whether the development itself will contribute to the promotion or improvement of the economic, social or environmental well-being of the area.

LORD MANCE JSC

97 I consider that this appeal should be allowed. I agree with the reasons given by Lord Collins of Mapesbury JSC, supplemented by those given by Lord Walker of Gestingthorpe and Baroness Hale of Richmond JJSC, and wish to add only a few comments on one aspect, relating to the basis upon which Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC (and Lord Brown of Eaton-under-Heywood JSC in an alternative) come in their judgments to an opposite result.

98 Like Lord Phillips PSC (paras 134–135), I agree with Lord Collins JSC's conclusion that a planning authority, when considering a planning application, is only entitled to take into account a planning obligation which the applicant offers if that obligation has some connection with the relevant development, apart from the fact of its offer. I also consider that there is a useful analogy between the grant of planning permission and the exercise of a power of compulsory purchase under section 226(1)(a) of the Town and Country Planning Act 1990, and that the considerations admissible in relation to the latter power are, in the respect mentioned in the previous sentence, no wider than those admissible in relation to the former.

99 In this case, the (decisive) attraction of Tesco's proposal in respect of the Raglan Street site consisted of Tesco's offer to use the profits to subsidise the wholly unconnected development by it of the Royal Hospital site, elsewhere in Wolverhampton, which the city council wished to see take place. Lord Phillips PSC accepts in para 138, for reasons which I have summarised in the previous paragraph, that, had Sainsbury been here "simply an owner who was unwilling to sell his land", it would not have been legitimate for Wolverhampton City Council to take this attraction into account in deciding to exercise its powers of compulsory purchase to facilitate Tesco's scheme in respect of the Raglan Street site. Likewise, he accepts (para 140) that, if Sainsbury and Tesco had been seeking in competition with each other to develop a site in the ownership of a third party, then, too, it would not been admissible for the city council to decide compulsorily to purchase the third party site because of the attraction of Tesco's offer to develop a wholly unconnected site.

100 However, Lord Phillips PSC and Lord Hope DPSC consider that it makes all the difference that, in this case, Sainsbury and Tesco were in competition for the same site (in fact owned or controlled as to 86% by the former and 14% by the latter). I cannot accept that distinction. On its logic, it should make no difference if Sainsbury owned and wanted itself to develop the whole Raglan Street site: Tesco, if it wanted to develop that site, could, by offering to devote part of the profits to the Royal Hospital project, still legitimately induce the city council compulsorily to purchase Sainsbury's

- A property in order to sell it to Tesco for the Raglan Street development. Lord Phillips DPSC's reference (para 147) to "the fact that the compulsory purchase of land owned by one or the other is involved" as "really peripheral" in a case where there are rival developers goes far towards accepting this conclusion. Alternatively, if some way of avoiding this conclusion exists, the logic must still be that Tesco, by acquiring only one house on the proposed Raglan Street site, could alter fundamentally the considerations admissible in relation to a decision whether compulsorily to purchase Sainsbury's property, rather than Tesco's, in order to facilitate the development of the Raglan Street site. In either case, I do not think it right to describe as "motivated by commercial rivalry" (para 147) the wish of a landowner in Sainsbury's position to develop its own land—or its wish to have any decision to compulsorily purchase its land for the benefit of some other developer made by reference to factors having at least some connection with its land.

- 101 The error in my view lies in divorcing the exercise of the power of compulsory purchase from the property to which it relates. Two different exercises of that power are here in issue relating to two different pieces of land. When a planning authority exercises compulsory purchase powers to promote a particular development, it does this in relation to specific property and only so far as necessary. In the present case, if Sainsbury's scheme is preferred on its admissible planning merits, then only Tesco's property will be compulsorily purchased, and vice versa. The council's first decision is therefore which development it prefers, and that will determine whose property is compulsorily purchased. The council's decision which development it prefers must be taken having regard to considerations which are admissible in the context of the development for which property is to be compulsorily purchased. Thus, when deciding whether compulsorily to purchase Sainsbury's property, it was not admissible to have regard to Tesco's offer relating to the unconnected development of the Royal Hospital site. If the Raglan Street site had already been in council ownership, and there were two interested developers, the council could of course take into account under section 233 any inducement offered by either—whether in terms of price or some unconnected benefit (such as an undertaking to develop the Royal Hospital site)—as Lord Hope DPSC says in para 155. But that is for the very reason that the only relevant decision would then relate to the disposal of the council's own property. Where the council is deciding whether compulsorily to purchase third party property under section 226(1)(a), the interests of the third party mean that the council must have regard only to considerations which are admissible in the context of the development for which such property is required.

- 102 *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33, to which Lord Phillips PSC and Lord Hope DPSC refer, does not in my view support the conclusion which they reach. It was a case where the Glasgow City Council took its decision which development to prefer on grounds which related scrupulously to the merits of the proposed development, without reference to unconnected factors: see e.g. paras 21–23, per Lord Hope, para 50, per Lord Rodger of Earlsferry and para 73, per Lord Brown. There was, as Lord Hope DPSC notes in para 155 in his present judgment, a strong element of planning gain involved in the potential development. But it was planning gain related to the development,

not to some entirely unconnected development, so that the case has no analogy with the present.

103 The issue before the House arose because all potential developers were required to provide an indemnity for Glasgow City Council's costs in effecting the compulsory purchase: paras 22, 50 and 73; and it was this feature which the losing developer criticised. There was some discussion of the possibility that the rival developers might have been invited to enter a bidding match in terms of the price to be paid: para 41, per Lord Hope, para 62, per Lord Rodger and paras 72–73, per Lord Brown. In paras 41 and 72, Lord Hope and Lord Brown both expressed their difficulty in understanding how such a bidding match would work.

104 At most, one might read into the discussion in the *Standard Commercial Property* case a tacit assumption that such a bidding match might have been permissible if possible, but that does not make the case authority on a point which was evidently not argued in that case, any more than it was in fact argued on the present appeal. The focus in the *Standard Commercial Property* case was on whether the terms on which the Glasgow City Council was proposing to dispose of the property, once compulsorily acquired, met the requirements of section 191(3) of the Town and Country Planning (Scotland) Act 1997. Section 191(1) provided that any land acquired and held for planning purposes could be disposed of to such person, in such manner and subject to such conditions as might appear expedient to secure purposes mentioned in section 191(2), viz the best use of that or other land, etc. Section 191(3) provided that any land so disposed of should only be disposed of "at the best price or on the best terms that can reasonably be obtained". The requirements of section 191(1) and (2) on the one hand and of section 191(3) on the other were, as Lord Hope said, at para 34, "separate and distinct". The issue before the House was, as Lord Hope made clear throughout paras 31–42, simply whether the proposed terms of disposal fell within section 191(3).

105 It is material to think about the consequences if the *Standard Commercial Property* case were to be treated as any sort of authority that a planning authority may, when deciding whether compulsorily to acquire property belonging to one landowner ("A"), have regard to the price offered for the land by potential developer ("B"). There would seem to be no logical reason to limit these consequences to situations where A and B are in competition, or to situations where the potential development extends beyond A's property and includes some property already owned by B. If, in any situation, B were to offer to repurchase A's property from the planning authority on terms giving the planning authority a profit, once the planning authority acquired it by compulsory purchase from A, why would that be illegitimate? Yet A would have little or no means of countering such an inducement. A could not offer any corresponding profit in respect of land which it already owned. And it could not be legitimate for A to offer the local authority a share in the profit it hoped to make from developing its own land, in order to induce the local authority to refrain from compulsorily purchasing its land for the benefit of B. That would amount to buying a local authority's exercise of its discretion. It might be suggested that if, as here, B owned some land which it was desired to include in an overall development, then A might counter B's offer in respect of A's land, by offering the planning authority a profit on the resale of B's land, if it were

- A compulsorily to acquire that land rather than A's. Apart from the evident inappropriateness of any such bidding war, B's relevant land holding might (as here) be much smaller in area, and, unless it is supposed that A could legitimately offer a ludicrously high price for B's land, the financial attraction for the planning authority of A's offer could not match that of B's. So far, I have spoken only in terms of a bidding match relating to the price to be paid by the developer for the property to be compulsorily purchased.
- B That was the only situation to which any discussion at all was addressed in the *Standard Commercial Property* case. The present case concerns the further question whether a proposed developer could influence the exercise by a planning authority of a discretion (viz whose property compulsorily to purchase and for the benefit of which of two potential developers) by offering some benefit wholly unconnected with any property the subject of the proposed development. In this context, it seems to me even clearer that the *Standard Commercial Property* case cannot lend support to Tesco's case on this appeal.

- 106 For these reasons, I do not regard the *Standard Commercial Property* case as justifying a conclusion that, as soon as rival developers are competing to develop a single site, part owned by each, considerations become material which would be immaterial if the whole site had been owned by one of them or by a third party. If the discussion in the judgments in that case lends any support to Tesco's case, the point did not arise for decision and was not argued there, any more than it was on the appeal in the present case. As a matter of principle, in my opinion, there is no basis on which the fact that Sainsbury and Tesco were, in a broad sense, rival developers in respect of the same overall site, can or should
- E alter fundamentally the considerations admissible when the city council came to consider which development it should prefer, and which property it should, therefore, compulsorily acquire to facilitate such development. Any such decision fell to be made by reference, and only by reference, to considerations having some connection with the proposed development, and not by reference to any entirely unconnected inducement which might
- F be held out by one of the rival developers. Like Lord Collins, Lord Walker and Baroness Hale JJSC, I would therefore allow Sainsbury's appeal.

LORD PHILLIPS OF WORTH MATRAVERS PSC

Introduction

- G 107 The facts of this appeal are set out in detail in the judgment of Lord Collins of Mapesbury JSC. In essence they are simple. The issue that they raise is not. As every shopper knows Sainsbury and Tesco are rivals. Each owns a chain of supermarkets. Each is anxious to open a supermarket on a site at Wolverhampton ("the site"). To this end Sainsbury has acquired 86% of the site and Tesco has acquired 14%. These figures ignore, as shall I for it has no materiality, the fact that Wolverhampton City Council ("the council")
- H owns a very small part of the site. Sainsbury and Tesco have each prepared a development plan for the site. The plans are very similar. Tesco has obtained planning permission for its plan and Sainsbury is in a position to do the same. The council is anxious that one or other development plan should be implemented, for it will be likely to contribute to the well-being of the

area. The problem is that neither of the rivals is prepared to give way, and in so doing to sell its portion of the site to the other. A

108 To resolve this impasse the council is prepared to use its powers of compulsory purchase to buy the land of one of the rivals and sell it to the other. Those powers are conferred by the following sections of the Town and Country Planning Act 1990, as amended:

“226 Compulsory acquisition of land for development and other planning purposes B

“(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land or; (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. C

“(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area.” D

“233 Disposal by local authorities of land held for planning purposes

“(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order— (a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority . . . E

“(3) The consent of the Secretary of State is . . . required where the disposal is to be for a consideration less than the best that can reasonably be obtained . . .” F

109 It is common ground, and rightly so, that the statutory requirements of section 226 are satisfied, so that the council has statutory power compulsorily to purchase the land owned by either of the rivals. There is little, if anything, to choose between the rival development plans. The council has, however, decided to prefer Tesco. Its intention is compulsorily to purchase Sainsbury's land and to sell this to Tesco. Its reason for this decision is as follows. Tesco own another site in Wolverhampton, the Royal Hospital site (“RHS”). This is run down and crying out for regeneration. The council wishes Tesco to redevelop this in a way which Tesco contends is uneconomic. Tesco has, however, agreed to enter into an obligation to redevelop the RHS in accordance with the council's wishes provided only that the council prefers Tesco in the competition for the development of the site. This obligation has been described as involving a “cross-subsidy” of the RHS redevelopment from the G

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A site development. The council has regarded this obligation as decisive in preferring Tesco to Sainsbury in the competition for the development of the site.

B 110 The issue raised by this appeal is whether Tesco's undertaking to develop the RHS in accordance with the council's wishes is a matter to which the council can properly have regard when deciding upon a scheme for developing the site that involves the compulsory purchase of Sainsbury's land.

RHS redevelopment

C 111 The RHS is about half a mile away from the site, on the other side of the city centre. When Tesco applied for planning permission for the development of the site, it sought initially to link this with the redevelopment of the RHS. It was, however, unable to demonstrate any connection between the two, and ultimately accepted that there was no linkage for the planning committee to consider. The reality is that there is no connection between the development of the site and the RHS development other than Tesco's agreement to proceed with the latter if granted the former.

D *The "cross-subsidy"*

E 112 I am puzzled by the nature of the so-called "cross-subsidy". Under what is commonly described as a "back-to-back agreement" Tesco has agreed to indemnify the council in relation to the cost to the council of compulsorily purchasing Sainsbury's 86% of the site. Tesco has further agreed to redevelop the RHS at what Tesco contends will be a commercial loss. Tesco states that it will be able to afford this because of the cross-subsidy that will be available if it is permitted to develop the site. It is thus implicit that Tesco anticipates that development of the site will result in an economic benefit that will enable it to entertain a loss-making venture. That economic benefit should, however, be reflected in the price that Tesco, as a willing buyer, would be prepared to pay to Sainsbury, as a willing seller, if F Sainsbury's land were to be sold directly to Tesco in an open market transaction. That, as I understand the position, is precisely the amount to which Sainsbury will be entitled from the council as compensation for the compulsory acquisition of their land: see *Waters v Welsh Development Agency* [2004] 1 WLR 1304, paras 17 and 18. If Tesco has to pay the council this amount under the back-to-back agreement it is not easy to see G how there will remain to Tesco any surplus economic benefit to fund a loss-making venture at the RHS. Be this as it may, that is precisely what Tesco has agreed to do. Accordingly I approach this appeal on the basis that the compulsory purchase of Sainsbury's land will procure for the council the benefit, not merely of the development of the site, but of the redevelopment of the RHS under the obligation that Tesco has agreed to assume. I shall describe this, by way of shorthand, as "the RHS benefit".

H *An analysis of the issues*

113 The basic issue raised by this appeal is whether the RHS benefit is a legitimate, or material, consideration to which the council can have regard when deciding whether to acquire Sainsbury's land by compulsory purchase

in the particular context of the competition that exists between Sainsbury and Tesco for this development. This basic issue subdivides into two separate questions: (i) Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury was not competing for the development? (ii) Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco? If the first question is answered in the affirmative, the second question must necessarily also be answered in the affirmative. A negative answer to the first question will not, however, necessarily require a negative answer to the second.

Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury were not competing for the development?

114 The statutory power of compulsory purchase can only lawfully be used for the purpose for which the power has been conferred. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43 Lord Cranworth LC said:

"The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers."

115 Section 226(1)(a) and 226(1A) confers the power compulsorily to purchase land, but to justify the exercise of that power the council must be able to show that this is clearly in the public interest: "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament *and the public interest decisively so demands*" (my emphasis), per Lord Denning MR in *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198. In this case it is common ground that the requirements of section 226 are satisfied and that if (i) there was no competing scheme and (ii) Tesco was not prepared to provide the RHS benefit, the public interest would none the less justify the compulsory purchase of Sainsbury's land in order to enable Tesco to carry out the development. If, however, this were not the case, would the offer by Tesco of the RHS benefit be a material consideration to which the council could have regard when deciding whether the exercise of their power of compulsory purchase was justified?

The ambit of section 226(1A)

116 Section 226(1A) of the Act sets out preconditions to the exercise of the power of compulsory purchase. The development facilitated by the compulsory purchase must be likely to contribute to the improvement of the economic, social or environmental well-being of the area. The Court of Appeal held that because the compulsory purchase of Sainsbury's land would result in the RHS benefit which, in its turn, would contribute to the economic, social or well-being of the area, this, of itself, satisfied section 226(1A).

- A It necessarily followed that the RHS benefit was a material consideration to which the council could have regard when considering the compulsory purchase of Sainsbury's land.

- B 117 This finding differed from that of Elias J at first instance. I consider that Elias J was correct and the Court of Appeal wrong. The reasoning of the Court of Appeal appears from the following passages of the only reasoned judgment, which was delivered by Sullivan LJ [2009] 3 EGLR 94, paras 26–29:

- C “26. Though convoluted, subsection 226(1A) is expressed in deliberately broad terms: ‘likely to contribute to the achievement of . . . [the well-being] . . . objects’. It is not prescriptive as to the manner in which the carrying out of redevelopment upon a CPO site might make a contribution to such wider benefits. Mr Lockhart-Mummery accepted that one of the more obvious ways in which the carrying out of redevelopment on a CPO site might, at least in principle, be capable of bringing economic/social/environmental benefits to a wider area would be if the redevelopment was likely to act as the catalyst for the development or redevelopment of some other site or sites within the authority's area.

- D “27. Such a catalytic effect might be direct, e.g. because redeveloping the CPO site would be likely to enable the occupier of another, run down site in the authority's area to relocate onto the CPO site, thus enabling the run down site to be redeveloped. Or it might be indirect, e.g. because the increased attractiveness after redevelopment of a hitherto run down CPO site was likely to make other sites in the area more attractive for development or redevelopment. It was common ground that such catalytic effects were capable of falling within the scope of section 226(1A).
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- F “28. In the present case the report makes it plain that the defendant was satisfied that facilitating the carrying out of the interested party's scheme for the redevelopment of the Raglan Street site would, by reason of the proposed cross-subsidy, act as the catalyst for the redevelopment of the RHS site in a manner which would contribute to the economic social and environmental well-being of its area . . .

- G “29. In my judgment subsection 226(1A) is concerned with all of the consequences that are likely to flow from the process of the carrying out of redevelopment on the CPO site, and these are not confined to what might be described as the impact of there being new ‘bricks and mortar’ on the redeveloped site. Thus, disturbance during the redevelopment process and the need to relocate existing occupiers on the one hand, and the job opportunities that would be created during the carrying out of the redevelopment on the other, would both be capable of being relevant (the one negative, the other positive) for the purposes of section 226(1A).”

- H 118 In these passages Sullivan LJ equates “the development” in section 226 (1A) with “the process of the carrying out of redevelopment”. I think that this is questionable. He describes the site development as acting “as a catalyst” for the RHS redevelopment, by reason of the cross-subsidy. This is a misuse of language. Section 226(1A) focuses primarily, if not exclusively, on whether the development will be likely to enhance the economic, social or environmental well-being of the area once it is completed. The subsection cannot be satisfied by an agreement by a

developer to fund a second development that has no physical, geographical or other connection with the development that the compulsory purchase is designed to facilitate.

119 This conclusion gives effect to the natural meaning of the language of section 226(1A). In the Court of Appeal Mr Lockhart-Mummery QC for Sainsbury submitted that the same conclusion should be reached by applying, by analogy, decisions on what constitute “material considerations” in the context of planning applications. Sullivan LJ held that these decisions could not be so applied, at least directly, and Mr King QC for the council and Mr Katkowski QC for Tesco have supported his approach. Both Lord Brown of Eaton-under-Heywood and Lord Collins of Mapesbury JJSC have relied on decisions in relation to planning applications in reaching their conclusions, albeit that they have differed as to their effect. Is the analogy between compulsory purchase and planning permission in the present context a fair one?

The analogy between compulsory purchase and planning permission

120 I agree with Lord Brown and Lord Collins JJSC that it is appropriate in this case to draw an analogy, when considering whether the RHS benefit is a material consideration, with certain decisions relating to the grant of planning permission. The issue in this case is whether it is legitimate, when considering the benefits that will flow from a development that is the object of compulsory purchase, to have regard to a particular benefit offered by the developer. The relevant planning cases deal with the question of when it is legitimate, when considering a planning application, to have regard to benefits offered by the developer. Each case raises the question of what can legitimately be considered when assessing how the public interest is affected by the development of land. The analogy is obvious. There is a further point.

121 Section 226 of the Act was amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, which inserted subsection (1A). In its previous form it included, by section 226(2)(c), a requirement that a local authority, when considering whether land was suitable for development, redevelopment or improvement, should have regard to “any other considerations which would be material for the purpose of determining an application for planning permission for development on the land”. While this provision was deleted by the 2004 Act it none the less illustrates the fact that the test of materiality in relation to planning permission can also be relevant in the context of compulsory purchase.

122 The planning obligation offered by Tesco in the present case is the RHS benefit. Could that have constituted a material consideration on Tesco’s application for planning permission, notwithstanding that it had no other connection with the proposed development of the site?

Considerations that are material to the grant of planning permission

123 The history of planning permission shows an ambivalence on the part of the legislature, the executive and the judiciary in respect of the extent to which it is legitimate for a local authority to exact planning gain from a developer as a condition of the grant of planning permission. Lord Hoffmann traced this history in some detail at pp 771–777 of his speech in

- A *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. I shall attempt a rather shorter summary, at least in relation to the earlier part of the history.

- B 124 At the beginning of the 20th century, apart from some public health legislation, there were no planning controls over the use that an individual could make of his own land. A comprehensive system of planning control over the use of land was first introduced by the Town and Country Planning Act 1947. Since then there have been a series of legislative changes seeking, inter alia, to balance the private rights of owners of land against the public interest in the control of the environment, culminating with the Planning Act 2008, which allows for a new Community Infrastructure Levy. A particular problem has been the extent to which it is legitimate to require developers to take responsibility for the
- C “off-site” consequences of their developments.

125 For present purposes, the most significant provision in force is section 70 of the Town and Country Planning Act 1990. This provides:

“*Determination of applications: general considerations*

- D “(1) Where an application is made to a local planning authority for planning permission— (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission.

“(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.”

- E 126 Some of the relevant authorities deal with the criteria of the “material considerations” to which subsection (2) requires the local authority to have regard. Others relate to the scope of the power to impose conditions. In relation to each of these, the following observations of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 are relevant:

- F “The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose ‘such conditions as they think fit,’ nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.”

- G As Lord Hoffmann observed in the *Tesco* case, at p 772, “As a general statement, this formulation has never been challenged”.

- H 127 A decision that is particularly relevant in relation to “material considerations” is *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. The facts of that case have been set out and analysed by Lord Collins JSC at paras 51–59 of his judgment. In short the Court of Appeal held that it was a material consideration, when considering a composite development, that one part of it, which was undesirable having regard to relevant planning considerations, would provide a necessary cross-subsidy for the development of the other part, which was highly desirable. Lord Collins JSC in his analysis at para 58, identifies the fact that the case concerned “composite or related developments” as a relevant part of the

Court of Appeal's reasoning. At para 70 he identifies the need for such a connection or relationship as being a requirement of law. Lord Brown JSC, in para 176 of his judgment, disagrees. He comments that it was expressly recognised that no discernable legal principle would have supported the need for such a connection.

128 I align myself with Lord Collins JSC's analysis. The passage from the judgment of Nicholls LJ, quoted by Lord Brown and Lord Collins JJSC at paras 169 and 56 of their respective judgments, and the passage from the judgment of Staughton LJ quoted by Lord Collins JSC at para 57, demonstrate that each of those judges saw the need for a relationship between the undesirable and the desirable developments other than the simple fact that the one would subsidise the other. The suggestion by Kerr LJ, at p 117, that the significance of the distance between developments involved "considerations of fact and degree rather than of principle" does not withstand analysis. If the distance matters, then the reason why it matters must be a matter of principle. The relevant principle appears to me to be that a cross-subsidy between two developments cannot be considered unless there is some independent reason for considering the two developments together.

129 Whether that is a rational principle is another matter. If it is acceptable that an undesirable development should be permitted in order to subsidise a desirable development it is not easy to see why there should be an inflexible requirement that one should be in proximity to, or have some other nexus with, the other.

130 A close nexus between the subject matter of a planning condition and the development in relation to which it is imposed has been required by the courts. Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 772 referred to the triple requirement for a valid planning condition laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578: (i) it must be for a planning purpose and not for any ulterior one; (ii) it must fairly and reasonably relate to the permitted development; (iii) it must not be *Wednesbury* unreasonable: [1948] 1 KB 233. Lord Hoffmann went on to refer to *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 as illustrating the very strict way that the courts gave effect to these requirements, so that conditions requiring contribution to the "external costs" generated by a development were not permitted. As Lord Hoffmann explained, this gave rise to the introduction of "planning agreements", which were replaced in their turn by "planning obligations".

131 Section 106 of the Act, as substituted by section 12(1) of the Planning and Compensation Act 1991, provides:

"Planning obligations"

"(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 and sections 106A and 106B 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 . . ."

- A This section is in very general terms and, in particular, no express restriction or qualification is placed on the undertaking to pay money to the authority. In these circumstances two separate questions arise. The first is whether, and if so what, implicit restrictions exist as to the nature of planning obligations that can lawfully be incurred. The second is the extent to which planning obligations that have been undertaken are material considerations to which the authority must have regard under section 70 of the Act. There are two relevant decisions that relate to the latter question.

- B 132 The first is *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78. Lord Brown JSC has set out the facts of this case at para 170 of his judgment. The issue was whether generous planning obligations (“benefits”) offered by Tesco and Sainsbury, there as here rival applicants for a development, were material considerations to which the planning authority could have regard, notwithstanding that they went well beyond anything that the authority would have been able properly to require by way of planning conditions as being “necessary”. The Court of Appeal applied the *Newbury* triple requirement, but held that there was no requirement that the benefits should be necessary, albeit that they had, fairly and reasonably, to relate to the development. As to that requirement, this was satisfied in the case of financial contributions to works off-site designed to accommodate demands generated by the development.

133 In that case Lord Hoffmann remarked, at p 90:

- E “Materiality is an entirely different matter, because there is a public interest in not allowing planning permissions to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development.”

He was subsequently in the *Tesco* case [1995] 1 WLR 759, 778 to say that the parallel between the *Newbury* triple requirement and the materiality of planning obligations was “by no means exact”.

- F 134 This brings me to the *Tesco* case, which is the most important decision in the context of this appeal. Once again the material facts have been summarised by Lord Brown and Lord Collins JJSC at paras 173 and 63–66 of their respective judgments. What the *Tesco* case established was that the second test in the *Newbury* case does not apply to planning obligations. These, to constitute material considerations, do not have “fairly and reasonably” to relate to the relevant development. It is enough if they have a connection to it that is not de minimis. The requirement for such a connection none the less remains. Lord Brown JSC has concluded, at para 174 of his judgment, that this connection is satisfied by an offer to cross-subsidise another development that is otherwise unconnected with the development for which planning permission is sought. He comments that such an offer could not sensibly be regarded as “an attempt to buy planning permission”, a phrase he takes from the judgment of Lord Keith of Kinkel, at p 770. Lord Brown JSC differs from Lord Collins JSC, who concludes at para 70 that the authorities, and the *Tesco* case in particular, establish that there “must be a real connection” between benefits undertaken by a planning obligation and the development to which the planning application relates.

135 Here I align myself once again with Lord Collins JSC. Lord Brown JSC's conclusions are at odds with the passage in Lord Keith's judgment from which he has borrowed a phrase. The full passage reads:

"An offered planning obligation which has nothing to do with the proposed development, *apart from the fact that it is offered by the developer*, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission." (Emphasis mine.)

All members of the committee agreed with the judgment of Lord Keith.

136 Lord Brown JSC has quoted a passage from the judgment of Lord Hoffmann, at p 779C–D, in which he says that section 106 does not require that the planning obligation should relate to any particular development, and Lord Keith made a similar observation, at p 769B. These observations related, however, to the legality, not the materiality, of planning obligations.

137 My conclusion in relation to the effect of the authorities is as follows. When considering the merits of an application for planning permission for a development it is material for the planning authority to consider the impact on the community and the environment of every aspect of the development and of any benefits that have some relevance to that impact that is not de minimis that the developer is prepared to provide. An offer of benefits that have no relation to or connection with the development is not material, for it is no more than an attempt to buy planning permission, which is able in principle. Tesco was right, on its application for planning permission, to drop any attempt to link the development of the site with the RHS development.

138 These principles can properly be applied, by analogy, to a simple case where a local authority is considering whether the public interest justifies the compulsory purchase of land for the purpose of facilitating a development. The development itself must be justified in the public interest and it would be wrong in principle for the local authority to be influenced by the offer by the chosen developer to provide some collateral benefit that has no connection of any kind with the development in question. Thus if, in this case, Sainsbury was not a rival seeking to develop the site but simply an owner who was unwilling to sell his land, it would not be right to treat Tesco's offer of the RHS benefit as a consideration that was material to the decision of whether or not to purchase Sainsbury's land.

Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco?

139 The principle that permits a planning authority to have regard to planning gain that has some connection with a proposed development, but not to planning gain that has no such connection, is not entirely rational. It becomes less rational in a situation where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both. That was believed to be the position in the *Plymouth* case 67 P & CR 78, although ultimately planning permission was granted to both the rivals, being once again Sainsbury and Tesco. In the *Plymouth* case each of the rivals was anxious to be permitted to build a supermarket. In competing for planning permission each offered to embellish its development with an array of expensive "add-ons",

- A described by Lord Brown JSC at para 170 of his judgment. These no doubt enhanced the attraction of each of the rival schemes from the viewpoint of the public and the local authority. But the possibility must exist that the cost of these embellishments might have been spent to better advantage in providing alternative planning gain in the local authority's area that had no connection with the proposed development. The reality is that the rivals were, to use a description adopted by Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 782, competing for the development as in an auction. If an auction is to be permissible there might be something to be said for permitting the local authority to identify, for consideration by the rival bidders, its most urgent planning needs, whether or not connected with the development. I make this observation only by way of a stepping stone to considering the more complicated issue raised by the facts of this case.
- B
- C 140 The council's decision involves the exercise of two statutory powers. The first is the power of compulsory purchase conferred by section 226 of the Act. The second is the power to sell the land compulsorily purchased, which is conferred by section 233. The purposes of the sale of the land described in section 233 differ from the purposes of the purchase described in section 226. Had the site been in the ownership of a third party who was unwilling to sell it, and had Tesco and Sainsbury been competing to develop it, the council would have had two separate decisions to make. First whether compulsorily to purchase the land. Secondly to which of the two rivals to sell it for the purpose of the development. The law that I have analysed suggests that, when making the first decision under section 226, the council would have been bound to disregard benefits that might be obtainable from either of the developers that were unconnected to the development. But in choosing to which of the two rivals to sell the land for development under section 233 the council would have been entitled, and perhaps bound, to negotiate the best deal available. The terms of section 233 would seem wide enough to have permitted the council to treat as material Tesco's offer to throw into the bargain the RHS benefit.
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- E
- F 141 These conclusions receive some support from *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33. Lord Collins JSC has set out some of the complicated facts of this case at para 40 of his judgment. That case had these features in common with the present. Glasgow City Council wished to develop a run down area of the city, parts of which were owned by rival developers. The council had decided compulsorily to purchase the entire site and to sell it on back-to-back terms to one of the rival developers. The other developer challenged the deal on the basis that back-to-back terms did not represent the best deal. This the council were bound to achieve under section 191 of the Scottish Act, which closely resembles section 233 of the Act. Lord Collins JSC rightly remarks that there was in that case no offer of benefits unconnected to the development, but I do not think that this robs it of all relevance. Of significance is that in that case, as in this, the council first decided in principle that the facts justified the use of its powers of compulsory purchase, before turning to choose between the rival developers. It is also significant that the House of Lords held that, at the stage of choosing the developer, the council was not simply concerned with achieving the object of the compulsory purchase, but was also entitled to have regard to purely commercial considerations. Lord Hope of Craighead described the position as follows, at para 34:
- G
- H

“section 191 seeks to do two things. On the one hand it seeks to regulate those aspects of the transaction which are intended to secure the purposes set out in subsection (2). These purposes are to secure the best use of the land and the proper planning of the area. On the other it seeks in addition to protect the public purse in the manner indicated by subsection (3). These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority. It is to the best commercial terms for the disposal of the land, not to what is best designed to achieve the overall planning purpose, that the authority must direct its attention at this stage. But the words ‘best terms’ permit disposal for a consideration which is not the ‘best price’. So terms that will produce planning benefits and gains of value to the authority can be taken into account as well as terms resulting in cash benefits.”

142 I can summarise the position as follows. (1) In deciding whether to exercise its powers of compulsory purchase for the purpose of development the council is not permitted to have regard to unconnected benefit that it may derive from the carrying out of the development, but (2) in deciding who shall carry out the development and, thus, to whom the land will be sold for that purpose, the council is entitled, and perhaps bound, to have regard to unconnected benefit offered by the developer. The problem is how to have regard to these principles in a case such as the present where the rival developers each owns part of the site needed for the development.

143 I have concluded that the proper approach should be as follows. The council should first decide, in the case of each of the rivals, whether compulsory purchase of his land would be approved to enable the development to proceed, disregarding any unconnected benefit that might accrue and on the premise that he was simply an unwilling seller rather than a rival developer. In the result of an affirmative answer being given in each case, the council should then decide which developer to prefer having regard to all considerations material to that choice, including the amount of the site already owned by each developer and any benefits offered by either developer, whether or not connected to the development. The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently able.

144 In the present case this is what the council did. The council was not influenced by the RHS benefit when deciding in principle to use its power of compulsory purchase. In deciding to purchase whatever land was necessary for the development of the site the council had regard only to the proper objects of compulsory purchase. The choice of developers necessarily also determined which land would be compulsorily purchased, but the decision had already been taken to purchase whatever land would be necessary having regard to the choice of developer.

145 To summarise, the RHS benefit was not a consideration that was material to the decision to use the power of compulsory purchase, but it was very material to the decision which developer to select, and this in its turn determined whose land was to be compulsorily purchased. In these circumstances I have reached the conclusion that the RHS benefit was a

A consideration that was material to the decision that determined simultaneously the developer and the land to be purchased. It cannot be said that the decision compulsorily to purchase Sainsbury's land was influenced by a consideration that was not material.

B 146 The decision that I have reached at laborious length was felicitously stated by Elias J in a single paragraph (para 38) and I propose to conclude my judgment by quoting this:

C "In my judgment when deciding which development should receive their support, the council could have regard to all the benefits accruing from the proposed development, including any off-site benefits achieved by way of a section 106 agreement. It seems to me that there are really two stages in the process. First, can a CPO lawfully be made in favour of a particular development? That must be determined by focusing solely on the benefits flowing from the development itself and the RHS benefits could not be taken into account at that stage. Second, if the power can lawfully be exercised, but there is more than one potential party in whose favour it could be exercised, to which development should the council lend its support? At that stage I can see no reason why the council should not have regard to its wider interests. It has established that there is in principle a proper basis in law for interfering with the rights of either of two (or more) owners of land on the site by compulsorily purchasing their interests; I see no reason why it should not select which landowner should be so affected by considering the overall benefits to the council which the respective developments would provide."

E 147 The reality in this case is that the real issue is which developer should be preferred by the council, which is in the position of being able to choose between the two. The fact that the compulsory purchase of land owned by one or the other is involved is really peripheral. Each purchased its land in the hope of being able to use it for the purpose of the development. Each shares the intention that its land should be used for the development. In resisting the compulsory purchase of its land each is motivated by commercial rivalry, not by any to the land being used for the proposed development. It would be unfortunate if the rigid application by analogy or principles of planning law were to rob the local community of the additional benefit of the redevelopment of the RHS. I have not found it necessary to reach such a result.

F 148 For these reasons I would dismiss this appeal.

G LORD HOPE OF CRAIGHEAD DPSC

H 149 Reduced to its essentials, this case is about two decisions that the council took to facilitate the development at Raglan Street. The first was whether they should exercise their powers of compulsory acquisition to enable the development. The second was as to the choice of developer. The first decision was taken in the exercise of the powers conferred on the council by section 226 of the Town and Country Planning Act 1990, as amended. The second, as Lord Phillips of Worth Matravers PSC has said (see para 140, above), was about the exercise of two statutory powers. I put it in this way, as I think Lord Phillips PSC does too, simply to indicate the context in which each of these powers was being exercised. The cart and the

horse—if I may adopt Baroness Hale of Richmond JSC's analogy (see para 91)—go together, like a horse and carriage, at this stage of the exercise.

150 The site was not in the sole ownership, or under the sole control, of either developer. They were in competition with each other for its development, so the exercise of compulsory powers to acquire the interest in the land vested in one or other of them was inevitable. Just as inevitable is the fact that the purpose of the exercise of those powers was to enable the council to dispose of the interest that was to be acquired to the preferred developer. Section 226 is concerned with the acquisition of the interest in the land, not its disposal. The power to dispose of land that has been acquired or appropriated is set out in section 233 of the 1990 Act.

151 The compulsory acquisition of land can only be permitted if it is within the powers of the statute. Great care must be taken to see that those powers are not resorted to unless the statute permits this and that the acquisition is necessary for the purpose that the statute contemplates. The issue on this part of the case is whether the council were entitled to take into account, in discharging their duty under section 226(1A) to consider the well-being benefits for the area, Tesco's commitment to secure by way of cross-subsidy the development of the Royal Hospital site. For the reasons that Lord Phillips PSC and Lord Collins JSC give, I would hold that they were not entitled to do so. Section 226(1)(a) provides that the authority have power to acquire land compulsorily if they think that it will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. The reference to "the land" in this paragraph is to the land which is to be the subject of the compulsory purchase order. Section 226(1A) places a limitation on the exercise of the power under section 226(1)(a). These two provisions must be read together. The contribution by the development, redevelopment or improvement that section 226(1A) refers to must be on the land that the authority is proposing to acquire compulsorily.

152 The situation in this case is that there was no physical connection of any kind between the two sites. Development of the Royal Hospital site could not contribute anything to the carrying out of development on the Raglan Street site in any real sense at all. They were not part of the same land. There is no doubt that the development of the Royal Hospital site would bring well-being benefits to the council's area of the kind that section 226(1A) refers to. But to fall within that subsection they had to be benefits that flowed from the Raglan Street development, not anywhere else. It follows that the council were not entitled to conclude that the work which Tesco were willing to undertake on the Royal Hospital site would contribute to the well-being of the area resulting from its development of the site at Raglan Street for the purposes of section 226(1A).

153 At first sight that might seem to be the end of the case. The report which was presented to the council's cabinet on 30 January 2008 stated that the Tesco and Sainsbury's schemes for the Raglan Street site would both fulfil the purpose referred to in section 226(1)(a). Addressing itself to the choice that had to be made between the two schemes, it went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco and to refer to the decisive advantage which Tesco enjoyed over Sainsbury's if the development of that site was taken into account. It concluded by recommending that there was a compelling case in the public interest to make a compulsory purchase order to enable the Tesco scheme to go ahead.

A As regards the exercise of the power to acquire the land compulsorily, if looked at in isolation, this was to stray into forbidden territory.

154 In my opinion however it would be unrealistic to stop there. The legality of the use of compulsory powers to enable the Raglan Street development to proceed has not been called into question. As the report said, both schemes satisfied the requirements of section 226(1)(a), and it has never been doubted that the carrying out of either of them on that site would contribute to the achievement of the well-being of the area. If the land had been in the ownership of a third party, there would have been no need to say more. The reason why the report went further was the council had to make a choice between the two developers. Although the report did not say so in terms, it is plain that the assumption on which it was proceeding was that, having acquired the land, the council would dispose of it to the preferred developer. The surrounding circumstances show that it was never the council's intention to develop the land themselves or to retain it in their ownership. This part of the report was as much concerned with the exercise of the power to dispose of the land as with the exercise of the power to acquire it.

155 The power of disposal under section 233 confers a wide discretion on the local authority. They may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient to secure the best use of that or other land or the proper planning of their area. Like section 191 of the Town and Country Planning (Scotland) Act 1997 which is in very similar terms, that is its primary objective: see *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33, para 32. It was held in that case that the council, when considering whether to use compulsory powers in conjunction with a sale of the land under a back-to-back agreement to the preferred developer, were entitled to have regard to the wider benefits that were expected to flow from the contribution that the preferred developer would make to the redevelopment, the proposals for which were to contain a strong element of planning gain. There was to be a requirement to include improvements to other areas of the urban block within which the site to be acquired compulsorily was situated: see paras 38, 39. The value of the planning gain was something that the council was entitled to take into account in its assessment of whether the disposal was achieved on the best commercial terms.

156 The focus in that case was on the terms on which the council proposed to make the assembled site available to the preferred developer. Its facts differ from those in the present case, so I am not to be taken as suggesting that it provides direct authority for the view which I take here. But it does illustrate the extent of the power of disposal that is conferred by this section on the local authority, and it shows how the authority may legitimately have regard to the way the land will be disposed of before it decides to acquire it compulsorily: taking them both together, like the horse and carriage to which I referred earlier. The council decided to use its compulsory powers to purchase the site with a view to its disposal by means of a back-to-back agreement to achieve the development. The site was part of an urban block within which properties owned by the first petitioners and the second respondents were situated. Each had their own interests and their own agendas which were in competition with each other and, as in this case,

their proposals had to be evaluated. The preferred developer was expected to achieve a scheme that would enhance the wider area within which the site itself was situated. Regard was to be had to benefits which it would provide that were extraneous to the site itself, and extraneous too to each of the properties that were to be acquired compulsorily. Among other things, it was to commit itself to supporting an order for regulating traffic on adjacent streets and to provide details of a financial commitment to the area's environmental enhancement. The whole thing was seen as a single package. The acquisition of the properties and their disposal to a developer who would achieve these benefits were each part of the same exercise: for a more complete account of the facts, see 2005 SLT 144, paras 1–16.

157 I would take from that case the proposition that it is legitimate for the acquiring and disposing authority which has to choose between competing proposals for development to have regard to planning benefits that lie outside the perimeter of the site itself. It has not been suggested that it would have been an improper use of the section 233 power for the council to take account of Tesco's commitment to develop the Royal Hospital site in the assessment as to whether a disposal of the land to Tesco was preferable to disposing of it to Sainsbury's. I can see no reason why that should be so if the land was already in the council's ownership and they were faced with a competition between two or more developers who had no interest in the land at all.

158 It was not possible in this case for the council to take these two decisions separately, each without reference to the other. The choice as to whose land to acquire was inevitably linked to the choice of the developer to whom the land was to be disposed of when it was acquired. Section 226 does not concern itself with choices of that kind. To say that it prohibits them would be to read a limitation into the section which is not there. It would unduly inhibit the exercise of the power of compulsory acquisition in a case such as this, where a site that is in need of development is in divided ownership, the owners are in competition with each other for its development and there are sound planning reasons beyond those that section 226(1A) refers to for regarding the proposal of one developer as preferable to that of the other. I would not regard the opportunity that this particular situation gives for achieving planning gain in the wider public interest as transgressing the rule that the power of compulsory purchase can only be used for the purpose for which the power has been conferred. The contrary view risks making it impossible for projects for urban renewal which can only be achieved by using compulsory powers to assemble the site for redevelopment to include measures for improvements in the public interest which lie outside the site's perimeter. As Lord Phillips PSC says (see para 147), it would be unfortunate if a rigid application of the compulsory purchase principles to proposals of that kind were to rob the community of such benefits.

159 For these reasons, and those of Lord Phillips PSC with which I agree and in respectful agreement too with what Elias J said at first instance [2009] EWHC 134 at [38], I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

160 Are a local planning authority, when deciding how to exercise their compulsory purchase powers, precluded in all circumstances, as a matter of

A law, from taking into account public planning benefits (however substantial and obvious) which would result, not directly from the development to be facilitated by the proposed land acquisition, but rather from a contractual obligation attaching to that development? That, crucially, is the issue arising on this appeal.

161 Take the facts of this very case, already fully recounted in the judgment of Lord Collins of Mapesbury JSC, but which may conveniently and sufficiently be summarised as follows. Two rival supermarket chains, Sainsbury's and Tesco, each own part of a site which is ripe for development ("the site"). Each wishes to develop the site as a supermarket and each has (or is about to obtain) planning permission for such development. There is really nothing to choose between their respective proposals. Neither is willing to sell its share of the site to the other. In these circumstances it is agreed by all that the local planning authority ("Wolverhampton") must inevitably exercise their compulsory purchase powers under section 226 of the Town and Country Planning Act 1990 (as amended). The question then becomes: who should be chosen to carry out the development of the site and whose land, therefore, should be compulsorily acquired for the purpose? Should Sainsbury's land be acquired so that Tesco may develop the site or vice versa? The issue more particularly arising is whether, in deciding to choose Tesco as the developer, Wolverhampton acted unlawfully in taking into account Tesco's commitment, if chosen, to redevelop the Royal Hospital site, another site in Wolverhampton's area some half a mile away ("the RHS"), redevelopment which Wolverhampton are anxious to promote but which Tesco would not be prepared to undertake save by way of cross-subsidy?

162 It so happens that one of the two rival chains (Sainsbury's) owns 86% of the site, the other (Tesco) 14%. But it is not suggested that this disparity between their respective interests affects the question of law at issue. The same question would arise even if each owned exactly half the site. Plainly the disparity is itself a material consideration and one, indeed, which ultimately could prove decisive in Sainsbury's favour. For present purposes, however, as Mr Lockhart-Mummery QC for Sainsbury's expressly acknowledged, it can be ignored.

163 Section 226 of the 1990 Act provides so far as material:

"(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land . . .

"(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

164 For present purposes the effect of those provisions in combination can be summarised quite simply as follows: A local authority can (subject to confirmation by the Secretary of State) compulsorily acquire land if they

think, first, that this will facilitate its development (section 226(1)(a)) and, secondly, that this development is likely to contribute to the economic and/or social and/or environmental well-being of their area (section 226(1A)).

165 In the present case it seems to me self-evident that both of these pre-conditions are fully satisfied in respect of each proposed development scheme so that Wolverhampton have a discretion to make whichever CPO they regard to be appropriate, whether of Sainsbury's land or of Tesco's land. The question, I repeat, is whether, in choosing whose land to acquire, Wolverhampton can take into account the additional benefit to their area which would result from Tesco's commitment, if they are enabled to develop the site, also to develop the RHS.

166 It was the Court of Appeal's conclusion below that Wolverhampton were indeed legally entitled to take account of the proposed cross-subsidy which would enable (and commit) Tesco to redevelop the RHS and that this entitlement arose directly under section 226(1A). This subsection, the Court of Appeal held [2009] 3 EGLR 94, para 33, imposes on local planning authorities an express obligation to have regard to such "off-site, or 'external' benefits". Elias J at first instance had held to the contrary [2009] EWHC 134 (Admin) at [35] that, to fall within section 226(1A), well-being benefits had to be generated by the development of the site itself, not by some contractually linked external development. In the only reasoned judgment in the Court of Appeal, Sullivan LJ (at paras 42 and 44) agreed with Elias J that,

"to fall within section 226(1A) the benefits in question must flow from the redevelopment of [the site]. However . . . [t]he likelihood of the redevelopment of a CPO site leading, whether because of cross-subsidy or for any other reason, to the development or redevelopment of other sites in the authority's area is precisely the kind of wider benefit that subsection (1A) requires the authority to consider."

"[Section 226(1A)] ensures that wider 'well-being' benefits are not ignored, but are always treated as material considerations . . ."

167 I have to say that on this particular issue, in common with the majority of this court, I prefer Elias J's view to that of the Court of Appeal. That, however, does not seem to me the real issue in the case. Section 226(1A), I repeat, does no more than specify a precondition (additional to that in section 226(1)(a)) which has to be satisfied before any power of compulsory acquisition can be exercised. No one doubts that it was satisfied here. Wolverhampton accordingly had a discretion under the section. The critical question then arising is whether the further public benefit which Tesco was offering was or was not a material consideration which Wolverhampton could take into account when deciding how to exercise that discretion. Elias J held that it was. The Court of Appeal, having concluded (wrongly as I believe) that this further benefit had to be regarded as material by virtue of section 226(1A), chose not to deal with the question whether the benefit would in any event have been a material consideration, section 226(1A) apart. As to this Sullivan LJ merely observed, at para 44, that section 226(1A) "does not purport to cut down the considerations that are capable of being material under subsection 226(1)(a)". And that at least must be right: to stipulate, as section 226(1A) does, that the authority must

- A not exercise their compulsory purchase powers unless they think that the development itself is likely to contribute to the well-being of their area (whether because it will act as a catalyst for other development or provide employment or stimulate other beneficial activity in the area or whatever else) is by no means to stipulate that, the condition being satisfied, this exhausts all the considerations to which the authority can have regard and they must shut their mind to all other possible external benefits which the exercise of their compulsory purchase powers would bring.

- B 168 In addressing the question whether such external benefits are capable of being material considerations in the exercise of compulsory purchase powers under section 226(1)(a), it seems to me helpful to begin by examining what the position would be in the broadly analogous situation of a planning authority considering rival applications for planning permission.
- C Suppose that the competition between the rival supermarket chains was not, as here, as to which should be preferred as developers of a single site by reference to the exercise of the authority's powers of compulsory purchase, but rather as to which should be granted planning permission assuming that each owned a suitable site but there was room in the area only for one supermarket—the very situation which arose in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (between, as it happens, the same competing developers as here). Would an offer such as that made here by Tesco to develop the RHS (probably by way of a planning obligation under section 106 of the 1990 Act) be a “material consideration” within the meaning of section 70(2) of the 1990 Act? If it would, then it is difficult to see why it should not be material also for section 226(1)(a) purposes. If, on the other hand, it would not, then the court would need to be persuaded that wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications.

- E 169 Before going to the House of Lords decision in the *Tesco* case itself it is instructive to take note of two earlier Court of Appeal authorities—*R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78—the essential backdrop to the speeches in the *Tesco* case. Lord Collins JSC having dealt with these at some length, I content myself with the briefest summary of each. *Ex p Monahan* was the Royal Opera House case in which the planning authority were held entitled to have granted permission for an office development notwithstanding that it involved a major departure from the development plan because that would cross-subsidise the refurbishment of the listed opera house. Nicholls LJ recorded (p 121) that counsel for the planning authority (Mr Sullivan QC)

- G “frankly accepted that he could discern no legal principle which distinguished between (a) what happens within one building, (b) what happens on two adjoining sites and (c) what happens on two sites which are miles away from each other”

H but continued:

“All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to

the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites . . . and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme.”

As to what the position would have been had the proposed office block been in Victoria, Kerr LJ similarly suggested, at p 117, that “all such cases would . . . involve considerations of fact and degree rather than of principle”.

170 The *Plymouth* case (like the *Tesco* case which followed it) involved competitive planning applications by Sainsbury's and Tesco, the council's original intention having been to allow one store only to be built. Each company was therefore invited to say why it should be preferred and both were told that the council would take into account any community benefits offered (provided they were “justifiable in land use planning terms”—the council's published policy). Sainsbury's offer included the construction of a tourist information centre on the site, an art gallery display facility, a work of art in the car park, a bird-watching hide overlooking the river, an £800,000 contribution to the establishment of a park and ride facility in the neighbourhood, and up to £1m for infrastructure works to make a different site suitable for industrial use. Tesco offered financial contribution to a crèche, a wildlife habitat, a water sculpture, and in addition it offered to sell the council a site for a park and ride facility. Both offers were by way of section 106 agreements. In the event, both applications were granted, doubtless to the satisfaction of Sainsbury's and Tesco but not that of the Co-operative Society who promptly challenged both planning permissions on the ground that the council had taken into account immaterial considerations.

171 The Co-operative Society argued that not merely must a community benefit offered under a section 106 agreement satisfy the three tests laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (following *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554) by which the legality of a section 70 condition is to be judged—namely (i) that it has a planning purpose, (ii) that it fairly and reasonably relates to the permitted development and (iii) that it is not *Wednesbury* unreasonable—but it must also be necessary in the sense of overcoming what would otherwise have been a planning to the development. In the leading judgment rejecting this argument and stating that “the only question is whether [the section 106 agreement] fairly and reasonably related to the development”, Hoffmann LJ said (p 90) that the only benefits which gave pause for thought were the two substantial sums offered by Sainsbury's as a contribution to work to be done away from the site. The park and ride facility, however, would tend to reduce both traffic heading for the store and use of Sainsbury's own car park by people not actually shopping there. As for the £1m offer, this “was not simply to pay the council £1 million. It was to contribute up to £1m to the actual cost of infrastructure works undertaken by the council within a period of two years at a specific site”: p 91.

172 As we shall shortly see, the supposed requirement that section 106 offers, like imposed section 70 conditions, have to “fairly and reasonably

A relate to the permitted development” (a requirement held satisfied in the *Plymouth* case) did not survive the decision of the House of Lords in the *Tesco* case [1995] 1 WLR 759 to which I now come.

173 The *Tesco* case (like the *Plymouth* case at the initial stage) concerned rival applications by Sainsbury's and Tesco to develop their respective sites (Sainsbury's in conjunction with Tarmac), there being room in Witney for one store only. Notwithstanding that Tesco's application included an offer of £6.6m to fund in its entirety a new link road, the Secretary of State (who had to decide which of the two proposals to allow) chose to grant Sainsbury's application. Tesco appealed on the ground that the Secretary of State had failed to take account of a material consideration, namely their £6.6m offer. Albeit the appeal failed, it did so not on the basis that the offer was an immaterial consideration but rather because, although material, the Secretary of State had been entitled to give it little or no weight and to prefer Sainsbury's proposal because the Secretary of State thought its site “marginally more suitable”: Lord Hoffmann, p 783. The following features of the *Tesco* case seem to me of particular importance: (1) The £6.6m offer was held to be a material consideration notwithstanding that the Secretary of State shared his inspector's view that the relationship between the proposed new development and the funding of the link road was “tenuous” (the development being likely to result only in “slight worsening of traffic conditions”). (2) The only reasoned speeches were given by Lord Keith of Kinkel (with whom the other members of the committee agreed) and Lord Hoffmann. Both of them recognised that, contrary to the Court of Appeal's assumption in the *Plymouth* case, the second *Newbury* test has no application to section 106 agreements. As Lord Hoffmann observed, at p 779:

“section 70(2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v Epping Forest District Council* [1994] 1 WLR 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable.”

Nevertheless, for a planning obligation to be a material consideration which can legitimately be taken into account in granting planning permission, it has to have “some connection with the proposed development which is not de minimis” (Lord Keith, p 770B); it cannot be “quite unconnected with the proposed development”: Lord Hoffmann, p 782D. (3) Were it otherwise, said Lord Keith (p 770A), it “could be regarded only as an attempt to buy planning permission”. Lord Hoffmann put it rather differently: p 782C–E. The metaphor of “bargain and sale”, he suggested, although “vivid”:

“is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the

planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits.”

(4) In the *Tesco* case itself, Lord Hoffmann then observed, (p 782G–H), the Secretary of State had in substance accepted the argument that Tesco’s “offer to pay for the whole road was wholly disproportionate and it would be quite unfair if [Sainsbury’s] was disadvantaged because it was unwilling to match this offer”. That, said Lord Hoffmann, “is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers”. However, Lord Hoffmann continued (p 783), so too was Tesco’s argument (that only if they offered the whole cost of the link road would it be constructed) a perfectly respectable one. Importantly, he then said:

“the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts.”

(5) Lord Hoffmann had earlier (p 780) emphasised the distinction to be made between materiality and weight:

“The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.”

174 Let me in the light of those authorities return to the question I posed at para 168: would an offer such as Tesco made to Wolverhampton, had it been made in a planning context have been, as a matter of law, a material consideration? To my mind the correct answer to that question should be yes, although plainly the weight (if any) to be given to it would be entirely for the planning authority. And the reason the answer should be yes is quite simply because such an offer could not sensibly have been regarded as “an attempt to buy planning permission” (Lord Keith, at p 770A); on the contrary, it would in my view have had “a sufficient connection” with the proposed development (Lord Hoffmann, at p 782D), “not de minimis”: Lord Keith, at p 770A.

175 The proposition that planning consent cannot be bought or sold, although stated nearly a quarter of a century ago to be “axiomatic”

- A (by Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55, 64), needs to be understood for what it is, essentially a prohibition against the grant of a planning permission for what would otherwise be unacceptable development induced by the offer of some entirely unrelated benefit. What it is *not* is a prohibition against, for example, the grant of permission for a development which is
- B contrary to local planning policy on the basis that it needs to be economically viable to ensure that the site does not remain derelict—see *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806, where, indeed, Woolf J held that no Secretary of State could reasonably have regarded the economic factor in that case as irrelevant. Nor, of course, did the principle prevent office development being permitted in *Ex p Monahan* [1990] 1 QB 87 essentially because the proposed refurbishment of the opera
- C house was financially dependant upon it.

- 176 *Ex p Monahan*, it must be noted, is *not* authority for the proposition that, but for the development there “forming part of one composite development project” (p 121), the office building would not have been permitted. As was expressly recognised, no discernible legal principle would have supported such a view. In any event *Ex p Monahan* is not
- D binding on this court. That aside, the *Tesco* case [1995] 1 WLR 759 later established that offers such as that in *Ex p Monahan* to refurbish the opera house do not have to “fairly and reasonably relate to the permitted development” (as at the time of *Ex p Monahan* would have been supposed). Had Tesco in the present case offered (uneconomically) to redevelop the RHS to the benefit of the public in consideration of some planning advantage elsewhere in Wolverhampton’s area, it is difficult to see why
- E Wolverhampton would have been legally obliged to refuse.

- 177 Still less does the principle prevent rival developers, in competitive situations such as arose in the *Plymouth* and *Tesco* cases, seeking to outbid each other as to the external benefits their proposals would bring with them—as both those cases amply demonstrate. It is surely one thing to say that you cannot buy a planning permission (itself, as I have sought to show,
- F only in a narrow sense an absolute principle); quite another to say that in deciding as between two competing developers, each of whose proposals is entirely acceptable on planning grounds, you must completely ignore other planning benefits on offer in your area.

- 178 Let it be assumed, however, contrary to my view but as I understand every other member of this court to have concluded, that, had the present issue arisen in the context of rival applications for planning permission,
- G Tesco’s offered redevelopment of the RHS would have had to be characterised as a wholly unconnected planning benefit and so not a material consideration under section 70. That majority view, as Lord Phillips of Worth Matravers PSC himself points out, at para 139, is “not entirely rational” even in a non-competitive planning context; “less rational” still “where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both”.

- H 179 Is that approach none the less to apply equally in the present context or, as I contemplated at para 168, is the position that “wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications”?

180 The Court of Appeal thought that the case for regarding Tesco's RHS offer as a material consideration was stronger in the CPO context than had it been made in a planning context. They thought this, first, because of the wide (to my mind over-wide) construction they put upon section 226(1A) itself (para 33); secondly, because they regarded financial viability as yet more important in the CPO context than in the planning context (paras 34–40); and, thirdly, because, whereas planning authorities (subject only to the Secretary of State's call-in powers) are free to grant any planning permissions they wish, CPOs must be confirmed by the Secretary of State (who can therefore prevent any misuse of the local authority's compulsory acquisition powers): para 41. Whilst I have difficulty with that reasoning, I nevertheless agree with Lord Phillips PSC and Lord Hope of Craighead DPSC that, even assuming that Tesco's RHS offer would not have been a material consideration had Wolverhampton been determining a planning application, it was none the less material in the context of the decisions the council were in fact required to take here. These were, first, whether Wolverhampton should compulsorily acquire land to facilitate the development of the site (for which both rival developers had the requisite planning permission) and, if so, second, whose land should be acquired—should it be Tesco's land to enable Sainsburys to develop the site or vice versa (i.e. who should be the preferred developer)?

181 I understand all of us to agree that Wolverhampton were amply entitled to exercise their section 226 power of compulsory acquisition here: as I noted at paras 164 and 165 above, self-evidently both the section 226(1)(a) and the section 226(1A) conditions were satisfied and the development of the site was only going to take place if Wolverhampton did indeed exercise this power. As Lord Hope DPSC observes, however, this power could not be exercised until Wolverhampton had also decided the second question before them: which of the two developers to choose. There seems to me no basis in authority or reason for holding that in reaching this second decision Wolverhampton were required to ignore the off-site benefit (unconnected though I am now assuming it to be) on offer from Tesco. I would on the contrary hold it to be a material consideration for the purposes of deciding which of the rival developers to prefer and whose land, therefore, should be the subject of compulsory purchase under section 226. That is precisely what was held at first instance here and I can but echo Lord Phillips PSC's plaudits for the passage in Elias J's judgment which he quotes in full at para 146.

182 It is essentially on this basis, rather than by reference to Wolverhampton's power of disposal of acquired land under section 233, that for my part I would hold Tesco's offer to have been a material consideration (even assuming that it would not have been so in the planning context). I think it difficult for Tesco to invoke section 233 here. True, section 233 would to my mind plainly entitle a planning authority to have regard to an off-site benefit such as Tesco offered here in deciding how to exercise their section 233 power. (Although, as Baroness Hale of Richmond and Lord Mance JJSC point out, no wholly extraneous benefits were offered or considered in *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) 2007 SC (HL) 33, it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get what I called there (para 68) “the best overall deal available”—that, by the same token as a cash bidding match would have been

- A possible, so too would have been an offer of other benefits, however extraneous. Why ever not? I do not regard this as inconsistent with what I said at para 75 of my judgment in the *Standard Commercial* case—quoted by Lord Walker of Gestingthorpe JSC at para 85: my quarrel there was with the disappointed developer's submission that the planning authority should itself have initiated a bidding war. It is quite another thing to say that they are precluded by law from accepting offers of money or other extraneous benefits
- B when they come to dispose of a compulsorily acquired development site.)

- 183 My difficulty with section 233, however, is, as Baroness Hale JSC points out, that it puts the cart before the horse. Unless and until the Secretary of State confirms a section 226 compulsory purchase order, the local authority has no land to dispose of. I do not see the council here, therefore, as entitled to have regard to their section 233 powers when
- C exercising their section 226 powers. I would be concerned also that on this approach the council might be statutorily *obliged* to accept Tesco's offer in order to obtain "the best overall deal available"—instead of merely being required to regard it as a material consideration, it being a matter for the council (and, in subsequent confirmation proceedings, the Secretary of State) to give it such weight, if any, as they thought right. (Indeed, as I observed earlier (at para 162), it might be that the Secretary of State, unlike
- D Wolverhampton, will regard Sainsbury's substantial larger interest in the site as the determining factor here—rather as the Secretary of State in the *Tesco* case [1995] 1 WLR 759, thought it only fair to Sainsbury's to give no weight to Tesco's "wholly disproportionate" £6.6m offer to fund the link road: see para 173(4) above. That, however, in this case as in that, would be entirely a matter for the planning authorities, not for this court.)

- E 184 All that said, I do not regard section 233 as central to either Lord Phillips PSC's or Lord Hope DPSC's reasoning in this case. Still less did it colour Elias J's approach; indeed, section 233 finds no mention whatever in his judgment.

- 185 Really what it all comes to is this. It is irrational and unsatisfactory that (in the view of the majority) Tesco's offer here would have had to be ignored in a competitive planning context. It is quite unnecessary and (as
- F Lord Phillips PSC and Lord Hope DPSC observe) would be unfortunate if this irrationality were carried over into the compulsory purchase context within which the present issue arises.

- 186 In the result I would answer the question I posed in para 160: no, not even if the benefits are wholly unconnected with the proposed development, and dismiss this appeal. As indicated, I would do so
- G essentially for the reasons given by Elias J at first instance rather than those given by the Court of Appeal.

Appeal allowed.
Declaration accordingly.

JILL SUTHERLAND, Barrister

APPENDIX 9 – 11

Queen's Bench Division

A

Regina (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport

[2021] EWHC 2161 (Admin)

B

2021 June 23–25;
July 30

Holgate J

Planning — Development consent — World Heritage Site — Strategic highways company applying for development consent order for nationally significant infrastructure project affecting World Heritage Site — Statutory expert panel recommending refusal of consent — Secretary of State granting development consent order — Whether decision unlawful — Whether failure to comply with and apply National Policy Statement for National Networks and local development plan policies — Whether material error of law in deciding that harm identified by panel as substantial should be treated as less than substantial — Whether unlawful approach to consideration of heritage harm — Whether national policy statement compliant with World Heritage Convention — Planning Act 2008 (c 29), s 104¹ — Infrastructure Planning (Decision) Regulations 2010 (SI 2010/305), reg 3² — Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), reg 21(1)³ — National Policy Statement for National Networks, paras 5.131–5.134⁴ — Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), arts 4, 5⁵

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The first interested party, a strategic highways company established under the Infrastructure Act 2015, applied to the Secretary of State for a development consent order under the Planning Act 2008 for a road scheme, being a nationally significant infrastructure project, involving the construction of a new 13 kilometre route to replace the existing A303 road through the Stonehenge, Avebury and Associated Sites World Heritage Site (“WHS”). The proposal included, inter alia, a 1 kilometre western cutting and a 3.3 kilometre tunnel through the Stonehenge part of the WHS, which contained 175 scheduled monuments, with other associated monuments outside it. The application was the subject of statutory examination before a panel of five planning inspectors. Having considered, among other matters, an environmental statement and heritage impact statement, and having considered an alternative longer tunnel option, the panel concluded that the scheme would cause substantial harm to the WHS and, having applied paragraphs 5.131 and 5.133 of the National Policy Statement for National Networks (“NPSNN”), recommended that development consent be refused. For the purpose of deciding the application the Secretary of State

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¹ Planning Act 2008, s 104: see post, para 35.

² Infrastructure Planning (Decision) Regulations 2010, reg 3: see post, para 28.

³ Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, reg 21(1): see post, para 31.

H

⁴ National Policy Statement for National Networks, paras 5.131–5.134: see post, paras 46–47.

⁵ Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, arts 4, 5: see post, para 58.

- A was provided, inter alia, with the panel's report but he did not have the environmental or heritage impact statements, or a summary of those documents, or any detailed briefing from officials about impacts on individual assets or groupings of assets. The Secretary of State concluded that less than substantial harm would be caused to the WHS as a whole, with the consequence that paragraph 5.134 of the NPSNN applied, and that the need for the scheme together with its other benefits, including the removal of the existing surface level A303, outweighed any harm. He therefore made the
- B order under section 114 of the 2008 Act. The claimant sought judicial review of the Secretary of State's decision on the grounds, inter alia, that (i) by considering the impact on the historic environment as a whole, rather than assessing the impact on individual assets, the Secretary of State had unlawfully failed to comply with and apply the NPSNN and applicable local development plan policies and had, in any event, unlawfully failed to give adequate and intelligible reasons as to the significance of each of the affected heritage assets, the impact upon each asset and the weight
- C to be given to that impact (ground 1); (ii) the Secretary of State had adopted an unlawful approach to the consideration of heritage harm under regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 and under paragraphs 5.131–5.134 of the NPSNN (ground 3); (iii) the Secretary of State's acceptance that the scheme would cause harm, that was less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention Concerning the Protection of the
- D World Cultural and Natural Heritage ("the World Heritage Convention") and he had therefore erred in law in concluding that section 104(4) of the Planning Act 2008 had not been engaged so that the presumption in section 104(3), to decide the application in accordance with the NPSNN, ought not to have been applied in his decision letter (ground 4); and (iv) that the Secretary of State had failed to consider mandatory material considerations, including the existence of alternative tunnel options (ground 5). It was common ground that, by whatever means was employed, the decision-
- E maker had to ensure that he had taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

On the application for permission to proceed and on the claim—

- Held*, granting permission to proceed and allowing the claim on parts of grounds 1 and 5 but otherwise refusing permission to proceed, (1) that in determining whether to grant a development consent order under the Planning Act 2008 the decision-
- F maker had to adopt a sensible approach while giving due weight to every element of harm and benefit as material considerations in the overall balancing exercise; that the legislation on heritage assets did not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent, the same applying to policies in the NPSNN, subject to applying any specific policy test which
- G was relevant; that requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" were matters left to the planning judgment of the decision-maker to resolve, the same applying to the application of the tests in paragraphs 195–196 of the National Planning Policy Framework ("NPPF") and paragraphs 5.133–5.134 of the NPSNN (post, paras 146–147).

- (2) That notwithstanding regulation 21(1) of the Infrastructure Planning
- H (Environmental Impact Assessment) Regulations 2017, which obliged the Secretary of State to take into account the environmental information for the proposal, and the statement in his decision letter that he had done so, neither the environmental statement nor the heritage impact assessment had been before the Secretary of State when he had been considering the panel's report and determining the application for development consent, nor had he received an adequate précis of and briefing on the

parts of those documents relating to impacts on heritage assets which the panel had accepted but had not summarised in its report; and that, accordingly, the Secretary of State's decision that the harm identified by the panel as substantial should be treated as less than substantial had involved a material error of law and to that extent ground 1 of the claim succeeded (post, paras 172, 177–181, 182, 291).

R (National Association of Health Stores) v Secretary of State for Health The Times, 9 March 2005, CA, *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) and *Revenue and Customs Comrs v Tooth* [2021] 1 WLR 2811, SC(E) applied.

(3) That paragraphs 5.133 and 5.134 of the NPSNN laid down the criteria for determining which of the policy tests was to be applied for dealing with harm to heritage assets (the “fork in the road decision”); that, in reaching that judgment, the decision-maker could take into account benefits to the heritage asset itself (referred to as an “internal balance”) but was not obliged to do so; that, further, when assessing the impact of a project on a heritage asset it was permissible to combine both the beneficial and the adverse effects on that asset; that that was not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole; that, moreover, if a scheme would cause harm to one asset and benefit to another that did not alter the judgment that the first asset would be harmed; that, instead, the benefit to the other was a matter to be weighed in whichever balance fell to be applied under the NPSNN or, indeed, paragraphs 195 or 196 of the NPPF; that a beneficial impact on a heritage asset might appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test was engaged, and then again in the balancing exercise required by that test when all public benefits were weighed against all harm to heritage assets, and no improper double-counting arose; that there was no reason to think that the Secretary of State had, relying upon the views of the second interested party, Historic England, taken into account a wider range of heritage benefits than had been permissible for the purposes of deciding whether paragraph 5.133 or paragraph 5.134 of the NPSNN applied; and that, accordingly, ground 3 of the claim had to be rejected (post, paras 193–196, 199, 200–209).

City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] 1 WLR 5761, CA applied.

(4) That the Secretary of State had been entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN, read together with the surrounding paragraphs, was compliant with articles 4 and 5 of the World Heritage Convention, which Convention had not been incorporated into domestic law and did not impose an absolute requirement of protection of World Heritage Sites; that a balance could be drawn between the protection against harm of a WHS or its assets and other public benefits and, if judged appropriate, a preference given to the latter; and that, accordingly, ground 4 of the claim had to be rejected (post, paras 215, 217–220, 222).

(5) That the relative merits of the alternative tunnel options compared to that which had been proposed were an obviously material consideration which the Secretary of State had been required to assess and it had been irrational not to take them into account; and that, accordingly, the claim succeeded on that further freestanding fifth ground (post, paras 277–290, 291).

Per curiam. It is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 was to the same effect and contained a statement that the Government considered the policies it contained to be consistent with the United Kingdom's obligations under the World Heritage Convention. No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which

- A is incorrect on any tenable view. A legal challenge to the NPSNN would now be precluded by section 13(1) of the Planning Act 2008. Under section 106(1) a representation relating to the merits of a policy set out in a National Policy Statement may be disregarded by the Secretary of State (post, para 223).

The following cases are referred to in the judgment and Appendix 1:

- B *Allen v Secretary of State for Communities and Local Government* [2016] EWCA Civ 767, CA
Associated Provincial Picture Houses Ltd v Wednesbury Corp'n [1948] 1 KB 223; [1947] 2 All ER 680, CA
Australian Conservation Foundation Inc v Minister for the Environment [2016] FCA 1042; 251 FCR 308
- C *Banks (HJ) & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin); [2019] PTSR 668
Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834, CA
City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320; [2021] 1 WLR 5761, CA
Commonwealth of Australia v State of Tasmania [1983] HCA 21; 158 CLR 1
- D *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19
East Northamptonshire District Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 137; [2015] 1 WLR 45, CA
First Secretary of State v Sainsbury's Supermarkets Ltd [2007] EWCA Civ 1083; [2008] JPL 973, CA
Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government [2020] EWHC 518 (Admin); [2020] PTSR 993; [2021] EWCA Civ 104; [2021] PTSR 1450, CA
- E *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169; [2016] PTSR 1271; [2017] 2 All ER 86, CA
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 162 CLR 24
Mordue v Secretary of State for Communities and Local Government [2015] EWCA Civ 1243; [2016] 1 WLR 2682, CA
R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839; [1997] 3 All ER 961, HL(E)
- F *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin); [2020] PTSR 1709; [2021] EWCA Civ 43; [2021] PTSR 1400, CA
R (Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] AC 756; [2008] 3 WLR 568; [2008] 4 All ER 927, HL(E)
R (CPRE Kent) v Dover District Council [2017] UKSC 79; [2018] 1 WLR 108; [2018] 2 All ER 121, SC(E)
- G *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 AC 1; [2005] 2 WLR 1; [2005] 1 All ER 527, HL(E)
R (Forge Field Society) v Sevenoaks District Council [2014] EWHC 1895 (Admin); [2015] JPL 22
R (Jones) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] 2 PLR 59, CA
- H *R (Langley Park School for Girls) v Bromley London Borough Council* [2009] EWCA Civ 734; [2010] 1 P & CR 10, CA
R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin)
R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy [2017] EWHC 1111 (Admin)

- R (*Mount Cook Land Ltd*) v Westminster City Council [2003] EWCA Civ 1346; [2017] PTSR 1166, CA A
- R (*National Association of Health Stores*) v Secretary of State for Health [2005] EWCA Civ 154; The Times, 9 March 2005, CA
- R (*Oxton Farm*) v Harrogate Borough Council [2020] EWCA Civ 805, CA
- R (*Rights: Community: Action*) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 3073 (Admin); [2021] PTSR 553, DC
- R (*Samuel Smith Old Brewery (Tadcaster)*) v North Yorkshire County Council [2020] UKSC 3; [2020] PTSR 221; [2020] 3 All ER 527, SC(E) B
- R (*Save Stonehenge World Heritage Site Ltd*) v Highways England [2021] EWHC 1642 (Admin)
- R (*Scarisbrick*) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787, CA
- R (*Spurrier*) v Secretary of State for Transport [2019] EWHC 1070 (Admin); [2020] PTSR 240, DC; sub nom R (*Friends of the Earth Ltd*) v Secretary of State for Transport [2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967, SC(E) C
- R (*Transport Action Network Ltd*) v Secretary of State for Transport [2021] EWHC 2095 (Admin); [2022] PTSR 31
- Revenue and Customs Comrs v Tooth [2021] UKSC 17; [2021] 1 WLR 2811; [2021] 3 All ER 711, SC(E)
- St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643; [2018] PTSR 746, CA D
- Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153; [1991] 2 All ER 10; 89 LGR 809, HL(E)
- South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)
- South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)
- Steer v Catesby Estates [2018] EWCA Civ 1697; [2019] 1 P & CR 5, CA E
- Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 53 P & CR 293
- The following additional cases were cited in argument or referred to in the skeleton arguments:
- Ball v Secretary of State for Communities and Local Government [2012] EWHC 3590 (Admin) F
- CREEDNZ Inc v Governor General [1981] 1 NZLR 172
- Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government [2015] EWCA Civ 657, CA
- Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; [2005] LLR 571, CA
- National Trust's Application for Judicial Review, In re [2013] NIQB 60
- Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465; [2002] LGR 51, HL(E) G
- R v Gough [1993] AC 646; [1993] 2 WLR 883; [1992] 4 All ER 481, CA; [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E)
- R (*Island Farm Development Ltd*) v Bridgend County Borough Council [2006] EWHC 2189 (Admin); [2007] LGR 60
- R (*Juden*) v Tower Hamlets London Borough Council [2021] EWHC 1368 (Admin)
- R (*Lewis*) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746; [2009] 1 WLR 83; [2008] LGR 781, CA H
- R (*Miller*) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61; [2017] 2 WLR 583; [2017] 1 All ER 593, SC(E)
- Trustees of the Barker Mill Estates v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408
- Whitby v Secretary of State for Transport [2016] EWCA Civ 444; [2016] JPL 980, CA

- A *Wholesale Mail Order Supplies v Secretary of State for the Environment* (1975) 237 EG 185
Winchester City Council v Secretary of State for the Environment (1979) 39 P & CR 1, CA
Lisle-Mainwaring v Carroll [2017] EWCA Civ 1315; [2018] JPL 194, CA

CLAIM for judicial review

- B By a claim form the claimant, Save Stonehenge World Heritage Site Ltd, sought judicial review challenging the lawfulness of the decision of the defendant, the Secretary of State for Transport, dated 12 November 2020, to make a development consent order (“DCO”) under section 114 of the Planning Act 2008 to authorise a scheme to replace the existing A303 road, involving the construction of a 13 kilometre long route, 3.3 kilometres of which would run in a tunnel through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site (“WHS”). The application for the DCO had been made by the first interested party, Highways England, a strategic highways company established under the Infrastructure Act 2015. The second interested party, Historic Buildings and Monuments Commission for England, was both a statutory consultee in relation to the application and the Government’s statutory adviser on the historic environment. The claimant sought permission to bring the claim and, by way of relief, an order that the claim be allowed; a declaration that the impugned decision had been taken unlawfully; and an order that the decision be quashed.
- D

- The grounds of the challenge were that: (1) by considering the impact on the historic environment as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the Secretary of State had unlawfully failed to comply with and apply the National Policy Statement for National Networks (“NPSNN”) and the applicable local development plan policies and had, in any event, unlawfully failed to give adequate and intelligible reasons as to (i) the significance of each of the affected heritage assets, (ii) the impact upon each asset and (iii) the weight to be given to that impact; (2) the Secretary of State had disagreed with the assessment of his expert panel without any proper evidential basis, and providing unlawfully inadequate and unintelligible reasons for so doing; (3) the Secretary of State had adopted an unlawful approach to the consideration of heritage harm under regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 and under paragraphs 5.131-5.134 of the NPSNN; (4) in accepting that the scheme would cause harm, that was less than substantial harm, to the WHS, the Secretary of State’s approach had been in breach of articles 4 and 5 of the World Heritage Convention administered by the United Nations Educational, Scientific and Cultural Organisation and, therefore, he had erred in law in concluding that section 104(4) of the Planning Act 2008 had not been engaged, thus the presumption in section 104(3) should not have been applied in his decision letter; (5) the Secretary of State had failed to consider mandatory material considerations, namely (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative. It was common ground that, by whatever means was employed, the decision-maker had to ensure that he had taken into account (a) the significance of each designated
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- F
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- H

heritage asset affected by the proposed development and (b) the impact of the proposal on that significance. A

On 16 February 2021 Holgate J ordered that the question of permission to proceed with the claim be heard together with the substantive legal issues.

The facts are stated in the judgment, post, paras 1–4, 5–18, 25.

David Wolfe QC and *Victoria Hutton* (instructed by *Leigh Day*) for the claimant. B

James Strachan QC and *Rose Grogan* (instructed by *Treasury Solicitor*) for the Secretary of State.

Reuben Taylor QC (instructed by *Pinsent Masons LLP*) for the first interested party.

Richard Harwood QC and *Christiaan Zwart* (instructed by *Shoosmiths LLP*) for the second interested party. C

The court took time for consideration.

30 July 2021. **HOLGATE J** handed down the following judgment.

Introduction D

1 The claimant, Save Stonehenge World Heritage Site Ltd, seeks to challenge by judicial review the decision dated 12 November 2020 of the defendant, the Secretary of State for Transport (“SST”), to grant a development consent order (“DCO”) under section 114 of the Planning Act 2008 (“the PA 2008”) for the construction of a new route 13 kilometres long for the A303, between Amesbury and Berwick Down, which would replace the existing surface route. The new road would have a dual instead of a single carriageway and would run in a tunnel 3.3 kilometres long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site (“WHS”). E

2 The application for the order was made by the first interested party, Highways England (“IP1”), a strategic highways company established under the Infrastructure Act 2015 (“IA 2015”). F

3 The second interested party, Historic England (“IP2”), was a statutory consultee in relation to the application and is the Government’s statutory adviser on the historic environment. IP2 has long been involved in the management of Stonehenge and since 2014 with the current road proposals.

4 The claimant is a company formed by the supporters of the Stonehenge Alliance, which is an unincorporated, umbrella campaign group, which coordinated the objections of many of its supporters before the statutory examination into the application. G

5 On 16 November 1972 the General Conference of the United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (“the World Heritage Convention” or “the Convention”). The United Kingdom ratified the Convention on 29 May 1984. In 1986 the World Heritage Committee (“WHC”) inscribed Stonehenge and Avebury as a WHS having “Outstanding Universal Value” (“OUV”) under article 11(2). H

6 In June 2013 the WHC adopted a statement of the OUV for the WHS which included the following:

- A “The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses, Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. At Avebury, they include Windmill Hill, the West Kennet Long Barrow, the Sanctuary, Silbury Hill, the West Kennet and Beckhampton Avenues, the West Kennet Palisade Enclosures, and important barrows.”
- B

The WHS is said to be of OUV for qualities which include the following:

- C “• Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.
- D • There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age.”
- E

The phrase “landscapes without parallel” has featured prominently in the material before the court.

- F 7 The Stonehenge part of the WHS occupies about 25 square kilometres and contains over 700 known archaeological features, of which 415 are protected as parts of 175 scheduled ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979 (see para 6.11.1 of the Environmental Statement (“ES”) for the project). For the assessment of impacts on heritage assets, either directly or upon their setting, the ES relied upon a primary study area up to 500 metres from the boundary of the proposed development. To address impacts on the setting of other high value assets a secondary study area was used extending to 2 kilometres from that boundary. There are 255 scheduled monuments within the 2 kilometre area, of which 167 fall entirely or partly within the WHS. Within that area there are also:
- G

- H 6 Grade I listed buildings
14 Grade II* listed buildings
209 Grade II listed buildings
8 conservation areas.

8 There are 1,142 known, non-designated heritage assets within the 500-metre study area, of which 11 would be directly impacted by the scheme. These 11 are relevant to ground 1(i) of the challenge.

9 Paras 11.1.14 to 11.1.17 of the World Heritage Site Management Plan, adopted on 18 May 2015, describe the background to the problem concerning the existing A303. Para 11.1.14 states:

“the A303 continues to have a major impact on the integrity of the wider WHS, the setting of its monuments and the ability of visitors to explore the southern part of the Site. The A303 divides the Stonehenge part of the WHS landscape into northern and southern sections diminishing its integrity and severing links between monuments in the two parts. It has significant impacts on the setting of Stonehenge and its Avenue as well as many other monuments that are attributes of OUV including a number of barrow cemeteries. The road and traffic represent visual and noise intrusion and have a major impact on the tranquillity of the WHS. Access to the southern part of the WHS is made both difficult and potentially dangerous by the road. In addition to its impacts on the WHS, reports indicate that the heavy congestion has a negative impact on the economy in the South West and locally and on the amenity of local residents.”

10 Proposals to improve the A303 date back to the 1990s when the process of identifying alternative routes began. In 2002 the then Highways Agency proposed a dual carriageway scheme with a tunnel, 2.1 kilometres long, running past Stonehenge. A public inquiry was held in 2004 (para 11.1.15). The inspector’s report in 2005 recommended in favour of the scheme proceeding. But in view of increased tunnelling costs, the Government decided to review whether the scheme still represented the best option for improving the A303 and the setting of Stonehenge, as well as value for money. The Government concluded that, because of significant environmental constraints across the whole of the WHS, there were no acceptable alternatives to the 2.1 kilometre tunnel but the scheme costs could not be justified at that time. The need to find a solution for the negative impacts of the A303 remained a key challenge (para 11.1.16). In 2014 the SST adopted a road investment strategy (“RIS”) for the purposes of the IA 2015 which identified the A303 corridor for improvements (para 11.1.17). This included the scheme which became the subject of the application for the DCO.

11 In summary, IP1’s scheme comprises the following components, running from west to east:

- A northern bypass of Winterbourne Stoke
- A new grade-separated junction with twin roundabouts between the A303 and A360 to the west of, and outside, the WHS replacing the existing Longbarrow roundabout
- “The western cutting”—a new dual carriageway within the WHS in a cutting 1 kilometre long connecting with the western portals of the tunnel
- A tunnel 3.3 kilometres long running past Stonehenge
- A new dual carriageway from the eastern tunnel portals to join the existing A303 at a new grade-separated junction (with a flyover) between the A303 and A345 at the Countess roundabout, of which 1 kilometre would be in cutting (“the eastern cutting”).

A The scheme includes a number of “green bridges.” One bridge (150 metres in width) over the western cutting would be located 150 metres inside the western boundary of the WHS (which follows the line of the A360).

B 12 The proposals for the western cutting, western tunnel portals and the Longbarrow junction have attracted much opposition. In the current design, the cutting is about 1 kilometre long, 7–11 metres deep, about 35 metres wide between retaining walls and 60 metres wide between the edges of sloping grass embankments (Panel Report (“PR”) 2.2.14 and 5.7.221).

C 13 In 2017 the WHC expressed concerns that the proposed tunnel (then 2.9 kilometres long) and cuttings would adversely affect the OUV and asked the UK to consider a non-tunnel bypass to the south of the WHS (“route F10”) or a longer tunnel (approximately 5 kilometres in length) which would remove the need for cuttings within the WHS. In 2019 the WHC commended the increase in the length of the tunnel to 3.3 kilometres and the green bridge over the western cutting. However, it still expressed concerns about the exposed dual carriageways within the WHS, particularly the western cutting. The WHC urged the UK to pursue a longer tunnel “so that the western portal is located outside” the WHS. But it no longer asked the UK to pursue the F10 option.

D 14 The application for a DCO was the subject of a statutory examination before a Panel of five inspectors between 2 April and 2 October 2019 (“the Examination”). The report of the Panel was submitted to the Department for Transport (“DfT”) on 2 January 2020.

15 During the Examination the option of a longer tunnel of 4.5 kilometres was considered. This would omit the western cutting.

E 16 In its report the Panel made the following observation about the western cutting at PR 5.7.225, in contrast to the removal of a surface road such as the existing A303:

F “On the other hand, the current proposal for a cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible.”

G 17 The Panel recommended that the DCO should not be granted (PR 7.5.25). In its final conclusions, the Panel said that the scheme would have a “significantly adverse effect” on the OUV of the WHS, including its integrity and authenticity. Taking this together with its impact upon the “significance of heritage assets through development within their settings”, the scheme would result in “substantial harm” (PR 7.5.11). The Panel considered that the benefits of the scheme would not be substantial and, in any event, would not outweigh the harm to the WHS (PR 7.5.21). In addition, the totality of the adverse impacts of the proposed scheme would strongly outweigh its overall benefits (PR 7.5.22). Those impacts included “considerable harm to both landscape character and visual amenity” (PR 7.5.12). Nonetheless, in PR 7.5.26 the Panel said this:

“the ExA recognises that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there

have been differing and informed opinions and evidence submitted to the Examination.” (“ExA” referring to the examining authority or Panel.) A

The Panel acknowledged that the SST might reach a different conclusion on adverse impacts or the weight to be attached to planning benefits and, consequently, on the overall planning balance, which might result in a DCO being granted.

18 In his decision letter, the SST preferred the views of IP2 on the level of harm to the spatial, visual relations and settings of designated assets, namely that the harm would be “less than substantial” rather than “substantial” (DL 34). In DL 43 the SST specifically noted the concerns raised by interested parties and the Panel about the adverse impacts from the western cutting and portals, the Longbarrow junction and, to a lesser extent, the eastern approach. However, on balance, and taking into account the views of IP2 and Wiltshire Council, the SST concluded that any harm caused to the WHS as a whole would be less than substantial. In DL 80 the SST accepted advice from IP2 that the harm to “heritage assets, including the OUV”, would be less than substantial. In DL 81 the SST disagreed with the Panel’s views that the level of harm to the landscape would conflict with the National Policy Statement for National Networks (“NPSNN”) and concluded that that harm would be outweighed by beneficial impacts throughout most of the scheme, so that landscape and visual impacts had a neutral effect rather than “considerable” negative weight, as the Panel had found. Ultimately, after weighing all the other considerations, the SST decided that the need for the scheme, together with its other benefits outweighed any harm (DL 87). B C D

19 Plainly, this is a scheme about which strongly divergent opinions are held. It is therefore necessary to refer to what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553, para 6: E

“It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully.” F G

20 The present judgment can only decide whether the decision to grant the DCO was lawful or unlawful. It would, therefore, be wrong for the outcome of this judgment to be treated as either approving or disapproving the project. That is not the court’s function. H

21 I would like to express my gratitude to counsel for their helpful written and oral submissions and to the legal teams for the assistance they have given. In particular, the parties are to be commended for having produced a very helpful and comprehensive statement of common ground (“SOCG”).

A 22 The claimant raises five grounds of challenge, which it has summarised in para 7 of its skeleton argument:

Ground 1: By considering the impact on the “historic environment” as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the SST has unlawfully failed to comply with and apply the NPSNN and the applicable local development plan policies. The SST has, in any event, unlawfully failed to give adequate and intelligible reasons as to (1) the significance of each of the affected heritage assets, (2) the impact upon each asset and (3) the weight to be given to that impact.

B *Ground 2:* The SST disagreed with the assessment of his Expert Panel, without—unlawfully—there being any proper evidential basis for so doing. That happened, in part, because the SST misconstrued the advice of Historic England. In any event, the SST’s reasons for disagreeing with the advice of his Expert Panel were unlawfully inadequate and unintelligible.

C *Ground 3:* The SST adopted an unlawful approach to the consideration of heritage harm under paragraphs 5.131–5.134 of the NPSNN.

Ground 4: The SST’s approach to the World Heritage Convention was unlawful.

D *Ground 5:* The SST failed to consider mandatory material considerations, namely: (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative.

E 23 On 16 February 2021 I ordered that the application for permission to apply for judicial review be adjourned to a “rolled up” hearing at which both the question of permission and substantive legal issues would be considered. A case management hearing took place on 23 February 2021 at which the parties successfully co-operated in putting forward directions to enable the court to handle the issues, and the potentially large amount of material, fairly and efficiently.

F 24 On 7 April 2020 the claimant made an application for permission to amend the statement of facts and grounds to add ground 6, which alleged that the decision to grant the DCO had been vitiated by actual or apparent predetermination and for an order for disclosure in relation to that ground. The application was opposed and on 18 May 2021 Waksman J refused it on the papers. The claimant renewed its application to an oral hearing and the matter came before me on 10 June 2021. Like Waksman J, I found the proposed new ground to be wholly unarguable and so dismissed the application. The judgment is at *R (Save Stonehenge World Heritage Site Ltd) v Highways England* [2021] EWHC 1642 (Admin).

G 25 The remainder of this judgment is set out under the following headings:

Subject	Paragraph Numbers
Planning legislation for nationally significant infrastructure projects	26–36
The National Policy Statement for National Networks	37–48
H Development plan and other policies	49–55
The World Heritage Convention	56–59
Legal principles	60–67
The Environmental Statement	68–77
Views of parties at the Examination	78–86

The Panel's report	87–121	A
The SST's decision letter	122–144	
Ground 1: Impacts on individual assets	145–182	B
(i) The 11 non-designated assets	149–155	
(ii) Failure to consider 14 scheduled ancient monuments	156–160	
(iii) Failure to consider effects on the settings of heritage assets	161–166	
(iv) Whether the SST took into account the impacts on all heritage assets	167–181	
Ground 2: lack of evidence to support disagreement with the Panel	183–189	C
Ground 3: double-counting of heritage benefits	190–209	
Ground 4: whether the proposal breached the World Heritage Convention	210–233	
Ground 5	224–290	C
(i) Failure to take into account local policies	225–231	
(ii) Whether the business case ought to have taken into account the findings on heritage harm	232–241	
(iii) Alternatives to the proposed western cutting and portals	242–290	
Conclusions	291–294	
Appendix 1: Legal principles agreed between the parties		
Appendix 2: paras 25 to 43 and 50 of the decision letter		

Planning legislation for nationally significant infrastructure projects

26 The proposed development is a nationally significant infrastructure project for the purposes of the PA 2008. Accordingly, development consent is required under that legislation (section 31). The requirements to obtain other approvals, such as planning permission and scheduled ancient monument consent are disappplied by section 33.

27 The statutory framework for the designation of national policy statements and for obtaining a DCO has been summarised in a number of recent cases and need not be repeated here (see eg *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [5]–[8]; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at paras 21–40 and 91–112; sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190, paras 19–38; and *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709, paras 26–52 and 105–116; [2021] PTSR 1400 at paras 67–68 and 104–105). None of the analysis in those passages was in dispute here.

28 Sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply to the determination of applications for a DCO but, instead, regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010 (SI 2010/305) (“the 2010 Regulations”) provides:

“(1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.

“(2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.

“(3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the

A Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting.”

29 The project constituted environmental impact assessment (“EIA”) development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) (“the EIA Regulations 2017”) applied.

B 30 Regulation 4(2) prohibits the granting of a DCO “unless an EIA has been carried out in respect of that application”. Regulation 5(1) defines EIA as a process consisting of (a) the preparation of an environmental statement, (b) compliance with publicity, notification and consultation requirements in the EIA Regulations 2017 on the application and the ES, and (c) compliance in this case with regulation 21.

C 31 Regulation 21(1) imposed the following obligations on the Secretary of State:

D “When deciding whether to make an order granting development consent for EIA development the Secretary of State *must*— (a) examine the environmental information; (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary; (c) integrate that conclusion into the decision as to whether an order is to be granted; and (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.” (Emphasis added.)

E “Environmental information” is defined by regulation 3(1) as including the ES, any further information added to the ES, and representations made by consultees or other persons about the effects of the development on the environment.

32 The EIA “must identify, describe and assess in an appropriate manner” “the direct and indirect significant effects of the proposed development” on inter alia “cultural heritage” (regulation 5(2)).

F 33 Regulation 14 defines what must be contained in an ES, including “the likely significant effects of the proposed development on the environment” (regulation 14(2)(b)) and also:

G “a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment.” (Regulation 14(2)(d).)

This is repeated in paragraph 2 of Schedule 4 (linked to regulation 14(2)(f)). Paragraph 3 of Schedule 4 requires the ES to contain a description of the relevant aspects of the current state of the environment, the “baseline scenario”. As we shall see, the effects of the current A303 on the environment, including heritage assets, formed an important part of the assessment of the changes in environmental impact resulting from the proposed scheme.

H 34 Regulation 5(5) provides:

“The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to,

sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate.” A

This provision acknowledges that a minister or relevant authority may not themselves have “sufficient expertise” to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has “access” to sufficient expertise for that purpose. That expertise will include the officials within the minister’s department and also the Panel of inspectors reporting on its assessment of the environmental information and of the statutory examination of the application for a DCO. B

35 Because, in this case, an NPS had taken effect, section 104 of the PA 2008 was applicable. Accordingly, by section 104(2) the SST was required to have regard to, inter alia, the NPSNN. Section 104(3) required the SST to “decide the application in accordance with” the NPSNN “except to the extent that one or more of subsections (4) to (8) applies”. Section 104(4) to (8) provides: C

“(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations. D

“(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

“(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment. E

“(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

“(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.” F

The legal issues in this case are particularly concerned with section 104(3), (4) and (7). It is common ground that the World Heritage Convention was an “international obligation” falling within section 104(4).

36 Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO. G

National Policy Statement for National Networks

37 The NPSNN was published on 17 December 2014 and formally designated, under section 5 of the PA 2008 on 14 January 2015, following consideration by Parliament in accordance with sections 5(4) and 9. H

38 Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:

“Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a presumption

A in favour of granting development consent for national networks [nationally significant infrastructure projects ('NSIPs')] that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in section 104 of the Planning Act."

B 39 Paragraph 4.3 provides:

"In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:

- its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
- its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

40 Paragraph 4.5 lays down a requirement for a business case:

D "Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development."

F This paragraph is relevant to ground 5(ii).

41 Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:

"4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:

- G • The EIA Directive [Parliament and Council Directive 2011/92/EU] requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.
- There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives [Council Directive 92/43/EEC and Parliament and Council Directive 2000/60/EC].
- H • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).

“4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision-maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision-making process. It is not necessary for the Examining Authority and the decision-maker to reconsider this process, but they should be satisfied that this assessment has been undertaken.”

42 Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of “heritage asset” and “significance”:

“Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called ‘heritage assets’. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset’s physical presence, but also from its setting.”

43 The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (paragraph 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:

“Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance.”

This paragraph is relevant to ground 1(i).

44 Paragraphs 5.128 and 5.129 state that the Secretary of State should seek to identify and assess the significance of any heritage asset which, or the setting of which, may be affected by a proposed development, including the nature of that significance and the value of the asset. Paragraph 5.129 says:

“In considering the impact of a proposed development on any heritage assets, the Secretary of State should take into account the particular nature of the significance of the heritage asset and the value that they hold for this and future generations. This understanding should be used to avoid or minimise conflict between their conservation and any aspect of the proposal.”

45 Paragraph 5.130 states:

A “The Secretary of State should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution that their conservation can make to sustainable communities—including their economic vitality.”

B 46 Paragraphs 5.131 and 5.132 set out the following general principles:

C “5.131 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset’s conservation. The more important the asset, the greater the weight should be. Once lost, heritage assets cannot be replaced and their loss has a cultural, environmental, economic and social impact. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. Given that heritage assets are irreplaceable, harm or loss affecting any designated heritage asset should require clear and convincing justification. Substantial harm to or loss of a grade II Listed Building or a grade II Registered Park or Garden should be exceptional. Substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, Scheduled Monuments, grade I and II* Listed Buildings, Registered Battlefields, and grade I and II* Registered Parks and Gardens should be wholly exceptional.

D “5.132 Any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification that will be needed for any loss.”

E 47 Paragraphs 5.133 and 5.134 lie at the heart of much of the claimant’s case under grounds 1 to 3. They set out what was described in argument as a “fork in the road” in the decision-making process. The policy test to be applied is more strict where a proposal would cause “substantial harm” to, or total loss of, the significance of a designated heritage asset, as opposed to “less than substantial harm.” In the former case, “substantial public benefits” are required to outweigh the heritage loss or harm, which must also be shown to be necessary in order to deliver those benefits. In the latter case, the policy simply requires the heritage harm to be weighed against “public benefits”:

G “5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, ...

H “5.134 Where the proposed development 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 securing its optimum viable use.”

48 It is common ground for the purposes of this claim that there is no material difference between paragraphs 5.133 and 5.134 of the NPSNN and

their counterparts in paragraphs 195 and 196 of the National Planning Policy Framework (“NPPF”) (SOCG at paras 63–64). A

Development plan and other policies

Wiltshire Core Strategy

49 Wiltshire Council adopted the Wiltshire Core Strategy in January 2015 as part of the statutory development plan. B

50 Core Policy 6 states: “*Stonehenge* The World Heritage Site and its setting will be protected so as to sustain its Outstanding Universal Value in accordance with Core Policy 59.”

51 Core Policy 58 states:

“Ensuring the conservation of the historic environment” C

“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, including:

- i. nationally significant archaeological remains
 - ii. World Heritage Sites within and adjacent to Wiltshire
 - iii. buildings and structures of special architectural or historic interest
 - iv. the special character or appearance of conservation areas
 - v. historic parks and gardens
 - vi. important landscapes, including registered battlefields and townscapes.
- D

“Distinctive elements of Wiltshire’s historic environment, including non-designated heritage assets, which contribute to a sense of local character and identity will be conserved, and where possible enhanced. The potential contribution of these heritage assets towards wider social, cultural, economic and environmental benefits will also be utilised where this can be delivered in a sensitive and appropriate manner in accordance with Core Policy 57 (Ensuring High Quality Design and Place Shaping).” E

52 Core Policy 59 states:

“The Stonehenge, Avebury and associated sites World Heritage Site”

“The Outstanding Universal Value (OUV) of the World Heritage Site will be sustained by:

- i. Giving precedence to the protection of the World Heritage Site and its setting
 - ii. Development not adversely affecting the World Heritage Site and its attributes of OUV. This includes the physical fabric, character, appearance, setting or views into or out of the World Heritage Site
 - iii. Seeking opportunities to support and maintain the positive management of the World Heritage Site through development that delivers improved conservation, presentation and interpretation and reduces the negative impacts of roads, traffic and visitor pressure
 - iv. Requiring developments to demonstrate that full account has been taken of their impact upon the World Heritage Site and its setting. Proposals will need to demonstrate that the development will have no
- G

A individual, cumulative or consequential adverse effect upon the site and its OUV. Consideration of opportunities for enhancing the World Heritage Site and sustaining its OUV should also be demonstrated. This will include proposals for climate change mitigation and renewable energy schemes.”

B *The Stonehenge World Heritage Site Management Plan*

53 This document contains a number of detailed policies. Policy 1d states: “Development which would impact adversely on the WHS, its setting and its attributes of OUV should not be permitted”.

C 54 Policy 3c states: “Maintain and enhance the setting of monuments and sites in the landscape and their interrelationships and astronomical alignments with particular attention given to achieving an appropriate landscape setting for the monuments and the WHS itself.”

55 Policy 6a states: “Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS.”

D *The World Heritage Convention*

56 Article 1 defines “cultural heritage” in terms of monuments (including elements or structures of an archaeological nature), groups of buildings and sites which are of “outstanding universal value”.

E 57 Article 3 provides that it is for each “state party” to the Convention to identify properties within its territory falling within, inter alia, article 1. Each state party must submit to the WHC an inventory of all such properties (article 11(1)). From that inventory the WHC compiles and publishes a list of those properties which “it considers as having outstanding universal value” (article 11(2)).

F 58 Articles 4 and 5 lie at the heart of the claimant’s ground 4. They state:

“Article 4

G “Each state party to this Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in articles 1 and 2 and situated on its territory, belongs primarily to that state. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.”

“Article 5

H “To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each state party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

“(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

“(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

“(c) to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage;

“(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

“(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.”

59 The WHC has issued *Operational Guidelines for the Implementation of the World Heritage Convention* (July 2019). Paras 77–78 set out criteria for identifying whether an asset has OUV to merit inscription as a WHS. Para 78 states that a property “must also meet the conditions of *integrity* and *authenticity* and must have an adequate protection and management system to ensure its safeguarding”. The concepts of authenticity and integrity are explained respectively in paras 79–86 and 87–95. Authenticity is concerned with the ability to understand the value attributable to a heritage asset (para 80). Properties meet the conditions of authenticity if “their cultural values ... are truthfully and credibly expressed through a variety of attributes” which include location and setting (para 82). Integrity is “a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes” (para 88). Para 96 states that “Protection and management of World Heritage properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time.” The Panel summarised the concepts of integrity and authenticity in its report at PR 5.7.314 and 5.7.317–318.

Legal principles

60 The parties have helpfully agreed in the SOCG a number of legal principles which it is appropriate to record in Appendix 1 to this judgment.

61 With regard to para 1e of the Appendix and the law on “obviously material considerations”, *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709, para 99 has been approved by the Court of Appeal in *R (Oxton Farm) v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]. The principles have been set out more fully by the Supreme Court in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190, paras 116–121.

62 On the issue of whether, as a matter of fact, a minister did take into account a particular factor, it is well established that a minister only has regard to matters of which he knows or which are drawn to his attention, for example in briefing material or by a précis (see *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 at [26]–[38] and *Revenue and Customs Comrs v Tooth* [2021] 1 WLR 2811, para 70).

A 63 However, the mere fact that a minister did not know about, or have his attention drawn to, a relevant consideration is insufficient by itself to vitiate his decision. A claimant needs to go further and demonstrate that relevant legislation mandated, expressly or by implication, that the consideration be taken into account. Otherwise, he must show that the consideration was so “obviously material” that a failure to take it into account would be irrational; it would not accord with the intention of the legislation. This is the familiar
B irrationality test in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 (see *National Association of Health Stores* at paras 62–63 and 73–75; *Oxton Farm* at para 8; *Friends of the Earth* [2021] PTSR 190, at paras 116–119).

64 In *National Association of Health Stores* the Court of Appeal approved the following passages from the decision of the High Court of
C Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. Gibbs CJ held at para 3 (pp 30–31) :

“Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the
D departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed
E his satisfaction in accordance with law. ”

Brennan J held at para 18 (p 61):

“A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are
F the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.”

And at para 27 (pp 65–66):

“The Department does not have to draw the Minister’s attention to every communication it receives and to every fact its officers know. Part of a Department’s function is to undertake an analysis, evaluation and précis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence
G of supplying a departmental analysis, evaluation and précis is, of course, that the Minister’s appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention
H

to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and précis of the material relevant to that decision."

65 It is plain from these authorities that in considering the legal adequacy of the briefing provided to a minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a précis of material which the minister is "bound to have regard to". To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application (see eg *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [91]–[94]).

66 Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a minister to inform him of all the matters which he is legally obliged to take into account.

67 In the present case, it is common ground that the relevant briefing materials before the SST comprised the Panel's report and the draft decision letter prepared by officials, as well as the briefing notes they submitted from time to time. Mr James Strachan QC said, on instructions, that there was no material difference between the draft decision letter which accompanied the final briefing note and the formal decision issued on 12 November 2020, following final ministerial approval on 5 November. The claimant did not ask the court to require the draft to be produced and did not take issue with that position. In effect, the parties have been content to proceed on the basis that Mr Strachan's statement is correct.

The Environmental Statement

68 As the Panel reported (PR 5.7.18), chapter 6 of the ES with its appendices assessed the effect of the proposed development on the significance of designated and non-designated heritage assets (including the WHS) within the two study areas, either through physical impact or by affecting their setting. A separate Heritage Impact Assessment ("HIA") was provided to deal with the impact of the scheme on the OUV of the WHS. It addressed both designated and non-designated assets, both within and without the WHS, relevant to its OUV, together with impacts on the character of the setting of the WHS (PR 5.7.22) in accordance with guidance issued by the International Council on Monuments and Sites ("ICOMOS") (see ES paras 6.3.1 to 6.3.2).

A 69 Chapter 3 of the ES dealt with IP1's assessment of alternative options to the proposed scheme.

70 The ES described in a conventional manner the significance of the scheme's effects on assets, using criteria to assess the significance or value of the asset, the "setting contribution" and the magnitude of the impact, whether adverse or beneficial (PR 5.7.20).

B 71 Para 6.6.59 of the ES explains that for the assessment in the ES and HIA of both the baseline scenario (with the existing A303) and the impacts of the proposed scheme, the analysis identified some 39 "asset groupings" to reflect the disposition and significance of some of the monuments within the WHS and wider landscape. This was said to be an established approach, endorsed in a joint mission report by the WHS and ICOMOS in 2015. IP2 agreed with this approach in the present case. "The consideration of related assets as part of groups allows for the potential of different levels and types of impact on individual components of individual asset groups extending over large areas to be assessed" (paras. 6.10.6 to 6.10.8 of IP2's representations to the Panel in May 2019). In addition, the ES and HIA made assessments of the impacts on certain individual assets and their settings.

D 72 The ES arrived at a range of impacts on different assets from different parts of the scheme, some adverse, some neutral and some beneficial. In particular, this was not a proposal for an entirely new road. The scheme would *remove* the existing A303 which, it is generally accepted, has its own detrimental impacts on heritage assets. Accordingly, it was unavoidable that, in assessing the impacts of the proposal on any particular asset or grouping of assets, the judgments expressed in the ES and HIA had to compare the effects of the existing A303 as part of the baseline. To do otherwise would have been unrealistic. That approach was not criticised during the hearing. In some instances the ES states that the proposed scheme would improve the existing position by reducing the level of net harm or producing a net benefit; in others the end result is assessed as harmful per se.

F 73 IP1's overall assessment was that the proposed development would not cause substantial harm to any designated heritage asset and, for many, the effects would be beneficial. It was then said that the substantial benefits of the scheme would outweigh the less than substantial harm caused to the significance of some heritage assets (PR 5.7.21).

74 The HIA assessed the proposed scheme in relation to the seven attributes of the OUV of the WHS:

- G “(1) Stonehenge itself as a globally famous and iconic monument.
 “(2) The physical remains of the Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
 “(3) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
 “(4) The design of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the skies and astronomy.
 H “(5) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other.
 “(6) The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel.

“(7) The influence of the remains of the Neolithic and Bronze Age funerary and ceremonial monuments and their landscape setting on architects, artists, historians, archaeologists and others.” A

The HIA also assessed the effect of the development on the “authenticity” and the “integrity” of the WHS.

75 IP1 concluded that the scheme would have a slightly adverse effect on two OUV attributes but a beneficial effect on the remaining five. They also judged that the proposal would have a slightly beneficial effect on the authenticity and integrity of the WHS and thus, viewed overall, a slightly beneficial effect on all three criteria, OUV attributes, authenticity and integrity (PR 5.7.25). B

76 Many of the impacts of the proposed development do not involve direct loss of assets. They are the subject of mitigation measures in the Outline Environmental Management Plan (“OEMP”) and the Detailed Archaeological Mitigation Strategy (“DAMS”). The former effectively provides a code of construction practice and the latter a detailed framework for the preparation, approval and implementation of plans for site-specific investigation and archaeological method statements (PR 5.7.33). The OEMP and DAMS are themselves important documents which gave rise to significant issues during the Examination (see the Panel’s “second main issue” at PR 5.7.151–5.7.205). C D

77 The Panel summarised IP1’s case on the *overall* heritage benefits of the scheme at PR 5.7.29:

“• The removal of the A303 and its traffic will greatly improve the setting of the stone circle and numerous monuments and monument groups across the central part of the WHS. Visitors will be able to appreciate the stone circle and interrelationships with numerous monuments and monument groups without the sight and sound of traffic intruding on their experience. This will help to conserve and enhance the WHS and sustain its OUV. E

• The Scheme will also remove the intrusion of vehicles and vehicle lights upon the mid-winter sunset solstitial alignment and restore the relationship between the stone circle and the Sun Barrow. It will also allow the removal of the lit junction at Longbarrow Roundabout, which currently results in night-time light spill and light pollution on the western edge of the WHS, contributing to improvements in the experience of dark skies. F

• The removal of the A303 will reconnect the Avenue where it is currently severed by the existing road. G

• The existing road as it passes through the WHS will be altered for use by NMUs allowing safer exploration of the WHS east to west.

• The Scheme would afford safer NMU connections using north-south Public Rights of Way, currently severed by the existing surface A303. H

• Removal of Longbarrow Roundabout and the conversion of the A303 and part of the A360 to NMU routes, immediately adjacent to the Winterbourne Stoke Crossroads complex of burial mounds, will allow improvements to the immediate landscape context and setting of this important barrow group.

- A • The construction of the Scheme will improve visitor's enjoyment and experience of the WHS landscape as a whole and provide opportunities for improved interpretation and presentation of the WHS.
- The construction of the Scheme will require advanced archaeological works to record archaeological remains in advance of Proposed Development construction. This will present educational and community outreach opportunities working sensitively and in close collaboration with key heritage stakeholders."
- B

Views of parties at the Examination

78 A number of parties strongly opposed the proposal. The claimant comprised a group of five NGOs, which included the British Archaeological Trust. They criticised the ES and HIA and supported the objections of the Consortium of Archaeologists ("COA") and the Council for British Archaeology ("CBA") (see eg PR at 5.7.105–5.7.128). The concerns and objections of the WHC and ICOMOS were summarised at, for example, PR 5.7.73–5.7.79 and 5.7.84–5.7.98.

79 Wiltshire Council, as the local planning authority, provided a local impact report under section 60 of the PA 2008, addressing the impact of the scheme on the authority's area. The council considered that the removal of the existing A303 would be beneficial to the setting of Stonehenge and many groups of monuments, contributing to its OUV. The removal of the existing Longbarrow roundabout would also bring benefits to the Winterbourne Stoke group of barrows.

80 The council considered that the most significant negative impact would be from the dual carriageway, cutting and portals in the western part of the WHS. There would be harmful visual effects, impacts on the settings of key monument groups expressing attributes of the OUV and spatial severance, which would be difficult to avoid with the length of tunnel proposed. The council accepted that the principles and commitments in the OEMP would enable the detailed design to accord with the aims and objectives of the WHS Management Plan and sustain the OUV. But the council remained concerned about the visual impact on monuments and their settings at the western end of the scheme. Although harm could be mitigated, to some extent, by the use of green infrastructure and other design solutions, the failure to reduce the impact by providing additional cover to the western cutting was a missed opportunity (PR 5.7.55–5.7.61).

81 A statement of common ground agreed between the council and IP1 noted that there was general agreement as to the likely extent of the impacts of the scheme and that the council agreed that there are no aspects which are likely to reach the level of "substantial harm" (DL 43). The council considered the proposal to be "in accordance with the large majority of policies" in the development plan, subject to appropriate mitigation being carried out by IP1 of potential harmful effects identified in the ES. By the end of the Examination, the council and IP1 agreed that there were no outstanding policy issues (PR 4.5.6 and 4.5.8).

82 The National Trust owns and manages 850 hectares of the Stonehenge landscape within the WHS. It welcomed the Government's intention to invest in a bored tunnel to remove a large part of the existing A303. If well designed and delivered with the utmost care for archaeology and the landscape, it could provide an overall benefit to the WHS. The Trust was satisfied that

design and delivery controls had been developed through the DAMS and OEMP to provide necessary reassurance and that other concerns had been overcome (PR 5.7.70–5.7.71).

83 The English Heritage Trust manages over 400 historic buildings, monuments and sites across the country, including the Stonehenge monument itself. In a statement of common ground agreed with IP1, the Trust said that it was supportive of the project, because it has the potential to transform the Stonehenge area of the WHS and make significant improvements to the setting of the Stonehenge monument (see SOCG in these proceedings at paras 34–35).

84 The position of IP2 at the Examination has been summarised in paras 24–27 of the SOCG agreed between the parties and by the Panel at PR 5.7.62–5.7.69.

85 In addition, I note that in its representations in May 2019, IP2 stated that it was supportive of the objectives of the scheme. It had been instrumental in securing the Government’s commitment to invest in a bored tunnel at least 2.9 kilometres long. But a number of matters needed to be addressed to ensure the delivery of those objectives and potential benefits for the OUV of the WHS (paras 1.16–1.17, 4.9.2, 6.10.12 et seq and 8.11). IP2 focused primarily on the WHS and on those scheduled monuments affected by the scheme, whether contributing to the OUV or not, and whether inside or outside the WHS (para 3.9). But it had considered all parts of the ES relevant to cultural heritage as well as the HIA (paras 3.10 and 6.3). In November 2017 IP2 had specifically identified the need for the ES to address non-designated heritage assets (para 4.10.4). IP2’s representations to the Examination identified those specific areas where it had concerns or further information was needed.

86 In PR 5.7.329 the Panel pinpointed the key difference between its overall assessment on the effect of the scheme on cultural heritage and that of IP2, namely it considered the harm to be substantial, whereas the latter considered it to be less than substantial. The Panel’s explanation for this was the weight it placed on the effects of the western cutting and the Longbarrow junction (see PR 5.7.330).

The Panel’s report

87 The Panel’s report is over 500 pages long, covering many topics and issues. However, the court was asked to focus primarily on sections dealing with heritage impact and the overall balance. Even so, the section dealing with heritage impact alone runs to over 50 pages. The Panel’s conclusions on heritage matters occupy some 30 pages, running from PR 5.7.129 to 5.7.333. But it is only necessary for this judgment to focus on certain of the issues which affect the claimant’s grounds of challenge.

88 At the outset of its assessment the Panel identified five “main issues”:

- (1) whether the analysis and assessment methodology is appropriate;
- (2) whether the mitigation strategy, and its effectiveness in the protection of WHS archaeology, is appropriate;
- (3) the effects of the proposed development on spatial relations, visual relations, and settings;
- (4) cumulative and in-combination effects;

A (5) effects on WHS OUV and the historic environment as a whole.

89 It is primarily the Panel's conclusions on the third and fifth main issues which are relevant to grounds 1 to 3 of this challenge. However, it is convenient to summarise the Panel's conclusions on the other main issues first.

B 90 On the first main issue the Panel concluded, at PR 5.7.150:

"The ExA considers the analysis and assessment methodology appropriate subject to the points of criticism set out. It does not necessarily agree with the Applicant's assessments. Particular points will be examined in the remainder of this section of the Report."

C Although the second sentence in that paragraph is ambiguous, the SST and IP1 say that the third sentence shows that the Panel accepted the analysis in the ES and HIA, save for where the contrary is expressly stated. The position taken in those documents was that the scheme would not cause "substantial harm" to any designated asset (see eg PR 5.7.21).

D 91 Under the first main issue, the Panel considered that, subject to a number of concerns identified in its report, the HIA was generally comprehensive and provided a sufficient level of detail (para 5.7.138). But the Panel said that the HIA should have given more consideration to the effect of the Longbarrow junction on the setting of the WHS as a whole (para 5.7.139). Furthermore, the assessment of impact on settings had largely been concerned with "static views" rather than "the less tangible aspects of setting that relate to the WHS as a whole", including the overall significance of the site and "the succession of impressions which lead cumulatively to an overall sensory and intellectual construct of the site" which is important (paras 5.7.143 to 5.7.145). This last point was linked to a paper by D Roberts et al (2018) on the distribution of long barrows within the Stonehenge landscape (PR 5.7.144). The Panel substantially relied upon the thinking in this paper when it came to express its conclusions on the third main issue (see below).

F 92 In relation to the second main issue, the Panel judged the proposed mitigation strategy to be adequate, provided that issues relating to the sampling strategy for the investigation of archaeological features, together with other identified concerns, were resolved. Such matters were addressed in post-examination consultation carried out by the SST as the Panel had envisaged at PR 5.7.328. There is no legal challenge that the SST failed to address those matters properly.

G 93 On the fourth main issue, and leaving to one side its criticisms under the third and fifth main issues, the Panel agreed with the ES's overall conclusions on cumulative and in-combination effects (para 5.7.305).

H 94 On the third main issue, part of the Panel's analysis was concerned with the effect of the proposal on listed buildings and conservation areas. The Panel concluded that the effects of the proposed development on the settings of assets lying beyond "three main elements" would be acceptable (PR 5.7.296). Those matters are not relevant, therefore, to the difference between the Panel and the SST as to whether the proposal would cause "substantial" or "less than substantial harm" to the heritage assets.

95 The "three main elements" were identified in PR 5.7.207 as: (1) the western approach, cutting and portals; (2) the proposed Longbarrow junction; (3) "and to a lesser extent, the eastern approach and portal". It will

be recalled that it was the first two elements upon which the Panel relied when expressing its disagreement with IP2 that the harm would be “less than substantial” (PR 5.7.329–5.7.330).

96 In relation to each of these three elements the Panel set out its conclusions on its effects on the OUV of the WHS and on the settings of heritage assets. But before embarking upon that exercise, the Panel returned, in PR 5.7.212 to 5.7.215, to the paper by D Roberts et al. The landscape setting of long barrows is important to such matters as their alignment, intervisibility, relationship with other early neolithic monuments and evidence of routes for movement. The Panel subsequently referred to this very specific landscape concept as “the landscape settings of monuments” (similarly the reference to “an unparalleled historic landscape”), which should not be confused with the typical assessment of landscape and visual impact as part of a general planning appraisal.

97 Dealing with the western cutting and portals, the Panel concluded that, in particular, attributes (3), (5), and (6) of the OUV of the WHS would be greatly harmed or would suffer major harm (PR 5.7.226–5.7.230). In relation to settings, the Panel emphasised the need to consider not only visual aspects but also contextual relationships, including the presence of archaeological features in the landscape; these aspects being similar to those considered when assessing the effect on the OUV of the WHS. Having regard to its earlier findings, the Panel considered that the western cutting and portals would cause “substantial harm” to the settings of designated assets (PR 5.7.233–5.7.236). Much of the Panel’s reasoning concerned the visual effects of this part of the scheme and the impact on the landscape in which the archaeological features are set (see eg PR 5.7.219–5.7.224, 5.7.227, 5.7.229 and 5.7.232–5.7.234).

98 The Panel described the second element, the new Longbarrow junction, as being of motorway scale, albeit sunk into the ground with substantial earthworks. The pattern of the junction’s landform would be at odds with the surrounding smaller scale morphology of small rectilinear fields and small groupings of traditional buildings. The junction, together with the western cutting and portals, would represent a single, very large, and continuous civil engineering work spanning the western boundary of the WHS. The effects of the junction on the OUV of the WHS would be similar to those of the western cutting and portal (PR 5.7.242–5.7.245). As with that first element, a good deal of the Panel’s reasoning concerned the visual impacts of the junction and the impact on the landscape in which the archaeological features are set (see eg PR 5.7.243–5.7.245 and 5.7.247). At PR 5.7.247 the Panel concluded:

“Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible.”

They also found that the proposal would cause substantial harm as regards the OUV and settings (PR 5.7.248).

99 The Panel considered that the effect of the eastern cutting would be very much less severe than the western cutting (PR 5.7.254–5.7.255). The

- A Panel found that there would be harm to the landscape values of the OUV, but neutral or slightly positive effects for attribute (3) and for attribute (6) (PR 5.7.256–5.7.257). At PR 5.7.258–5.7.279 the Panel assessed harm caused to a number of heritage assets, ranging from negligible, slight or small to moderate in one instance (PR 5.7.259) and great harm from the flyover at the Countess Road junction (PR 5.7.274). The overall conclusion for the eastern approaches, including the Countess Road junction, was given at PR 5.7.280:
- B “The effects of this element of the Proposed Development on OUV would be neutral or slightly positive. The effects on settings, taken as a whole, would be moderately adverse. Overall, a small degree of harm would arise.”

100 It is, therefore, plain that the Panel’s conclusion under the third main issue that “substantial harm” would be caused related solely to the western cutting and portals and to the Longbarrow junction. This is borne out by the

- C Panel’s overall conclusion at PR 5.7.297, read in context:

“The ExA concludes overall on this issue that substantial harm would arise with regard to the effects of the Proposed Development on spatial relations, visual relations and settings. This is despite the assessment of more moderate effects with regard to the eastern approaches and settings of assets beyond the main three elements considered.”

D

101 The Panel addressed the fifth main issue at PR 5.7.306 to 5.7.326. First, it found that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV (PR 5.7.306–PR 5.7.313). Under the third main issue the Panel had found that the western cutting and Longbarrow junction would only

E harm attributes (3), (5) and (6) (see paras 97–98 above). So it is plain that the judgment here was based upon the Panel’s assessment of the scheme as a whole and was not driven simply by the effects of the works in the western section. For example, PR 5.7.308 referred to the tunnel and the potentially serious loss of assets through excavation works and PR 5.7.313 referred to the profound and irreversible aesthetic and spiritual damage that would be

F caused, even after allowing for the removal of the existing A303. By contrast, IP1’s HIA had claimed a large or very large beneficial effect for attributes (1) and (4), slight beneficial effects for attributes (5), (6) and (7) and only slight adverse effects for attributes (2) and (3).

102 The Panel then concluded that the scheme would substantially and permanently harm the integrity of the WHS, pointing to the impacts of the Longbarrow junction and the western cutting (PR 5.7.315–5.7.316). The Panel reached the view that the development would seriously harm the authenticity of the WHS (PR 5.7.317–PR 5.7.320).

G

103 The Panel’s overall conclusion on the fifth main issue was that the benefits *to the OUV* resulting from the scheme were outweighed by the harm caused and so “the overall effect on the WHS OUV would be significantly adverse” (PR 5.7.321). Because of this impact, the proposal did not accord

H with Core Policies 58 and 59 of the Wiltshire Core Strategy nor with Policy 1d of the WHS Management Plan (PR 5.7.324–PR 5.7.325). It is important to note the Panel’s overall conclusion, at PR 5.7.326:

“The ExA concludes that the effects of the Proposed Development on WHS OUV and the historic environment as a whole would be

significantly adverse. *Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List.*” (Emphasis added.) A

As IP2 has explained (para 42 of its skeleton argument), the assessment in an HIA of impact on a WHS is not expressed using NPSNN terminology of “substantial” or “less than substantial harm”. B

104 At PR 5.7.327 to PR 5.7.332 the Panel summarised its conclusions on the five main heritage issues. It said that it regarded the views of ICOMOS and the WHC as important, but not of such weight as to be determinative in themselves (PR 5.7.331). The Panel then summarised its view, in terms of paragraph 5.133 of the NPSNN, that the effect of the scheme on the OUV of the WHS and on “the significance of heritage assets through development within their settings,” taken as whole, would lead to “substantial harm” for the purposes of the “fork in the road” decision (PR 5.7.333 and see also PR 7.2.33). However, the Panel left the application of that policy test to its overall conclusions later on in the report. C

105 In the light of a submission in relation to ground 2 made by Mr Strachan (who, together with Ms Rose Grogan, appeared on behalf of the SST), it is necessary to summarise how the Panel dealt separately with landscape and visual impacts in section 5.12 of its report. They did so from a general planning perspective. PR 5.12.1 explains: D

“The integrity of the cultural heritage landscape was examined in a previous section of the Report. This section covers the potential impacts of the Proposed Development on existing landscape features and landscape and townscape character, together with potential impacts on visual receptors, including residents, visitors, and users of [public rights of way].” E

As is common for a general assessment of this kind, the method used by IP1 was based on the *Guidelines for Landscape and Visual Impact Assessment* (3rd ed) published by the Landscape Institute and the Institute of Environmental Management and Assessment (PR 5.12.14). F

106 The Panel dealt with the landscape and visual impacts of the western cutting and Longbarrow junction once completed, at PR 5.12.112–5.12.119. The assessment in this part of the report focused on the effects of the proposal on landscape character and visual amenity and not on cultural heritage, which had already been dealt with in section 5.7 of the report. The overall impact of this part of the scheme was described as being “significantly harmful”. These paragraphs formed but a small part of the assessment made by the Panel of each part of the scheme in PR 5.12.79–5.12.147. The assessment took into account broader planning considerations, including effects on tranquillity, connectivity, light pollution and the night sky. G

107 The Panel set out its overall conclusions on the impact of the whole scheme on landscape and visual amenity at PR 5.12.148–5.12.152. They concluded that it “would cause considerable harm in the ways identified, and therefore it conflicts with the aims of the NPSNN”. H

108 At PR 5.17.121–5.17.128 the Panel set out its overall conclusions on traffic and transport which, in summary were:

- A (i) public transport would be incapable of delivering a decisive shift from private car transport for the majority of trips in the corridor;
 (ii) the development would contribute to meeting the Government's objective of a high quality route between the southeast and the southwest, meeting also the future needs of traffic;
 (iii) journey times would be reduced, with the benefits being greater in the summer months and other times of high demand;
- B (iv) the road would be safer, helping to reduce collisions and casualties;
 (v) there would be a significant reduction in traffic through rural settlements, helping to relieve traffic and related environmental issues;
 (vi) transportation costs for users and businesses would be reduced;
 (vii) the scheme would help to enable growth in jobs and housing.

- C 109 In section 7.2 of its report the Panel summarised its findings on the matters for and against the proposal which would be taken into account in the overall balance. As part of its conclusions on cultural heritage issues the Panel said, at PR 7.2.32–7.2.33:

- D “7.2.32. The ExA recognises that the Proposed Development would benefit the OUV in certain valuable respects. However, it considers that the effects of the Proposed Development would substantially and permanently harm the integrity of the WHS. In addition, it would seriously harm the authenticity of the WHS. The ExA finds that permanent, irreversible harm, critical to the OUV would occur, affecting not only our own, but future generations. The fundamental nature of that harm would be such that it would not be offset by the benefits to the OUV. The overall effect on the WHS OUV would be significantly adverse. The Proposed Development would not therefore accord with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan.
- E

- F “7.2.33. Assessed in accordance with the NPSNN, the effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to substantial harm. This harmful impact on the significance of the WHS designated heritage asset shall be weighed against the public benefits in the ExA's overall conclusions.”

- G 110 It is important to note the careful distinction drawn by the Panel between these two paragraphs. PR 7.2.33 expressly made the “fork in the road” decision, applying paragraph 5.133 of the NPSNN. PR 7.2.32 dealt separately with the Panel's conclusion about the effect on the OUV of the WHS. In that paragraph the Panel reiterated that the integrity of the WHS would be permanently and substantially harmed and its authenticity would be seriously harmed and that the benefits of the proposal to the OUV would not outweigh the harm caused. The Panel weighed the benefits of the proposal to the OUV for the specific purpose of deciding what the net heritage effect would be on the WHS as a designated asset itself, just as they had previously done in PR 5.7.321 (see para 103 above). This should not be confused with the separate exercise carried out under paragraph 5.133 or 5.134 of the NPSNN.
- H

111 The Panel considered landscape and visual impacts from a general planning perspective separately, at PR 7.2.53–7.2.55.

112 At PR 7.3.1–7.3.43 of its report the Panel considered whether the proposed scheme would result in a breach of the Convention and thus engage section 104(4) of PA 2008, so as to displace the requirement in section 104(3) to decide the application for the DCO in accordance with the NPSNN. The argument during the Examination centred on articles 4 and 5 and is the subject of ground 4 in this challenge. Certain parties contended at the Examination that “any harm” to a WHS could breach those provisions. Others, including IP1 and IP2, argued that if a scheme complies with the policy tests in paragraphs 5.132 to 5.134 of the NPSNN there would be no breach of the Convention. The Panel followed the latter approach (PR 7.3.40–7.3.43).

113 At PR 7.3.65 the Panel concluded that the ES was fully compliant with the EIA Regulations 2017. The SST accepted that conclusion at DL 67. There is no challenge to that part of the decision. But, by definition, it was impossible for the Panel to deal with the separate issue of whether the SST subsequently complied with regulation 21(1) of the EIA Regulations 2017 at the decision-making stage.

114 The Panel struck the overall balance in section 7.5 of its report. The Panel first set out its views on the benefits of the proposal (PR 7.5.5–7.5.9). It then did the same for the scheme’s adverse impacts (PR 7.5.10–7.5.17).

115 The Panel regarded a number of factors as having limited or very limited weight, that is agriculture, the loss of a view of the stones for people passing on the A303 (moderate weight), impact on users of byways open to all traffic, and impacts on businesses and individuals (PR 7.5.13–7.5.17).

116 The Panel gave substantial or considerable weight to only two sets of adverse impact (PR 7.5.11–7.5.12):

(1) substantial weight for the effects of the proposal on the WHS OUV and on the significance of heritage assets through development within their settings (drawn from section 5.7 of the report); and

(2) considerable weight to the considerable harm to both landscape character and visual amenity (drawn from section 5.12 of the report).

117 On impact to the cultural heritage the Panel said, at PR 7.5.11:

“The ExA considers that the effects of the Proposed Development would substantially and permanently harm the *integrity* of the WHS, now and in the future. In addition, it would seriously harm the *authenticity* of the WHS. The overall effect on the WHS OUV would be *significantly adverse*. The effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to *substantial harm*. The Proposed Development would not therefore be in accordance with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan. This is a factor to which substantial weight can be attributed.” (Emphasis added.)

This reflects the approach taken by the Panel in its conclusions in PR 7.2.32–7.2.33 (see paras 109–110 above).

118 On impact to landscape and visual impact the Panel said at PR 7.5.12:

“In addition, there would be considerable harm to both landscape character and visual amenity, notwithstanding the mitigation proposed. There would therefore be conflict with the Wiltshire Core Strategy, Core

A Policy 51. The harms to landscape character and visual amenity are factors to which considerable weight can be attributed.”

119 The Panel’s striking of the overall planning balance was set out in PR 7.5.19–7.5.22:

B “7.5.19. Since the ExA has identified that there would be substantial harm to the WHS, paragraph 5.131 of the NPSNN applies to the determination of the application. This requires the [SST] to give great weight to the conservation of a designated heritage asset. Furthermore, substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional.

C “7.5.20. In addition, paragraph 5.133 of the NPSNN provides that where the proposed development would lead to substantial harm to the significance of a designated heritage asset, the [SST] should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.

D “7.5.21. The ExA disagrees with the Applicant as to the extent of the public benefits that would be delivered. In totality, it does not consider that substantial public benefit would result from the Proposed Development. In reaching that view, the ExA has had regard to all potential benefits including any long-term or wider benefits. In any event, those public benefits which have been identified, even if they could be regarded as substantial, would not outweigh the substantial harm to the designated heritage asset. In the light of NPSNN, paragraph 5.133, the substantial harm that would result to the WHS cannot therefore be justified.

E “7.5.22. In applying the NPSNN, paragraph 4.3, the ExA concludes that the totality of the adverse impacts of the Proposed Development would strongly outweigh its overall benefits. S104(7) PA 2008 applies and the NPSNN presumption in favour of the grant of development consent cannot therefore be sustained.”

G 120 Thus, in PR 7.5.19–7.5.21 the Panel concluded that the proposal failed to meet the test in paragraph 5.133 of the NPSNN simply on the basis that the benefits of the scheme, even if assumed to be substantial, did not outweigh its harm. They did not go any further and apply the necessity test. It is to be noted that in striking the balance required by paragraph 5.133 of the NPSNN the Panel did not, of course, put into the disbenefits side of the balance any harm other than harm to cultural heritage. For example, harm to landscape and visual amenity was rightly not taken into account until the separate *overall* balance was struck in PR 7.5.22.

H 121 In Section 10 of its report the Panel summarised its overall findings and conclusions. In PR 10.2.6 the Panel summarised its separate conclusions on impacts to cultural heritage and to landscape and visual amenity. In PR 10.2.10–10.2.12 it repeated the separate balancing exercises carried out under paragraph 5.133 of the NPSNN and under paragraph 4.3 of the NPSNN and section 104 of the PA 2008. The Panel recommended that the SST should not make an order granting development consent for the application. On the other hand, if the SST were to disagree and to grant a

DCO the Panel recommended that he should seek clarification on a number of additional points, mainly relating to the OEMP and DAMS, as set out in Appendix E to the report.

The SST's decision letter

The process leading to the decision letter

122 The process has been described by Mr David Buttery, the senior official responsible for the handling of the application in the department.

123 On 27 March 2020 officials submitted a briefing note to the SST and the relevant minister responsible for determining the application for a DCO. Officials said that there were two options. First, the SST could accept the Panel's recommendation and refuse the application for a DCO. Second, officials could explore whether there was evidence to support the case for rejecting the recommendation and granting a DCO, on the basis, for example, that the development would result in less than substantial harm to the heritage assets. Officials drew attention to the Panel's statement that its views on cultural heritage, landscape and visual impacts were matters of judgment and were not shared by all consultees. Consequently, it might be possible to take a different view on the weight to be attached to the benefits and disbenefits of the scheme if there was sufficient justification to do so. Officials said that at that stage they had not yet identified sufficient evidence to justify an approval. In that context, they said that they would assess in detail the evidence provided by bodies such as IP2 to see whether it contained sufficient evidence to conclude that less than substantial harm would be caused. They also advised that if this second option were to be chosen, a consultation letter should be sent on the points raised in Appendix E to the Panel's report (see para 119 above).

124 The SST and the minister chose the second option. The consultation letter was sent on 4 May 2020.

125 On 6 July 2020 officials submitted a further memorandum to the ministers recommending that a further consultation be carried out on a recent archaeological find at the WHS. Ministers agreed and a consultation letter was sent on 16 July 2020. A third and final consultation letter, dated 20 August 2020, was sent allowing representations on the responses which had been received by the DfT.

126 On 28 October 2020 officials provided a further briefing note to the SST and the minister, advising that they considered that there was sufficient evidence to justify a decision that a DCO be granted and attaching a draft decision letter to that effect.

127 On 5 November 2020 the ministers responded that they approved the grant of a DCO. The decision letter was issued on 12 November 2020.

128 I note that at para 78 of its skeleton argument the claimant said that none of the consultation responses provided any material which could have supported the SST's decision to reject the Panel's recommendation and to grant the DCO. This is one of several points that were not pursued but, for the record, I note that it is not strictly correct. The responses to the consultation letter dated 4 May 2020 provided clarification on the issues set out in Appendix E to the Panel's report, which arose from its second main heritage issue, to do with the mitigation strategy, and were relied upon by the SST. He accepted the views of IP2 on the important subject of "artefact

- A sampling” and concluded that the updated OEMP and DAMS submitted on 18 May 2020 “would help minimise harm to the WHS” (DL 39, 48, 50 and 80).

The decision letter

- B 129 DL 10 explained the approach taken in the decision letter to the Panel’s report:

“Where not otherwise stated, the Secretary of State can be taken to agree with the ExA’s findings, conclusions and recommendations as set out in the ExA’s Report and the reasons given for the Secretary of State’s decision are those given by the ExA in support of the conclusions and recommendations.”

- C 130 At DL 12 to DL 22 the SST addressed the need for the scheme and the benefits it would bring, either in isolation or in conjunction with other improvements to the A303 corridor. The SST said that he was satisfied that there was a clear need case for the proposed development and that the benefits weighed significantly in its favour.

- D 131 Turning to the adverse impacts of the scheme, the SST agreed with the Panel’s views on issues relating to agriculture, views from the existing A303, public rights of way and harm to businesses and individuals (DL 23–24 and 57–60). He also agreed with the Panel that climate change was not a matter weighing in the balance against the proposal (DL 61) and that the matters listed in DL 63 were of neutral weight. He agreed with the Panel’s assessment that granting consent by applying the heritage policies in the NPSNN would not involve a breach of the World Heritage Convention and would not engage section 104(4) (see DL 64–66).

132 The two issues on which the SST disagreed with the Panel were (a) landscape and visual impact and (b) cultural heritage impact (DL 25–56).

- F 133 In relation to landscape and visual effects the SST noted the identification of various benefits and disbenefits by the Panel (DL 53) and adverse impacts by some interested parties (DL 54). He noted the views of Wiltshire Council on the permanent beneficial effects of the scheme for landscape and visual amenity and that overall it would deliver “beneficial effects through the reconnection of the landscape within the WHS and avoiding the severance of communities” (DL 54.) He then referred to the positive effects of the proposal identified by IP2 (significant reduction in sight and sound of traffic benefiting the experience of the Stonehenge monument and wider access to the landscape), English Heritage Trust and National Trust (DL 55). Drawing on that material, the SST considered that the design of the scheme accorded with principles in the NPSNN and that “the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations”. Disagreeing with the Panel’s judgment, the SST considered the landscape and visual impacts to be of neutral weight in the overall planning balance (DL 56). It is plain that the SST’s treatment of this subject, like that of the Panel, did not address the landscape setting of monuments or the historic landscape, which had so influenced the Panel when dealing with the impact on cultural heritage.

134 DL 25 to DL 43 and DL 50 dealing with heritage issues are annexed to this judgment in Appendix 2.

135 The SST began his consideration of heritage issues by referring to the Panel's assessment, together with the differing views of a number of different parties at the Examination (DL 25).

136 At DL 26 the SST recognised the importance of the Panel's conclusion that the proposal would cause "substantial harm" to the OUV of WHS, how that would lead to the application of the test in paragraph 5.133 of the NPSNN and that substantial harm to a WHS should be "wholly exceptional."

137 The structure of the relevant part of the SST's reasoning is as follows:

(i) In DL 28 the SST summarised the views of the Panel on its fifth main issue, namely the effects of the scheme on the OUV of the WHS. There would be "permanent irreversible harm, critical to the OUV" affecting not only present but future generations. The benefits of the scheme to the OUV would be incapable of offsetting this harm and the overall effect would be "significantly adverse".

(ii) In DL 29 the SST summarised the views of the Panel on the first and second main issues.

(iii) The SST then referred, at DL 30, to the third main issue, effects on spatial relations, visual relations and settings. He took into account the Panel's judgment that the proposal would cause substantial harm and their recognition that that view differed from IP2 (PR 5.7.329). He identified the great weight placed by the Panel on the effects of the spatial division of the western cutting in combination with the Longbarrow junction, on the physical connectivity between monuments and the significance they derive from their settings (PR 5.7.330).

(iv) At DL 32 the SST summarised the Panel's conclusion on the fourth main issue.

(v) At DL 33 the SST summarised the Panel's overall conclusion (in PR 5.7.333) applying the NSPNN, that is, the effects of the scheme on the OUV of the WHS *and* on "the significance of heritage assets through development within their settings". The Panel's judgment, drawing on what they had already concluded under the third main issue (see DL 30), was that, taken as a whole, there would be "substantial harm".

(vi) The SST then relied, in DL 33, upon the Panel's acceptance that this was a matter of judgment upon which differing and informed opinions and evidence had been given to the Examination.

(vii) Still in DL 33, the SST drew upon the views of IP1, IP2, Wiltshire Council, the National Trust, English Heritage Trust and DCMS, placing greater weight on the benefits of the scheme to the WHS from the removal of the existing A303 compared to any harmful effects of the scheme elsewhere in the WHS. Those bodies did not agree that the level of harm would be substantial. Some said that there would or could be scope for a net benefit overall to the WHS (see eg the cross-references to PR 5.7.70, 5.7.72 and 5.7.83).

(viii) In DL 34 the SST referred to the third main issue again. He preferred the view of IP2 on the effect of the scheme on spatial and visual relations and settings, judging that it would be less than substantial, rather than substantial.

(ix) The SST then drew upon the views of a number of parties at the Examination who, to varying degrees, were supportive of the proposal: IP2,

A National Trust, English Heritage Trust and Wiltshire Council (DL 35 to DL 42).

(x) In DL 43 the SST said that he had carefully considered the Panel's concerns and those of other interested parties, including ICOMOS-UK, the claimant, the COA and the CBA in relation to both the effects of the proposal on the OUV of the WHS and also the cultural heritage and the historic environment of the wider area. He took into account, in particular, the concerns expressed by some interested parties and the Panel regarding the adverse impact from the western cutting and portal, the Longbarrow junction and, to a lesser extent, the eastern approach and portal. He accepted that there would be adverse impacts from those parts of the development. But the SST concluded, on balance, taking into account the views of IP2 and Wiltshire Council, that any harm to the WHS as a whole would be less than substantial.

C 138 The judgments expressed at DL 34 and DL 43 involved the SST taking the "fork in the road" decision with the consequence that paragraph 5.134 of the NPSNN applied, rather than, as the Panel had concluded, paragraph 5.133.

D 139 In DL 50 the SST stated that he had placed great importance on the views of IP2. He agreed with IP2 that the harm caused would not be substantial and accepted its view that the proposed approach to artefact sampling was acceptable, disagreeing with the judgment of the Panel on those matters. It is plain from DL 34, DL 43, DL 50 and DL 80 that the SST understood IP2 to have said that there would be "less than substantial" harm and he agreed with that view. It follows that the SST did not agree with those interested parties who had gone further by suggesting that the scheme would result in a net *benefit* to the OUV of the WHS. Accordingly, the SST did not depart from the Panel's view that the benefits of the scheme to the OUV of the WHS did not outweigh the harm that would be caused to OUV attributes, the integrity and the authenticity of the WHS (see paras 101–103 above).

E 140 In DL 80–87 the SST summarised his overall conclusions on the application for a DCO. He dealt with heritage issues and visual and landscape impacts at DL 80–81:

G "80. For the reasons above, the Secretary of State is satisfied that there is a clear need for the Development and considers that there are a number of benefits that weigh significantly in favour of the Development (paras 12–22). He considers that the harm that would arise to agriculture should be given limited weight in the overall planning balance (paras 23–24). In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the NPSNN, he must give great weight to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. He accepts there will be harm as a result of the Development in relation to cultural heritage and the historic environment and that this should carry great weight. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, on balance the Secretary of State accepts the advice from his statutory advisor, Historic England, and is satisfied that the

harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS (paras 25–51).

“81. The Secretary of State accepts there will be adverse and beneficial visual and landscape impacts resulting from the Development and recognises that the extent of landscape and visual effects is also a matter of planning judgment. He is satisfied the Development has been designed to accord with the NPSNN and that reasonable mitigation has been included to minimise harm to the landscape. He disagrees that the level of harm on landscape impacts conflicts with the aims of the NPSNN. Whilst he recognises the adverse harm caused, he considers that the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations and therefore considers that there is no conflict with the aims of the NPSNN. For these reasons, he considers landscape and visual effects to be of neutral weight in the overall planning balance (paras 52–56).”

141 In DL 87 the SST concluded that the need case for the development together with the other identified benefits outweighed any harm.

142 One potential issue was whether the SST’s disagreement with the Panel that there would be substantial harm to heritage assets meant that he was also disagreeing with its specific findings on the impacts of the scheme upon which that conclusion had been based. Mr Strachan put it neatly in his oral submissions: the SST did not disagree with the Panel’s findings on specific impacts on heritage assets but he did disagree with the Panel’s categorisation of those impacts as involving substantial harm. I accept that submission.

143 In my judgment, there is nothing in the decision letter to indicate that the SST dissented from any of the Panel’s specific findings on impact. The Panel’s view that there would be substantial harm to designated assets related only to the effects of the western cutting and portals together with the Longbarrow junction. The SST’s decision letter simply decided that that level of harm would be lower, without expressing any disagreement or doubts about the more detailed assessments made by the Panel (see eg PR 5.7.229–5.7.330 and DL 34, 43 and 50). It has to be borne in mind that the SST did not have the ES or HIA and he did not have any detailed briefing from officials about impacts on individual assets or groupings of assets. The Panel’s report of IP2’s views did not provide that information because IP2 had stated that they were not setting out for the Examination an assessment of that nature, albeit that they disagreed with IP1’s appraisal of some impacts (which were not identified). Indeed, if it had been submitted by the SST, IP1 or IP2 that the decision letter should be read as if the SST had disagreed with the Panel’s specific findings, and that submission had been arguable, I would have decided that the reasons given in the letter on such an important matter were legally inadequate and quashed the decision on that ground.

144 For similar reasons, I do not consider that the SST disagreed with the Panel on its conclusions that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV, as well as the integrity and authenticity of the WHS, or the specific findings on impact from which the Panel drew those conclusions. Similarly, he did not disagree with its view that benefits to the OUV of the WHS would not outweigh harm to OUV attributes, authenticity and integrity of the WHS. There is simply no reasoning in the decision letter

A to indicate that the SST took that course. On an issue of such importance, both nationally and internationally, the SST would have been legally obliged to state clearly that those were his conclusions. As in para 143 above, if it had been submitted that the decision letter should be read as if the SST had rejected those specific findings, and that submission had been arguable, I would have decided that the reasoning was legally inadequate. The SST simply dealt with the question posed by the NPSNN of “substantial” or “less than substantial” harm which, as both he and the Panel made clear, was a judgment bringing together the overall effect of the proposal on designated assets as well as the WHS (see eg PR 5.7.333, PR 7.2.33 and DL 33 to 34 and 50).

C Ground 1

145 The claimant raises four issues under ground 1, which it is convenient to take in the following order:

(i) the SST failed to apply paragraph 5.124 of the NPSNN (see para 43 above) to 11 non-designated heritage assets;

D (ii) the SST failed to consider the effect of the proposal on 14 scheduled ancient monuments (ie designated heritage assets);

(iii) the SST failed to consider the effect of the proposal on the setting of the heritage assets, as opposed to its effect on the OUV of the WHS as a whole;

(iv) the SST’s judgment that the proposal would cause less than substantial harm improperly involved the application of a “blanket discount” to the harm caused to individual heritage assets.

E 146 Underlying much of the claimant’s case under ground 1 was the proposition that a decision-maker is obliged to consider in respect of *each* heritage asset its significance, the impact of the proposal and the weight to be given to that impact (see eg paras 93–121 of the claimant’s skeleton argument). The claimant relies upon regulation 3 of the 2010 Regulations (see para 27 above), paragraphs 5.128 to 5.133 of the NPSNN (see paras F 41–43 above) and the decision of the Court of Appeal in *City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761, in particular the passage in the judgment of Sir Keith Lindblom SPT where he stated at para 79 that in the overall balancing exercise: “every element of harm and benefit must be given due weight by the decision-maker as material considerations ...”

G 147 However, the court also added that the decision-maker has to adopt “a sensible approach” (para 80). The legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent (para 72). The same applies to policies in the NPSNN subject, of course, to applying any specific policy test which is relevant. Requirements in the NPSNN that “great H weight” be given to the conservation of an asset and “the more important the asset, the greater the weight should be” are matters left to the planning judgment of the decision-maker to resolve (para 73). The same applies to the application of the tests in paragraphs 195–196 of the NPPF and paragraphs 5.133–5.134 of the NPSNN. The policies do not direct the decision-maker to adopt any specific approach as to *how* harm should be assessed or what

should be taken into account or excluded in that exercise. “There is no one approach.” (See para 74.) A

148 In the present case, the ES upon which the planning assessments by the Panel and, ultimately, the SST were based, had to address a large number of heritage assets over a substantial area. The assessment for some individual assets was expressed separately for each one. But, in addition, a number of assets were collected together in groupings, an approach endorsed by the WHC, ICOMOS and IP2 (see para 71 above). The Panel made no criticism of that approach in its report. Indeed, it adopted it at various points in its reasoning, and the same is true of the decision letter. The presentation of an assessment by the use of groupings does not mean that assets have not been individually assessed. Instead, the technique enables such assessments to be collected together and expressed in relation to an appropriate grouping. Mr David Wolfe QC, who, together with Ms Victoria Hutton, appeared on behalf of the claimant, confirmed that the claimant makes no criticism of this approach. B C

(i) The 11 non-designated heritage assets

149 The claimant accepts that an assessment was made of the 11 non-designated heritage assets in the western section of the scheme. They are listed in table 6.11 of chapter 6 of the ES. They are not located in the WHS. Some of the assets would be lost because of the scheme. But others would not. For example, it was said that one asset might suffer damage from compression by overlaying of material. Another could not be found when a survey was carried out, or had ceased to exist because of plough damage. D

150 The point taken by the claimant is that the Panel and the SST failed to apply paragraph 5.124 of the NPSNN by considering whether these 11 assets should be treated as having equivalent significance to scheduled ancient monuments, so that policies such as paragraphs 5.133 to 5.134 of the NPSNN might be applied. E

151 With respect, there is nothing in this point. Mr Strachan, supported by Mr Reuben Taylor QC for IP1 and Mr Richard Harwood QC for IP2, pointed to the test which has to be satisfied for paragraph 5.124 to apply. A non-designated asset must be “demonstrably of equivalent significance to Scheduled Monuments”. Accordingly, such a monument must be considered to be of national importance (section 1(3) of the Ancient Monuments and Archaeological Areas Act 1979). Decisions on national importance are guided by Principles of Selection laid down by the Secretary of State for Digital, Culture, Media and Sport (Annex 1 of *Scheduled Monuments* (October 2013)). IP2 has published a number of scheduling selection guides on eligibility under section 1(3). F G

152 Table 6.1 of the ES stated that paragraph 5.124 of the NPSNN had been applied in the work carried out and cross-referred to table 6.2. The latter set out the criteria applied in the ES for determining the value of a heritage asset. A non-designated asset contributing to *regional* research objectives was assessed as having a “medium” value. A non-designated asset of comparable quality to a scheduled monument, that is one of *national* importance, was assessed as having a “high” value. None of the non-designated assets in table 6.11 were given a high value. All were treated as having a medium value. They were, therefore, treated by IP1 as not falling within paragraph 5.124 of the NPSNN. Appendix 6.3 to the ES gave detailed references to the H

A source material, including surveys, relied upon for this evaluation. I therefore accept the SST's submission that this exercise was carried out transparently and in such a way that any interested party who wished to disagree, by demonstrating that any asset should be treated as equivalent to a scheduled monument, could do so.

B 153 The short point is that no objecting party attempted to carry out any such exercise. Accordingly, this was not an issue in the Examination, let alone a "principal important controversial issue", which the Panel was required to address in its report to the SST, or which had to be addressed in the decision letter (*South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36). I should also add that the Panel's report refers to paragraph 5.124 of the NPSNN and shows that it was applied to other assets, where judged appropriate (see PR 5.7.28 and 5.7.49). The Panel approved of the approach taken in the ES, save for where it explicitly identified any disagreement (see para 90 above). It did not criticise the handling of this part of the NPSNN.

C 154 The claimant relied upon some very brief passages in representations made to the examination about non-designated heritage assets. These passages were of a generalised nature. They did not pick out any item from table 6.11 of the ES to attempt to demonstrate that such a feature is of national importance, applying relevant criteria and drawing upon any source material.

D 155 The criticism made under ground 1(i) must be rejected.

(ii) *Failure to consider 14 scheduled ancient monuments*

E 156 Originally, the claimant suggested in its "First Reply" that the impact on 15 scheduled monuments had not been assessed by the Panel in its report and, likewise, had not been assessed by the SST in his decision letter. During oral argument the number of assets was said to be 14. It was submitted that the effect of the proposal on the *setting* of these assets had not been addressed. The HIA had simply considered the effect on the OUV of the WHS. Ms Hutton told the court that these assets are located in the vicinity of the proposed Longbarrow junction.

F 157 However, as Mr Strachan pointed out, the 14 designated assets were also dealt with in the "Setting Assessment", Appendix 6.9 to the ES. There the effect on the settings of each of the assets was addressed. The SST provided a detailed schedule showing where each asset was considered in the documentation. This has not been disputed by the claimant. The ES assessed the effects of the scheme on the settings as ranging from neutral, through G slightly beneficial to moderately beneficial. In no case did the ES identify any substantial harm.

H 158 Here, again, the claimant has relied upon a few brief passages from representations made in the Examination. These passages do not contain anything like the level of detail or referencing contained in the ES or HIA, although it would appear that the document would have been prepared by expert archaeologists. The claimant has not shown that they gave rise to a principal important controversial issue which has not been addressed by the Panel in its report, for example, in its criticisms of the Longbarrow junction and its continuation of the western cutting.

159 Under its third main issue the Panel expressed its concern about the adverse impact of the western cutting and portals on the Wilsford/

Normanton dry valley and the relationship between monuments on either side (see PR 5.7.227 and 5.7.229) which formed part of its finding of “substantial harm”. In relation to the proposed Longbarrow junction, the Panel noted its effect on, inter alia, the Winterbourne Stoke Downs barrows, two individual scheduled monuments on Winterbourne Stoke Down and the Diamond Group (PR 5.7.239). The SST agreed with the Panel’s report on these matters (see DL 10).

160 Accordingly, the criticisms made under ground 1(ii) must be rejected.

(iii) Failure to consider effect on the settings of heritage assets

161 It is plain from the review carried out above that the ES and HIA considered the effects of the scheme on both the OUV of the WHS and on the settings of heritage assets. It is also plain from its report that the Panel addressed, under its third and fifth main issues, the effect of the proposal on spatial relations, visual relations and settings in relation to the WHS and also heritage assets (paras 88 and 96–100 above). It then went on to consider effects on the OUV of the WHS and the historic environment as a whole.

162 However, the claimant submits that in his decision letter the SST failed to consider the effect of the proposal on the settings of heritage assets as well as on the WHS overall. It is said that he only considered the latter issue.

163 This criticism is untenable. It comes from a misreading of the decision letter and, to some extent, the Panel’s report. The third and fifth main issues were not treated by the Panel as being in hermetically sealed compartments. Conclusions drawn under the third main issue on the project’s effects upon the settings of assets, and upon the landscape containing these assets, also influenced the Panel’s reasoning on the fifth main issue. This is plain, not only from the Panel’s report but also the decision letter (see para 137 above). Mr Wolfe is incorrect to suggest that DL 34 did not refer to the third main issue and only considered the effect on the OUV as a whole. The language of DL 34 cannot be read in that way, particularly when it is considered in the context of the preceding parts of the decision letter and the Panel’s report to which it responds.

164 There is equally no merit in the submission that IP2 had only addressed the impact of the proposal on the OUV of the WHS and, therefore, because DL 34 relied upon the opinion of IP2 that paragraph must be read as addressing only the WHS and not heritage assets. DL 30 had already referred to PR 5.7.329 to 5.7.330. From those paragraphs it was clear to the SST that the Panel understood IP2 to disagree with its view on substantial harm, in the context of the third main issue, which dealt with the effect of the development on spatial and visual relations and settings of *heritage assets*.

165 The decision letter was prepared by officials for consideration by the SST following their review of the representations which had been made in the Examination by IP2 and others. DL 33 reflects that exercise. IP2’s representations in May 2019 (paras 3.9–3.10 and 6.3) made it plain that it had addressed scheduled monuments (and other assets), whether contributing to the OUV or not, and whether inside the WHS or not, and had considered all parts of the ES relating to cultural heritage issues as well as the HIA (see para 85 above).

166 Accordingly, the criticisms made under ground 1(iii) must be rejected.

A (iv) *Whether the SST took into account the impacts on all heritage assets*

167 This is a challenge to the SST's judgment that the harm identified by the Panel as substantial should be treated as less than substantial. It has been put in more than one way.

B 168 First, it is said that that reduction in the level of harm was an improper "blanket discount" because the judgment is said to have been applied to a "significant number of designated and undesignated heritage assets" and yet the impact of the scheme was not the same for all the assets affected. Mr Wolfe also described the error of law here as a "composite approach," whereas, in accordance with *Bramshill* para 79 and the NPSNN (paragraph 5.129), a separate assessment of the impact on each individual heritage asset was required.

C 169 To some extent the argument has moved on since the claimant's pleadings and skeleton were prepared. The claimant accepts that the requirement for individual assessment can properly be addressed by an approach based on groupings (see para 129 above).

D 170 But what appears clearly from para 76 of the SOCG is that, by whatever means he employs, the decision-maker must ensure that he has taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

E 171 Mr Strachan submitted, supported by IP1 and IP2, that the SST complied with the principle in para 170 above. This is because, first, the ES addressed all relevant heritage assets. Second, the Panel identified in its report those impacts where it disagreed with the assessment in IP1's ES and must be taken as having agreed with the remainder (PR 5.7.150). Third, the SST stated in DL 10 that he is to be taken as having agreed with the findings and conclusions in the Panel's report save for where the contrary is stated. It is submitted that the SST must, therefore, be treated as having agreed with those parts of the ES and HIA with which the Panel did not expressly disagree.

F 172 The SST's argument essentially relies upon the starting point that all relevant assets were assessed in the ES (and HIA). So the question arises whether the SST's analysis is correct, given that neither the ES nor the HIA were before the SST at any stage. In this context, regulation 21(1) of the EIA Regulations 2017 is relevant (see para 31 above). The SST was obliged to take into account the environmental information for the proposal, which included the ES, and DL 11 states that he did this.

G 173 The ES concluded that no part of the scheme would result in substantial harm to any designated heritage asset. The Panel disagreed with that view in relation to the effects of the western cutting and portals and the Longbarrow junction. Nonetheless, the Panel recognised that that was a matter of judgment on which the SST might differ and that there had been differing opinions submitted to the Examination, not least that of IP2 (PR 7.5.26).

H 174 As I have said in para 137 above, the SST disagreed with the Panel's judgment that "substantial harm" would be caused by those parts of the scheme. It follows that he disagreed with the conclusions in PR 5.7.236, 5.7.248, 5.7.297, 5.7.329, 5.7.333, 7.5.11, 7.5.19, 7.5.21 and 10.2.10 that

that level of harm would be substantial. However, the SST did not disagree with the more specific findings of the Panel upon which its “substantial harm” conclusion was based. The effect of DL 10 is that he agreed with those findings (see paras 142–144 above).

175 The agreed principle in para 170 above does not lay down a rubric as to how an assessment should be made or how reasoning should be expressed. It does not indicate that something akin to the analysis in an environmental statement is required. It is open to a decision-maker to accept the findings of an inspector or panel about the specific impacts that would be caused by a proposed development, or a part thereof, and then to say, as a matter of judgment, that those effects should be treated as less than substantial harm rather than substantial harm, particularly where that view is supported by the evidence and opinion of a specialist adviser such as IP2 in this case. It was not suggested that the judgment in the present case should be treated as irrational. That is hardly surprising given what the Panel had said at PR 5.7.26. So that part of ground 1(iv) which seeks to attack what is described as a “blanket discount” does not assist the claimant.

176 But the real issue remains whether the principle in para 170 above has been satisfied in the decision letter in the light of the explanation of the decision-making process given in para 171.

177 Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL 11, the SST’s legal team informed the court that the ES and HIA were not before ministers when they were considering the Panel’s report and the determination of the application for development consent. It is said that “the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website”. However, as is clear from the case law cited in paras 62–65 above, what was within the knowledge of officials is not to be treated on that account as having been within the minister’s knowledge, unless it was drawn to his attention in a briefing or précis.

178 That same case law suggests that in the real world a minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But, nevertheless, an adequate précis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a panel or an inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement *to take into account* the impact on the significance of each relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision-maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset.

179 Here, the SST did receive a précis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a précis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise

A in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a précis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement.

B 180 In my judgment, this involved a material error of law. The precise number of assets involved has not been given, but it is undoubtedly large. Mr Wolfe pointed to some significant matters. To take one example, IP1 assessed some of the impacts on assets and asset groupings not mentioned by the Panel as slightly adverse and others as neutral or beneficial. We have no evidence as to what officials thought about those assessments. More
C pertinently, the decision letter drafted by officials (which was not materially different from the final document—see para 67 above) was completely silent about those assessments. The draft decision letter did not say that they had been considered and were accepted or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally
D sufficient material to be able lawfully to carry out the “heritage” balancing exercise required by para 5.134 of the NPSNN and the overall balancing exercise required by section 104 of the PA 2008. In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one.

E 181 Accordingly, I uphold ground 1(iv) of the challenge.

Conclusion

182 For these reasons, I uphold ground 1(iv) of the challenge and reject grounds 1(i), (ii) and (iii).

Ground 2—lack of evidence to support disagreement with the Panel

F 183 The claimant submits that the SST disagreed with the Panel on the substantial harm issue without there being any proper evidential basis for doing so. Mr Wolfe advances this ground by reference to the SST’s acceptance of the views of IP2 in DL 34, 43, 50 and 80. He submitted that IP2’s representations did not provide the SST with evidence to support his disagreement with the Panel on “substantial harm” in two respects. First, he
G said that IP2 only addressed the spatial aspect of the third main issue and did not address harm to individual assets or groups of assets. Second, he submitted that SST had misunderstood IP2’s position: it had never said that the harm would be less than substantial.

H 184 It should be noted that although the claimant had raised other more detailed criticisms, Mr Wolfe did not pursue them in oral submissions or invite the court to deal with them. No doubt he considered that ground 2 should stand or fall on the points that he chose to advance, as set out above.

185 The short answer is to be found in PR 5.7.329 to 5.7.330. The Panel understood that IP2 took the view that no substantial harm would be caused to any asset and that the reasons for the difference of view between the Panel and IP2 were concerned with the effects of the western cutting and portals and the new Longbarrow junction. Those passages would have reflected what

took place during the hearings in which IP2 took part, as well as its written representations. IP2 has confirmed that the Panel's report at PR 5.7.329 to 5.7.330 accurately set out its position in the Examination (para 28 of the detailed grounds of defence). There is no proper basis for the court to go behind what was said by the Panel in its report on this subject. The SST was plainly entitled to rely upon that part of the report.

186 It is also apparent from PR 5.7.329 to 5.7.330 that the Panel was dealing with its overall finding of substantial harm under the third main issue. The claimant's attempt to confine the effect of those passages to effects on "spatial relations, visual relations and settings" overlooks the fact that PR 5.7.329 simply repeated the heading given for the third main issue when it was introduced in PR 5.7.129. It is plain from the section of the report devoted to the third main issue that the Panel considered both the spatial aspect and the harm to heritage assets and their setting. There is no reason to think that the shorthand they used in PR 5.7.329 was meant to suggest that IP2 had only considered the spatial aspect. This is a forensic, excessively legalistic argument of the kind which should not be advanced in the Planning Court.

187 In any event, on a fair reading of IP2's representations, it is plain that it did consider those parts of the ES and HIA which assessed impacts on individual heritage assets or groups of assets.

188 For these reasons, ground 2 must be rejected.

189 For completeness, I would add that I do not accept the submission of Mr Strachan that the SST's disagreement on the level of harm resulting from the western section of the scheme was supported by his conclusions in DL 52–56 on landscape and visual amenity impacts from a general planning perspective. Both the Panel and the SST treated those issues separately from the historic landscape matters which arose under the cultural heritage sections of their respective assessments. However, Mr Strachan's submission is not necessary for the court to reject ground 2.

Ground 3—double-counting of heritage benefits

190 The claimant submits that the SST not only took into account the heritage benefits of the scheme as part of the overall balancing exercise required by paragraph 5.134 of the NPSNN but also took those matters into account as tempering the level of heritage disbenefit. It is said that this was impermissible double-counting because those heritage benefits were placed in both scales of the same balance.

191 But the claimant also made a further submission, which is rather different. It was said that the SST relied upon heritage benefits in DL 34 and DL 43 as reducing the level of heritage harm when deciding whether less than substantial harm would be caused (ie whether paragraph 5.133 or 5.134 of the NPSNN should be applied), and then also took those heritage benefits into account when deciding whether the balance pointed in favour or against the scheme.

192 It is necessary to be clear about how the policies in the NPSNN operate, the process which was followed in the ES and HIA, and the chain of reasoning in the decision letter.

193 Paragraphs 5.133 and 5.134 of the NPSNN lay down the criteria which determine which of the policy tests is to be applied for dealing with harm to heritage assets (the "fork in the road decision"—see para 47 above).

A In the light of *Bramshill* at para 71 it is common ground that in reaching this judgment, the decision-maker *may* take into account benefits to the heritage asset itself (referred to as an “internal balance”) but he is not obliged to do so (and see para 74).

194 In *Bramshill* at para 78 Sir Keith Lindblom SPT stated:

B “Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no ‘harm’ of the kind envisaged in paragraph 196 [of the NPPF]. There might be benefits to other heritage assets that would not prevent ‘harm’ being sustained by the heritage asset in question but are enough to outweigh that ‘harm’ when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with.”

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For the purposes of the present case, two points may be drawn from that passage.

195 First, when assessing the impact of a project on a heritage asset it is permissible to combine both the beneficial and the adverse effects *on that asset*. That is not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole and not partially. That approach was followed in the ES in this case. It was necessary to take into account the A303 as part of the existing baseline and to take into account the beneficial impact on an individual asset of removing that road as well as any harmful impact on that asset from the new scheme. The net outcome might be positive, neutral or negative.

D

E 196 Second, if a scheme would cause harm to one asset and benefit to another, that does not alter the judgment that the first asset will be harmed. Instead, the benefit to the other is a matter to be weighed in whichever balance falls to be applied under the NPSNN or, indeed, paragraphs 195 or 196 of the NPPF. Here again we see the distinction between deciding which of the two policy tests in those paragraphs is to be applied and the carrying out of the balancing exercise itself.

F

G 197 There is a tendency to use the term “double-counting” imprecisely, as if to say that it is necessarily objectionable whenever a particular factor is taken into account in a decision on a planning application more than once. That is too sweeping a proposition. Well-known planning policies contain examples where, legitimately, the same factor may have to be taken into account more than once. For example, in Green Belt policy some types of development are regarded as inappropriate if they would harm the openness of the Green Belt and/or conflict with the purposes of including land within it (paragraphs 145 and 146 of the NPPF). In those circumstances, the application of the “very special circumstances test” will also require that harm to the Green Belt to be included in the overall planning balance. There is no improper double-counting. The same factor is being assessed twice for two different and permissible purposes.

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198 Paragraph 11(d) of the NPPF provides another example. If, for example the presumption in favour of granting permission is engaged (eg because the supply of housing land is less than five years) the “tilted balance” in sub-paragraph (ii) may be applicable. If so, the extent to which the proposal complies with or breaches development plan policies

may be taken into account in the balance required to be struck under paragraph 11(d)(ii). But it is also necessary to take into account those policies when striking the balance required by section 38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”). Those two balances may either be struck separately or taken together. Either way, there is no impermissible double-counting. Taking into account the same factor more than once is simply the consequence of having to apply more than one test (see *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1450, paras 62–67 and [2020] PTSR 993, para 110). The same considerations may apply where paragraph 11(d)(i) falls to be applied.

199 The policies in paragraphs 5.133 to 5.134 of the NPSNN are similar in nature to the first of those examples. These paragraphs determine which of the two tests for decision-making on heritage policy are to be applied, before arriving at the overall planning balance. A beneficial impact on a heritage asset may appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test is engaged, and then again in the balancing exercise required by that test when *all* public benefits are weighed against all harm to heritage assets. The same factor is taken into account at two different stages for different and permissible purposes. There is no question of improper double-counting. Ultimately, in his reply Mr Wolfe accepted this analysis.

200 Accordingly, the real issue under ground 3 has come down to whether the SST, when striking the balance, put the same benefits in both scales, for and against the proposal (see para 190 above).

201 The ES and HIA assessed the impacts of the proposal on individual assets and groups of assets and arrived at the conclusion that no asset would be substantially harmed. On that basis the test in paragraph 5.134 would fall to be applied. I accept the submission of the SST and IP1 that that series of separate judgments did not involve any off-setting of net benefit to one asset against net harm to another. The claimant did not identify any material to the contrary.

202 The Panel disagreed with that assessment in relation to the impacts of two elements of the scheme, the western cutting and portals and the Longbarrow junction. They judged that there would be substantial harm to assets or groups of assets and to the OUV of the WHS in certain locations (see eg PR 5.7.219, 5.7.224, 5.7.228 to 5.7.229, 5.7.231 to 5.7.232, 5.7.239, 5.7.241, 5.7.245 and 5.7.247). The Panel’s judgment was based upon its assessment of the scale and design of the civil engineering works together with the mitigation proposed and their effect upon the setting of assets and the landscape in which they feature. In reaching its judgments the Panel appropriately took into account the removal of the A303 because that, in itself, affects the impact on relevant assets, as well as the mitigation proposed for those elements of the scheme (see eg PR 5.7.236 and 5.7.248). There is no evidence that when it made its judgment on the “fork in the road” between paragraphs 5.133 and 5.134 of the NPSNN, the Panel introduced off-setting between different assets or had regard to the broader (or generic) heritage benefits of the entire scheme (eg as set out in PR 5.7.29—see para 70 above). The Panel performed the overall balancing exercise separately in section 7.5.

203 In DL 34 and DL 43 the SST set out his conclusion on which of the policy tests in paragraph 5.133 or 5.134 of the NPSNN should be applied.

A Having decided in favour of paragraph 5.134, the SST then applied that test in DL 51. There, the SST simply weighed benefits from the overall scheme (“the public benefits”) against the harm he had already identified. They included the overall or generic scheme benefits for cultural heritage identified at PR 5.7.29. The benefits in PR 5.7.29 were put into the correct scale. There is no indication that the SST put the positive effects on each *individual* asset or asset grouping attributable to the western section of the proposed scheme

B in both sides of the balance.

204 In DL 80 the SST drew upon his earlier conclusions in DL 34 and DL 43 that the proposal would cause less than substantial harm but there is no suggestion in DL 80 that that judgment was tainted by improperly taking into account heritage benefits from the scheme overall, rather than the way in which the contentious elements of the western section of the scheme affected relevant assets. That judgment had previously been reached in DL 34 and DL 43.

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205 Ultimately, ground 3 came down to an attack on the way in which the SST reached his conclusions on less than substantial harm in DL 34 and DL 43. In my judgment, they contain no indication that the SST took into account *overall* benefits of the scheme rather than effects of the scheme on *individual* relevant assets, so that this resulted in improper double-counting, either in DL 51 or in DL 80 to DL 87.

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206 The claimant’s submission was also advanced on the basis that the SST had relied upon the views of IP2 and that the latter had taken that broader approach. I reject that submission. In PR 5.7.229 to 5.7.330 the Panel stated that IP2 had taken the view that less than substantial harm would be caused to assets affected by the western cutting and Longbarrow junction. The Panel gave no indication that that involved a different and broader approach to the assessment of that harm, one which took into account overall or generic scheme benefits, as compared with its own approach. Instead, the Panel said that it was simply a difference of professional judgment on the evidence. The claimant’s submission on this point is not supported by any of the documents shown to the court

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207 The claimant sought to criticise the relationship between DL 33 and DL 34 in order to suggest that impermissible double-counting was introduced into DL 34. I disagree. Part of DL 33 addressed the Panel’s conclusion on the effect of the overall scheme on the WHS. It was in that context that the SST referred to the views of IP2 and others that greater weight should be given to the beneficial effects of removing the existing A303 from the WHS rather than the harmful effects of part of the new scheme on part of the WHS. Indeed, some contended that there would be a net benefit overall. This approach was entirely proper because, it was necessary to consider the WHS as a whole and, correctly, it involved treating the WHS as a designated heritage asset in itself. Thus the benefits relevant to that asset would necessarily relate to the scheme as a whole. That approach is entirely consistent with the second and third sentences of para 78 in *Bramshill* (see paras 194–196 above).

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208 But in DL 34 the SST also brought in the third main issue and did so in the context of what he had already said in DL 30. The difference between IP2 and the Panel related to the effect of the western cutting and the Longbarrow junction on heritage assets and also the OUV of the WHS. Here, there is no reason to think that the SST, relying upon the views of IP2, took into account

a wider range of heritage benefits than was permissible for the purposes of deciding whether paragraph 5.133 or 5.134 of the NPSNN applied (see para 206 above). A

209 For these reasons, ground 3 must be rejected.

Ground 4—whether the proposal breached the World Heritage Convention

210 The claimant contends that the SST's acceptance that the scheme would cause harm, that is less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention and therefore the SST erred in law in concluding that section 104(4) of PA 2008 was not engaged. It was engaged and so, it is submitted, the presumption in section 104(3) should not have been applied in the decision letter. B

211 The claimant's case as set out in its skeleton (see eg para 242) appeared to be that any harm, or at least any significant harm, to the WHS would, if allowed, involve a breach of articles 4 and 5 of the Convention, irrespective of whether the benefits of the scheme were judged to have greater weight. That appears to have been the case presented in the Examination and which IP1 successfully persuaded the Panel to reject. In his oral submissions Mr Wolfe shifted the case significantly. He accepted that the Convention allows for a balance to be struck between harm to the WHS and benefits, but contended that only heritage benefits, in particular benefits to the WHS, its OUV and attributes, could be taken into account in that balance. Thus, he submitted, the balance required to be struck by either paragraph 5.133 or 5.134 of the NPSNN conflicts with the Convention. C
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212 The first issue is whether the Convention has been incorporated into UK law, or the law applicable in England and Wales, so that its construction is a matter of law directly for this court. Although the Convention had been ratified by the UK, it is common ground that it has not been incorporated into our domestic law by legislation. Instead, Mr Wolfe submitted that an international treaty may be treated by the court "as for all practical purposes as incorporated into domestic law," citing Lord Steyn in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, para 40 et seq. However, that decision does not assist the claimant. Lord Steyn was not prepared to treat a provision in the Immigration Rules not requiring any action to be taken contrary to the Refugee Convention (Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906)) as incorporating that Convention into English law. The Rules were insufficient for that purpose. But because the same principle was later enacted in primary legislation, it was that measure which was held to have been sufficient to achieve incorporation (see paras 41–42). E
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213 In the present case the claimant merely points to section 104(4) of the PA 2008. But that refers to international obligations generally and not specifically to the World Heritage Convention. As Mr Taylor pointed out, on the claimant's argument section 104(4) would have the effect of incorporating *any* international obligation into our domestic law, but *only* for the purposes of determining an application for a DCO. There is nothing in the language used by Parliament to indicate that it intended to achieve such a strange result. H

214 Instead, all that section 104(4) does is to make a breach of an international obligation one of the grounds for not applying section 104(3).

A But, as Mr Wolfe accepted, where section 104(4) is met that does not automatically result in the refusal of an application for a DCO. Accordingly, Mr Wolfe accepted that the highest that he could put the incorporation argument is that section 104(4) treats the issue of whether a proposal would comply with the Convention as a mandatory material consideration, and not that Parliament requires a proposal to comply with the Convention as a matter of law.

B 215 I am not persuaded that Mr Wolfe's revised analysis provides a sufficient justification for concluding that an international obligation has been incorporated into domestic law. Mr Wolfe has not shown the court any authority where that has been accepted. Indeed, if the Convention is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgment for the decision-maker, subject to review on the grounds of irrationality. That is especially so given the very broad, open-textured nature of the language used in articles 4 and 5. The position would not be materially different from the second authority cited by Mr Wolfe, *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, where the Secretary of State took the Convention on the Protection of Human Rights and Fundamental Freedoms into account and the grounds of challenge were dealt with under the law on irrationality (see pp 867E–869B).

E 216 On the basis that the Convention has not been incorporated into domestic law, the relevant principles on the interpretation of that instrument were set out by Lord Brown of Eaton-under-Heywood in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] AC 756, paras 67 to 68. The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not “tenable” or is “unreasonable.” This approach allows for the possibility that, so far as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as “tenable.” The issue is simply whether the decision-maker has adopted an interpretation falling within that range.

F 217 I have no hesitation in concluding that the SST was entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention. That is a tenable view. If I had to decide the point of construction for myself, I would still conclude that those policies are compliant with the Convention.

G 218 Although articles 4 and 5 refer to matters of great importance, they are expressed in very broad terms. By article 4 each state party has recognised that the duty of protecting and conserving a WHS belongs primarily to that state, which “will do all it can to this end, to the utmost of its own resources”. Resources are, of course, finite and they are the subject of competing social, economic and environmental needs. The Convention does not further explain the meaning and scope of the language used in article 4. This must be a matter left to individual party states.

H 219 In any event, article 4 has to be read in conjunction with the slightly more specific provisions in article 5, and not in isolation. There, the obligation on each state is to endeavour “as far as possible”, and “as appropriate” for that country, to comply with paragraphs (a) to (e). They include the taking of the “appropriate” legal measures necessary to protect and conserve the heritage referred to in articles 1 and 2.

220 The broad language of these articles is compatible with a state adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter. The Convention does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case. Nor does the Convention use language which would limit such other factors to heritage benefits or benefits for the WHS in question. I also note that in its “Guidance on Heritage Impact Assessments for Cultural World Heritage Properties”, ICOMOS accepts that a balance may be drawn between the “public benefit” of a proposed change and adverse impacts on a WHS (para 2-1-5).

221 The Australian authorities cited (*Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1; *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308) need to be read carefully. Those cases were concerned with circumstances in which the Convention had been incorporated into Australian law by legislation and any observations on interpretation should be understood in the context to which the decisions were addressed. Having said that, I do not see my conclusion as conflicting with any of the observations in those decisions. They do not lend any support for the interpretation which Mr Wolfe said must be given to the Convention. Indeed, the observations in the High Court of Australia in the Tasmanian Dam case, upon which Mr Wolfe principally relied, emphasise the discretion left to individual state parties as to the steps each will take and the resources it will commit (see eg Brennan J at 158 CLR 1, 224–225).

222 For these reasons, ground 4 must be rejected.

223 Although it is not necessary for my decision on ground 4, I would add one further point. As I have noted, it is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 (PPS5) was to the same effect and contained a statement that the Government considered the policies it contained to be consistent with the UK’s obligations under the Convention. No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which is incorrect *on any tenable view*. A legal challenge to the NPSNN would now be precluded by section 13(1) of the PA 2008. Under section 106(1)(b) a representation relating to the merits of a policy set out in a NPS may be disregarded by the SST (see also *Spurrier and ClientEarth*).

Ground 5

224 The claimant raises three contentions under ground 5:

(i) the SST failed to take into account any conflict with Core Policies 58 and 59 of the Wiltshire Plan and with policy 1d of the WHS Management Plan;

(ii) the SST failed to take into account the effect of his conclusion that the proposal would cause less than substantial harm to heritage assets on the business case advanced for the scheme;

(iii) the SST failed to consider alternative schemes, in accordance with the World Heritage Convention and common law.

A (i) *Failure to take into account local policies*

225 It is plain from, for example, DL 11 and DL 27 that the SST had regard to the Wiltshire Core Strategy and the WHS Management Plan.

B 226 In PR 5.7.322 to 5.7.325 of its report the Panel stated, in a section devoted to its fifth main issue, that in view of its conclusions on the impact of the scheme on the OUV of the WHS the proposal would not accord with Core Policies 58 and 59 of the Core Strategy, nor with policy 1d of the WHS Management Plan. The Panel clearly thought that the language used in PR 5.7.324 was apt to cover impact upon the settings of designated heritage assets, the subject of Core Policy 58. The Panel carried that conclusion regarding conflict with those three policies through to its summary of the adverse impacts of the scheme within section 7.2 dealing with the planning balance. At PR 7.2.32 the Panel restated the conflict they perceived with the three local policies in terms of harm to the WHS and its OUV. There is no reason to think that in that paragraph the Panel excluded the broader consideration addressed in PR 7.2.33. In any event, at PR 7.5.11 the Panel restated its conclusion on breach of the three policies in terms of both harm to the OUV of the WHS and harm to “the significance of heritage assets through development within their settings”. Plainly the Panel did not think these differences in wording were important for a true understanding of their reasoning on local policies.

D 227 In DL 28 the SST stated:

E “The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [PR 5.7.321]. The ExA considers the Development’s impact on OUV does not accord with the Wiltshire Core Strategy Core Policies F 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [PR 5.7.322–5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [PR 5.7.325]. It considers this is a factor to which substantial weight can be attributed [PR 7.5.11].”

G 228 The claimant complains that this failed to address the breach of Core Policy 58 as a result of harm caused to the settings of a number of designated assets (para 262 of its skeleton argument). But the SST’s summary in DL 28 accurately and fairly reflects the language used by the Panel themselves to cover the issues raised by both Core Policies 58 and 59. The criticism is wholly untenable.

H 229 The second complaint is that the SST disagreed with the Panel on the level of harm that would be caused to heritage assets (ie from the western cutting and from the Longbarrow junction) and so cannot be taken to have accepted, in accordance with DL 10, that that lesser degree of harm still involved conflict with the three local policies. But the language used in those policies does not indicate that “less than substantial” harm could not involve any conflict therewith and the SST said nothing to the contrary. The only

rational inference is that the SST accepted that there remained a conflict with those policies. The second criticism is no better than the first. A

230 There is nothing in the decision letter to indicate that the conflict with local policies was disregarded by the SST. In any event, and as Mr Strachan submitted, the local policies do not refer to any balancing of harm against the benefits of a proposal, as required by the NPSNN. The NPSNN was the primary policy document to be applied under the PA 2008 according to section 104(3), which may be contrasted with section 38(6) of PCPA 2004 (see also para 91 of the SST's skeleton and *Bramshill* at para 87). B

231 For these reasons ground 5(i) must be rejected.

(ii) The alleged error regarding the business case for the scheme

232 This complaint arises from paragraph 4.5 of the NPSNN (see para 40 above). An application is normally to be supported by a business case prepared in accordance with HM Treasury Green Book principles (*The Green Book: Central Government Guidance on Appraisal and Evaluation* (2020)). It provides the basis for investment decisions and will also be important for the consideration by the examining authority or by the Secretary of State of the adverse impacts and benefits of a proposal. However, the NPSNN does not suggest that such a business case should put a monetary value on every factor which goes into a planning balance or a balance carried out under paragraphs 5.133 or 5.134 of the NPSNN. C D

233 Nonetheless, the claimant submits that the SST's decision was flawed because he did not take into account his conclusion that two elements in the western section of the scheme would result in less than substantial harm to heritage assets.

234 The point is said to arise in this way. The cost benefit analysis for the scheme placed a monetary value of £955m on the benefit of removing the existing A303 from the WHS. This was, by far, the greatest monetary benefit ascribed to the scheme, being approximately three quarters of its overall benefits. The costs of the scheme were said to be between £1.15bn and £1.2bn (tables 5–6 of IP1's "Case for the scheme and NPS accordance"). So, without the sum attributed to the removal of the A303 the analysis would be heavily negative. That is hardly surprising. The construction of a 3.3 kilometre tunnel, the cuttings and the junctions are expensive works. E F

235 The figure of £955m was arrived at by a public attitude survey which asked people to put a monetary value on their willingness to pay for the perceived benefit of removing the existing A303 and its traffic from the immediate vicinity of Stonehenge; or to put a monetary value on their willingness to accept a payment as compensation for the loss of amenity to travellers on the existing A303, through no longer being able to see Stonehenge while travelling. The survey was targeted at three groups: visitors to Stonehenge, road users and the general population (PR 5.17.94). G

236 A number of criticisms were made of this approach during the Examination (see eg PR 5.17.96–5.17.99). IP1 accepted that it was unusual for cultural heritage assets to be given a monetary value in the appraisal of a transport scheme but here the enhancement of the cultural heritage was so significant that it formed an integral part of the objectives of the scheme and it was therefore considered appropriate to make an attempt at quantification of that factor (PR 5.17.100). However, it is plain that the exercise did not attempt to monetise all positive or negative impacts upon cultural heritage or H

A all factors going into the planning balance. IP1 submitted at the Examination that the two should not be confused (PR 5.17.112). The cost benefit analysis formed part of a value for money exercise. It was relevant, for example, that funding was in place, given that compulsory purchase powers needed to be granted as part of the DCO.

B 237 The National Audit Office pointed out that, although IP1 had used approved methodologies to arrive at the figure of £955m, calculating benefits in that way was inherently uncertain and decision-makers were advised to treat them cautiously (PR 5.17.108).

238 The Panel took a realistic attitude to this debate (PR 5.17.117):

C “The ExA makes no specific criticism of the manner in which the study has been undertaken, or the methodology adopted. It appears to the ExA a genuine attempt undertaken to put a value on heritage benefits as described in the survey material. However, the ExA recognises that this is hedged with uncertainty and endorses the cautious approach advocated by the NAO and the DfT itself. The ExA notes the concerns of SA and others that the visual information provided to survey participants did not fully represent the impact of the Proposed Development on the WHS and recognises that participants could not be expected to have the detailed knowledge of impacts that the Examination process has allowed. The ExA also understands that participants might, if presented with choices about what their taxes would be spent on, adjust the priority given to otherwise desirable heritage outcomes.”

E 239 The whole of the Panel’s report was before the SST. The Panel accepted that respondents to the survey could not be expected to have detailed knowledge about impacts on cultural heritage that had been discussed in the Examination. It did not suggest that this component of the economic or investment analysis should be adjusted, in some way, whether quantitatively or otherwise, according to the judgments reached on heritage impacts, for example, from the western section of the scheme.

F 240 The SST did not disagree with the Panel’s approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an “obviously material consideration” which the SST was obliged to take into account as altering the business case.

241 Accordingly, ground 5(ii) must be rejected.

G (iii) *Alternatives to the proposed western cutting and portals*

H 242 The focus of the claimant’s oral submissions was that the SST failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800 metres of the cutting and, secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243 The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2

of the report, which brought together in the planning balance the various factors which had previously been considered. PR 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at PR 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244 It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see para 41 above) (see PR 5.4–5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56–5.4.75.

245 IP1's case, applying paragraphs 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were: (i) "to be satisfied that an options appraisal has taken place", (ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and (iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246 At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) ("the Habitats Regulations 2017") or the Water Framework Directive (Parliament and Council Directive 2000/60/EC) (PR 5.4.57–5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied the sequential and exception tests for flood risk and that no part of the scheme fell within a national park or an area of outstanding natural beauty (PR 5.4.59). However, the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35–5.4.55).

247 The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16–5.4.27 and the representations of interested parties on that issue at PR 5.4.45–5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18–5.4.19). In the HIA IP1 stated that the options involving 4.5 kilometre tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para 7.3.12). However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248 It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets (para 73 above). Second, it

A considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall (para 75 above).

B 249 The Panel recorded the position of IP2 as having been satisfied, that IP1 had undertaken “an options appraisal in relation to the alternatives to the route of a highway in place of the A303” (PR 5.4.55). Once again, “options appraisal” referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in para 247 above from PR 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1’s additional contention that the extended tunnel options would bring only minimal benefits in heritage terms.

D 250 In its conclusions the Panel said that it was satisfied that IP1 had carried out a “full options appraisal” for the project in achieving its selection for inclusion in the RIS^{1*} as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2’s view that “the EIA has addressed alternatives” and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred expressly to IP1’s case that because the scheme retained its status in the RIS, “further option testing need not be considered by the [Panel] or by the [SST]” (PR 5.4.68). The Panel also referred to the “full response” which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had “explained” its reasons for their rejection and the selection of the scheme route. The Panel said that it found “no reason to question the method and approach of the appraisal process that led to that outcome” (PR 5.4.69).

F 251 After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:

G “However, in so far as the options appraisal is concerned, the ExA is content that the Applicant’s approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision-making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision-maker.*” (Emphasis added.)

H This simply restated paragraph 4.27 of the NPSNN.

252 The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72–5.4.73. Its conclusions focused on the adequacy

* *Reporter’s note.* The superior figures in the text refer to the notes at the end of the judgment on pp 139–149.

of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.

253 In PR 5.4.74 the Panel addressed alternatives, in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254 The Panel's overall conclusions at PR 5.4.75 were: "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255 Similarly, at PR 7.2.28 the Panel concluded:

"The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision-making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative."

256 In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [panel's] reasoning and conclusions on these matters".

257 Accordingly, both the Panel and the SST considered alternatives on the same basis as IP1, in that it was necessary to consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see para 31 above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258 Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change

A to the Stonehenge landscape in 6,000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224–5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

B 259 It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with “all legal requirements” and “any policy requirements set out in this NPS” on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered “in particular”, namely, the EIA Directive (Parliament and Council Directive 2011/92/EU) and the Water Framework Directive and “policy requirements in the NPS for the consideration of alternatives”. But those instances are not exhaustive. “Legal requirements” include any arising from judicial principles set out in case law as well
C as the Habitats Regulations 2017. Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and Areas of Outstanding Natural Beauty and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

D 260 But the Panel and, by the same token, the SST applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision-maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (ie there has been full options testing for the purposes of a RIS) the applicant does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an “investment
E decision-making process”. For example, p 91 of the current RIS, *Road Investment Strategy 2: 2020–2025*, explains that the document makes an investment commitment to the projects listed, on the assumption that they can “secure the necessary planning consents.” “Nothing in the RIS interferes with the normal planning consent process.”²

F 261 A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in paragraph 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

G 262 Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process or there may have been a change in circumstance since that exercise was carried out. In the present case, p 3-3 of chapter 3 of the ES stated that the options involving a 4.5 kilometre tunnel (ie a western extension) all involved costs significantly in excess of the available
H budget and so had not been considered further. During the Examination IP1 stated, in a response to questions from the Panel, that it also considered that extending the tunnel to the west would provide only “minimal benefit” in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel.

263 Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which, therefore, undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case, IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset (para 71 above) and (ii) there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall (para 75 above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets (paras 97–98 above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed and its authenticity seriously harmed (paras 101–103 above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, a fortiori if there was a policy or legal requirement for that matter to be considered by the decision-maker.

264 The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see para 46 above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265 Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting inspector or panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see para 120). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266 The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see paras 130 and 140–141 above).

267 Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and

A authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see paras 139 and 142–144 above).

268 The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an “obviously material consideration” which must be taken into account, are well established and need only be summarised here.

B 269 The analysis by Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293, 299–300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of
C planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then “it may well be relevant and indeed necessary” to consider whether there is a more appropriate site elsewhere. “This is particularly so where 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
D outweighs the planning disadvantages inherent in it.” Examples of this second situation may include infrastructure projects of national importance. The judge added that, even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270 The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR 1166, at para 30.

E Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those “exceptional circumstances” where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant or, where relevant, should be given little or no weight.

F 271 Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] 2 P LR 59, paras 22–30. At para 30 Laws LJ stated:

“it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than
G did Oliver LJ or Simon Brown J—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question.”

H 272 In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred

by failing to take them into account (paras 17 and 35). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an “obviously material” consideration in the case so that it was irrational not to take them into account (paras 16–28).

273 In *R (Langley Park School for Girls) v Bromley London Borough Council* [2010] 1 P & CR 10 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of metropolitan open land (“MOL”) would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant’s contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether (paras 45–46). He added that no “exceptional circumstances” had to be shown in such a case (para 40).

274 At paras 52–53 Sullivan LJ stated:

“52. It does not follow that in every case the ‘mere’ possibility that an alternative scheme might do less harm must be given no weight. In the *Trusthouse Forte* case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. 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. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the

A objectors were contending, and the members were considering the merits of that application.”

B 275 The decision cited by Mr Taylor in *First Secretary of State v Sainsbury's Supermarkets Ltd* [2008] JPL 973 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational (paras 30 and 32). Accordingly, that was not a case, like the present one³, where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see para 272 above).

C 276 The wider issue which the Court of Appeal went on to address at paras 33–38 of the *Sainsbury's* case does not arise in our case, namely, must *planning permission be refused* for a proposal which is judged to be “acceptable” because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets but that was, undoubtedly, an example of the first principle stated in *Trusthouse Forte* (see D para 269 above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account*. Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in E paragraph 4.27 of the NPSNN and PR 5.4.71?

F 277 In my judgment, the clear and firm answer to that question is “no”. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account⁴. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

G 278 First, the designation of the WHS is a declaration that the asset has “outstanding universal value” for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its “protection, conservation, presentation and rehabilitation” (article 5). The NPSNN treats a World Heritage Site as an asset of “the highest significance” (paragraph 5.131).

H 279 Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (eg scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be “significantly adverse”, the SST repeated that (DL 28) and did not disagree (see paras 137, 139 and 144 above).

280 Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible. A

281 Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations. B

282 Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at para 78). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable per se. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse Forte*, where an assessment of relevant alternatives to the western cutting was required (see para 269 above). C
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283 The submission of Mr Strachan that the SST has decided that the proposed scheme is “acceptable”, so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in paragraph 5.134 of the NPSNN). E

284 I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr Strachan says that the SST found the scheme to be acceptable collapses. F

285 Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1’s view that the tunnel alternatives would provide only “minimal benefit” in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see paras 139 and 144 above) made it irrational or logically impossible for him to treat IP1’s options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST. G
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286 Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially

A the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see para 273 above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

B 287 Eighth, it is no answer for the SST to say that DL 11 records that the SST has had regard to the “environmental information” as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

C 288 Ninth, it is no answer for the SST to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so section 104(7) of the PA 2008 may not be used as a “back door” for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN and does not disapply the common law principles on when alternatives are an obviously material consideration. But, in addition, the SST’s finding that the proposal accords with the NPSNN for the purposes of section 104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

D 289 I should add, for completeness, that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

E 290 For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291 The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

F 292 Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293 There is no basis for the court to hold that relief should be withheld under section 31(2A) of the Senior Courts Act 1981. It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

G 294 The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST’s decision to grant development consent and the DCO itself.

Notes

H 1. For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network Ltd) v Secretary of State for Transport* [2022] PTSR 31.

2. See *R (Transport Action Network Ltd) v Secretary of State for Transport* [2022] PTSR 31, paras 28–37 and 96(vii).

3. Which is to do with a failure to assess the relative merits of identified alternatives.

4. It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.

Appendix 1—Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well established. Amongst other things:

(a) There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The court will not interfere with matters of planning judgment other than on legitimate public law grounds: see, for example, *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709 at paras 101 and 103 [4/9/203–204], applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 and *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, para 7.

(b) Decision letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, 164E–G).

(c) Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see, for example, *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953. The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108, para 42). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision-maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *ClientEarth* High Court judgment at para 146 and *Allen v Secretary of State for Communities and Local Government* [2016] EWCA Civ 767 at [19]. However, “if disagreeing with an inspector's recommendation the Secretary of State is ... required to explain why he rejects the inspector's view”: see *Horada v Secretary of State for Communities and Local Government* [2016] PTSR 1271, para 40. Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government* [2016] 1 WLR 2682, paras 24–26. Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 668).

(d) The judgment of Lewis J in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1111 (Admin) has applied the *South Bucks* standard of reasons to development consent decisions (at para 47).

A (e) Where it is alleged that a decision-maker has failed to take into account a material consideration, it is insufficient for a claimant simply to say that the decision-maker has failed to take into account a material consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take

B a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so “obviously material”, that it was irrational not to have taken it into account: see *ClientEarth* [2020] PTSR 1709, at para 99 applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221.

C (f) The interpretation of planning policy is a matter for the court. In *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008. See paras 5–8.

D Lindblom LJ (with whom the other Lord Justices agreed) held:

“19. The court’s general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983, in particular the judgment of Lord Reed JSC at paras 17–19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd and Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37; [2017] 1 WLR 1865 at [22]–[26]). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see para 18 of Lord Reed’s judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see para 18 of Lord Reed’s judgment in *Tesco Stores v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paras 24–26 of Lord Carnwath’s judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS—notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making.”

*Heritage Assessment—The statutory duty***A**

2. Regulation 3 of the [Infrastructure Planning (Decision) Regulations 2010] states:

“(1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.

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“(2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.

“(3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting.”

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3. The 2010 Regulations do not address World Heritage Sites, although they do address individual scheduled monuments, listed buildings etc within a World Heritage Site.

4. The equivalent sections applying to listed buildings and conservation areas in relation to planning decisions are in section 66(1) and section 72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 (“the Listed Buildings Act”). These state:

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“66(1) In considering whether to grant planning permission ... 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.”

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“72(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.”

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5. The case law concerning the wording of the statutory duties in the Listed Buildings Act refers to the decision-maker being required to give “considerable importance and weight” to the desirability of: (a) preserving listed buildings or their settings, (b) preserving or enhancing the character or appearance of a conservation area, (c) preserving scheduled monuments or their settings (see *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45 the Court of Appeal (following *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 and *Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303)).

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6. In *R (Forge Field Society) v Sevenoaks District Council* [2015] JPL 22 Lindblom J (as he then was) stated in respect of duties in the Listed Buildings Act that: “There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area” (at para 45). The judge went on at para 49:

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A “an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.”

B 7. The case of *South Lakeland* (above) confirmed that the concept of “preserving” under the Listed Buildings Act means “doing no harm” (per Lord Bridge of Harwich at pp 149–50).

8. Lindblom LJ provided further guidance in relation to the duty in relation to the settings of listed buildings under the Listed Buildings Act in *Steer v Catesby Estates* [2019] 1 P & CR 5. He highlighted that:

C (a) “the section 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is—even if its extent is difficult or impossible to delineate exactly—and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision-maker may find it hard to assess whether and how the proposed development ‘affects’ the setting of the listed building, and to perform the statutory obligation to ‘have special regard to the desirability of preserving ... its setting ...’” Para 28.

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E (b) “though this is never a purely subjective exercise, none of the relevant policy guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building’s setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will differ from one case to the next.” Para 29.

F (c) “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, subject, of course, to the principle emphasised by this court in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45 (at paras 26–29), [*Mordue v Secretary of State for Communities and Local Government* [2016] 1 WLR 2682 (at paras 21–23)], and [*R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 (at para 5)], that ‘considerable importance and weight’ must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision-maker’s approach, the court should not intervene (see [*R (Williams) v Powys County Council* [2018] 1 WLR 439], at para 72). For decisions on planning appeals, 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 WLR 1865 (at para 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’.” Para 30.

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9. The most recent judgment of the Court of Appeal addressing paragraph 196 NPPF is *City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320; [[2021] 1 WLR 5761]. In that case, the court confirmed that neither paragraph 196 NPPF nor section 66(1) Listed Buildings Act 1990 require an internal heritage balance to be conducted in order to arrive at the level of harm to an asset before weighing that harm against public benefits. The key passages of the judgment are at paras 71–81.

Appendix 2—Paras 25–43 and 50 of the decision letter

25. The Secretary of State notes the ExA's [Examining Authority's] consideration of cultural heritage and the historic environment in Chapter 5.7 of the Report and the differing positions on this matter among others of: Wiltshire Council [PR 5.7.55–5.7.61]; the Historic Buildings and Monuments Commission for England ("Historic England") [PR 5.7.62–5.7.69]; the National Trust [PR 5.7.70–5.7.71]; English Heritage Trust [PR 5.7.72]; International Council on 7 Monuments and Sites ("ICOMOS") Missions [PR 7.7.73–5.7.80]; Department for Digital, Culture, Media and Sport ("DCMS") [PR 5.7.81–5.7.83]; International Council on Monuments and Sites, UK ("ICOMOS-UK") [PR 5.7.84–5.7.98]; Stonehenge and Avebury World Heritage Site Co-ordination Unit ("WHSCU") [PR 5.7.99–PR 5.7.104]; the Stonehenge Alliance (comprising: Ancient Sacred Landscape Network, Campaign for Better Transport, Campaign to Protect Rural England, Friends of the Earth, and Rescue: The British Archaeological Trust) [PR 5.7.105–5.7.108]; the Consortium of Archaeologists and the Blick Mead Project Team ("COA") [PR 5.7.109–5.7.120]; and the Council for British Archaeology ("CBA") and CBA Wessex [PR 5.7.121–5.7.128].

26. Central to the Secretary of State's consideration of cultural heritage and historic environment is the question of the Development's conformity with the NPSNN and whether substantial or less than substantial harm is caused to the Outstanding Universal Value ("OUV") of the WHS. The NPSNN (paragraphs 5.131–5.134) states that substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional and that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage site, the greater the justification that will be needed for any loss. Where the Development would lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm. Where the Development 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.

27. The Secretary of State notes that the concept of OUV has evolved and been incorporated in the UNESCO document "The Operational Guidelines ("OG") for the Implementation of the World Heritage Convention", which have been regularly revised since 1977 (the latest update being in 2019). It is noted that the term OUV is defined in para 49 of the OG as meaning: "Outstanding Universal Value means cultural and/or national significance which is so exceptional as to transcend national boundaries

A and to be of common importance for present and future generations of all humanity”. The Secretary of State notes the UNESCO definitions of criteria for inscription of the WHS on the World Heritage List [PR 2.2.2] and the description of the attributes of OUV4 [PR 2.2.6] has been set out by the ExA. The WHS Management Plan that was adopted for the WHS in 2015 sets out the vision and management priorities for the WHS to sustain its OUV [PR 3.13.1–3.13.2]. The ExA has also considered the local Development
B Plan, National Planning Policy Framework (“NPPF”), and the Statement of Outstanding Universal Value that exists for the WHS as important and relevant matters [PR 5.7.13–5.7.17].

28. The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur,
C affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [PR 5.7.321]. The ExA considers the Development’s impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment
D [PR 5.7.322–5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [PR 5.7.325]. It considers this is a factor to which substantial weight can be attributed [PR 7.5.11].

29. In the ExA’s overall heritage assessment [PR 5.7.327–5.7.333] the ExA considers the cultural heritage analysis and assessment methodology adopted by the Applicant appropriate, subject to certain points of criticism. These include poor consideration of the influence of the proposed
E Longbarrow Junction on OUV; inadequate attention paid to the less tangible and dynamic aspects of setting, as well as the absence of consideration of certain settings; and concerns regarding the consideration given to the interaction and overall summation of effects. The ExA took these points into account in its assessment [PR 5.7.327]. The ExA is also content overall with the mitigation strategy, apart from the proposed approach to artefact
F sampling and various other points identified. As set out in Appendix E to its Report the ExA recommends the Secretary of State considers resolving these matters if the decision differs from the recommendation [PR 5.7.328].

30. On the effects of the Development on spatial relations, visual relations and settings, the ExA concludes that substantial harm would arise. This conclusion does not accord with that of Historic England, but is based on the ExA’s professional judgments, having regard to the entirety of evidence
G on cultural heritage [PR 5.7.329]. In particular, the ExA places great weight on the effects of the spatial division of the cutting, in combination with the presence of the Longbarrow junction on the physical connectivity between the monuments and the significance that they derive from their settings. This includes the physical form of the valleys, with their historic significance for past cultures, and the presence of archaeological remains [PR 5.7.330].

H 31. The ICOMOS mission reports and the WH Committee decisions, alongside the submissions of DCMS, in the context of the remainder of the evidence examined have been noted by the ExA and it regards the reports and decisions as both relevant and important, but not of such weight as to be determinative in themselves [PR 5.7.331].

32. The Secretary of State notes the ExA's approach has been to integrate cumulative and in-combination effects into its assessment, where relevant and that the ExA agrees with the outcome of the Applicant's exercise that cumulative effects arising from the future baseline would not be significant, and that adequate mitigation has been arranged in respect of in-combination effects during construction and operation [PR 5.7.332].

33. It is the ExA's opinion that when assessed in accordance with NPSNN, the Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [PR 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [PR 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they 9 consider there would or could be scope for a net benefit overall to the WHS [PR 5.7.54, PR 5.7.55, PR 5.7.62, PR 5.7.70, PR 5.7.72 and PR 5.7.83].

34. The Secretary of State notes the differing positions of the ExA and Historic England, who has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [PR 5.7.62–5.7.69] and considers it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Development in the planning balance.

35. Whilst also acknowledging the adverse impacts of the Development, the Secretary of State notes that Historic England's concluding submission [Examination Library document AS-111] states that it has supported the aspirations of the Development from the outset and that putting much of the existing A303 surface road into a tunnel would allow archaeological features within the WHS, currently separated by the A303 road, to be appreciated as part of a reunited landscape, and would facilitate enhanced public access to this internationally important site [PR 5.7.62] and that overall it broadly concurs with the Applicant's Heritage Impact Assessment [PR 5.7.66]. Furthermore, it is also noted from Historic England's concluding submission that it considers the Development proposes a significant reduction in the sight and sound of traffic in the part of the WHS where it will most improve the experience of the Stonehenge monument itself, and enhancements to the experience of the solstitial alignments [PR 5.12.32]. It considers that, alongside enhanced public access, these are all significant benefits for the historic environment.

A 36. The Secretary of State also notes from Historic England's concluding submission made during the examination [Examination library document AS-111] that its objective through the course of the examination was to ensure that the historic environment is fully and properly taken into account in the determination of the application and, if consented, that appropriate safeguards be built into the Development across the DCO, OEMP and the Detailed Archaeological Mitigation Strategy ("DAMS") [PR 5.7.63]. Whilst
 B it is also noted that Historic England identified during the examination a number of concerns where further information, detail, clarity or amendments were needed, particularly around how the impacts of the Development would be mitigated, their concluding submission states that its concerns have been broadly addressed. Historic England believe that the DCO, OEMP and DAMS set out a process to ensure that heritage advice and considerations
 C can play an appropriate and important role in the construction, operation and maintenance of the Development. As a consequence of the incorporation of the Design Vision, Commitments and Principles in the OEMP, together with arrangements for consultation and engagement with Historic England, it considers sufficient safeguards have been built in for the detailed design stage and there are now sufficient provisions for the protection of the historic environment in the DCO. It is Historic England's view that the DAMS is
 D underpinned by a series of scheme specific research questions which will ensure that an understanding of the OUV of the WHS and the significance of the historic environment overall will guide decision-making and maximise opportunities to further understand this exceptional landscape. It considers the DAMS will also ensure that the archaeological mitigation under the Site Specific Written Schemes of Investigation ("SSWSIs") will be supported by
 E the use of innovative methods 10 and technologies and the implementation of an iterative and intelligent strategy, which will enable it to make a unique contribution to international research agendas.

37. Given the amendments and assurances requested and received during the course of the examination and the safeguards that are now built into the DCO overall, Historic England states in the concluding submission that it is
 F confident of the Development's potential to deliver benefits for the historic environment.

38. The Secretary of State also notes that Historic England would continue to advise the Applicant on the detail of the design and delivery of the Development through its statutory role and its roles as a member of Heritage Monitoring and Advisory Group and of the Stakeholder Design Consultation Group. The ExA agrees with Historic England's view that this would also
 G help minimise impact on the OUV, and delivery of the potential benefits for the historic environment [PR 5.7.69].

39. Historic England's response to the Secretary of State's further consultation on 4 May 2020 also indicates that its advice has addressed the need to avoid any risk of confusion which might impede the successful operation of the processes, procedures and consultation mechanisms set out
 H in the revised DAMS and OEMP designed to minimise the harm to the Stones and surrounding environment of the WHS.

40. Similarly, the Secretary of State also notes the National Trust's support for the Development and view that, if well designed and delivered with the utmost care for the surrounding archaeology and chalk grassland landscape, the Development could provide an overall benefit to the WHS. It also

considers the Development could help to reunite the landscape providing improvements to monument setting, tranquillity and access for both people and wildlife. Following initial concerns about the lack of detail in relation to both design and delivery, it is now satisfied that sufficient control measures have been developed through the DAMS and OEMP and also in the DCO [PR 5.7.70–5.7.71]. English Heritage Trust support the scope for linking Stonehenge back to its wider landscape and making it possible for people to explore more of the WHS and welcomes the reconnection of the line of the Avenue [PR 5.7.72]. DCMS also expressed the view that the Development represents a unique opportunity to improve the ability to experience the WHS and its overall impact would be of benefit to the OUV of the WHS, primarily through the removal of the existing harmful road bisecting the site [PR 5.7.81–5.7.83].

41. The Secretary of State notes that whilst Wiltshire Council acknowledge that the most significant negative impact of the Development would be that of the new carriageway, cutting and portal on the western part of the WHS, the Council considers the removal of the existing A303 road would benefit the setting of Stonehenge and many groups of monuments that contribute to its OUV and the removal of the severance at the centre of the WHS caused by the road would improve access and visual connectivity between the monuments and allow the reconnection of the Avenue linear monument. It considers the removal of the existing Longbarrow Roundabout and the realignment of the A360 would also benefit the setting of the Winterbourne Stoke Barrow Group and its visual relationship to other groupings of monuments in the western part of the WHS and the absence of road lighting within the WHS and at the replacement Longbarrow Junction would help reduce light pollution. The rearranged road and byway layout to the east would remove traffic from the vicinity of the scheduled Ratfin Barrows [PR 5.7.55–5.7.57].

42. The Secretary of State also notes from the Statement of Common Ground agreed between Wiltshire Council and the Applicant [Examination library document AS-147] that Wiltshire Council's regulatory responsibility include managing impacts on Wiltshire's heritage assets and landscape, in relation to its statutory undertakings. These responsibilities include having regard to the favourable conservation status of the WHS. The document notes that the Development affects several built heritage assets, both designated and undesignated. However, all sites of interest along the route had been visited by the relevant Council officer with the built heritage consultant, and general agreement exists regarding the likely extent of the Development's impacts. Wiltshire Council agreed that there are no aspects that are considered likely to reach a level of 'substantial harm'.

43. The Secretary of State has also carefully considered the ExA's concerns and the respective counter-arguments and positions of other Interested Parties, including ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Development on the OUV of the WHS and on the cultural heritage and the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [PR 5.7.207]. He accepts there will be adverse

A impacts from those parts of the Development. However, on balance and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and therefore the adverse impacts of the Development should be balanced against its public benefits.

B 50. In conclusion on cultural heritage and the historic environment, the Secretary of State places great importance in particular on the views of his statutory advisor, Historic England and also sees no reason to doubt the expertise of those from Historic England or other statutory consultees that have advised on this matter (or indeed on other matters relating to the application). As indicated above, whilst he accepts there will be harm, there is no suggestion from Historic England that the harm will be substantial. The Secretary of State agrees with Historic England on this matter and is also encouraged by the continued role Historic England would have in the detailed design and delivery of the Development should consent be granted. Whilst also acknowledging some Scientific Committee experts are not content with the mitigation proposed and also that the ExA was not content with the proposed approach to artefact sampling, the Secretary of State accepts Historic England's views on this matter and is satisfied that the mitigation measures included in the updated OEMP and DAMS as submitted by the Applicant on 18 May 2020 and secured by requirements 4 and 5 in the DCO are acceptable and will help minimise harm to the WHS.

Order accordingly.

CATHERINE MAY, Solicitor

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APPENDIX 9 – 12

A

Supreme Court

***Hillside Parks Ltd v Snowdonia National Park Authority**

[2022] UKSC 30

B

2022 July 4;
Nov 2Lord Reed PSC Lord Briggs, Lord Sales,
Lord Leggatt, Lady Rose JJSC

C

Planning — Planning permission — Inconsistent planning permissions in relation to same site — Planning permission granted for development of site as housing estate — Further planning permissions subsequently granted and implemented in relation to part of same site — Whether lawful to carry out development under original permission — Whether lawfulness of such development dependent on whether landowner abandoning right to carry it out — Whether permission for development comprising multiple units to be construed as authorising single scheme or multiple acts of development — Whether later permissions varying original permission — Town and Country Planning Act 1990 (c 8), s 75(1)¹

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In 1967 the then local planning authority granted planning permission for the development of a site as a housing estate with 401 dwellings, to be built in accordance with a master plan which identified the proposed location of each dwelling and the road system for the estate. Between 1996 and 2011 the authority's successor as planning authority made eight additional grants of planning permission for development on the site which departed from the master plan. Six of those planning permissions were implemented, all in the north-west part of the site. Three of the permissions that were implemented were expressed on their face to be "variations" of the 1967 permission. In 2017 the planning authority wrote to the developer of the site requiring it to stop all works on the site on the ground that it was

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no longer physically possible to implement the 1967 planning permission. The developer brought proceedings in the High Court seeking a declaration that the 1967 planning permission remained valid and could be carried out to completion. The High Court refused to grant the declaration and the Court of Appeal dismissed the developer's appeal. The developer appealed, contending in the alternative: (i) that the right to develop land in accordance with a planning permission would not be lost by virtue of development under a later permission unless the landowner had acted in

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a way which would lead a reasonable person to conclude that that right had been abandoned; (ii) that, unless it expressly said otherwise, a planning permission for the construction of multiple buildings was properly construed as permitting the construction of any sub-set of those buildings, and there was no reason why the landowner could not combine such development with development on other parts of the site authorised by other planning permissions; and (iii) that each of the six additional planning permissions that had been implemented was to be construed as a variation of the 1967 permission, with the consequence that the 1967 permission, as so varied, remained valid and capable of further implementation.

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On the appeal—

Held, dismissing the appeal, (1) that there was no principle in planning law whereby a planning permission could be abandoned, or extinguished by abandonment; that such a principle would involve an impermissible gloss on section 75(1) of the Town and Country Planning Act 1990, which impliedly provided that only the 1990 Act or the terms of a planning permission itself could stop a planning permission enuring for the benefit of the land and of all persons for the time being interested therein, and would be inconsistent with the principle that the existence or otherwise of a valid planning permission should be capable of

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¹ Town and Country Planning Act 1990, s 75(1): see post, para 21.

ascertainment by inspection of the planning register and the land in question; that, rather, where two mutually inconsistent planning permissions were granted in respect of the same site and one of them was implemented, it would be unlawful to carry out the development proposed in the unimplemented planning permission if it had become physically impossible to do so, having regard to what had been done under the implemented permission; and that, accordingly, in the present case, the 1967 planning permission would not authorise development if, as a result of physical alteration of the site to which the permission related, it had become physically impossible to carry out the development for which that permission had been granted (post, paras 35–45).

Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132, HL(E) applied.

Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527, DC explained.

(2) That where planning permission was granted for the development of a site comprising multiple units it was not to be construed, absent clear express provision, as authorising a number of independent acts of development, each of which was separately permitted by it, but rather was to be construed as authorising a single scheme which could not be disaggregated in that way; that, where planning permission authorised a single scheme, failure or inability to complete the whole scheme did not make development already carried out pursuant to that permission unlawful, but further development under that permission would be unauthorised if at any stage compliance with the permission became physically impossible; that, in the present case, the 1967 permission, properly construed, authorised a single scheme of development on the site, rather than authorising particular parts of the scheme to be built alongside development of the site authorised by independent permissions; and that it followed that carrying out, under an independent planning permission, development on the site which departed in a material way from that scheme would make it physically impossible and hence unlawful to carry out any further development under the 1967 permission (post, paras 50, 68–69, 71–72).

Sage v Secretary of State for the Environment, Transport and the Regions [2003] 1 WLR 983, HL(E) considered.

F Lucas & Sons Ltd v Dorking and Horley Rural District Council (1964) 17 P & CR 1111 and dicta of Hickinbottom J in *Singh v Secretary of State for Communities and Local Government* [2010] EWHC 1621 (Admin) at [20], [25] disapproved.

(3) That although strictly speaking a planning permission could not be “varied”, save by a local planning authority under section 96A of the 1990 Act, as a matter of principle there was no reason why a grant of planning permission could not, on its true construction, authorise development in accordance with an earlier permission but with specified modifications; that, thus, the later permission would be construed as a permission to carry out the development described in the original permission as modified to accommodate the development specifically authorised by the new permission (and as modified by any previous such “variations”); that, in the present case, the developer had failed to show that any of the six permissions which had been implemented between 1996 and 2011 could be construed as approving a modification of the scheme authorised by the 1967 permission; that, rather, each of those six permissions constituted a separate permission referable solely to the specific limited area of land to which it applied; that it followed that development under those six permissions was inconsistent with the 1967 permission and had the effect that it was physically impossible to develop the site in accordance with the master plan approved by the 1967 permission; that, furthermore, other development had been carried out for which the developer had failed to show that any planning permission had been obtained, as a result of which it was now physically impossible to develop the site in accordance with the master plan approved by the 1967 permission; and that, accordingly, the judge and the Court of Appeal had been right to dismiss the developer’s claim (post, paras 76–77, 81–82, 88, 90, 100).

Decision of the Court of Appeal [2020] EWCA Civ 1440; [2021] JPL 698 affirmed.

- A The following cases are referred to in the judgment of Lord Sales and Lord Leggatt JJSC:

Barnett v Secretary of State for Communities and Local Government [2008] EWHC 1601 (Admin); [2009] JPL 243; [2009] EWCA Civ 476; [2009] JPL 1597, CA
Cardiff City Council v National Assembly for Wales [2006] EWHC 1412 (Admin); [2007] 1 P & CR 9

- B *Durham County Council v Secretary of State for the Environment* (1989) 60 P & CR 507, CA

Finnery v Welsh Ministers [2019] EWCA Civ 1868; [2020] PTSR 455; [2020] 1 All ER 1034, CA

Hoveringham Gravels Ltd v Chiltern District Council (1977) 35 P & CR 295, CA

Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government [2019] UKSC 33; [2019] 1 WLR 4317; [2019] PTSR 1388; [2019] 4 All ER 981, SC(E)

- C *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222; [1970] 3 WLR 732; [1970] 3 All ER 496, CA

Lucas (F) & Sons Ltd v Dorking and Horley Rural District Council (1964) 17 P & CR 111

Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527; [1974] 1 All ER 283, DC

Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358, HL(E)

- D *Prestige Homes (Southern) Ltd v Secretary of State for the Environment* (1992) 64 P & CR 502

R v Arfon Borough Council, Ex p Walton Commercial Group Ltd [1997] JPL 237

R (Robert Hitchins Ltd) v Worcestershire County Council [2015] EWCA Civ 1060; [2016] JPL 373, CA

Sage v Secretary of State for the Environment, Transport and the Regions [2003] UKHL 22; [2003] 1 WLR 983; [2003] 2 All ER 689, HL(E)

- E *Singh v Secretary of State for Communities and Local Government* [2010] EWHC 1621 (Admin)

Slough Estates v Slough Borough Council (No 2) [1971] AC 958. [1970] 2 WLR 1187; [1970] 3 All ER 216, HL(E)

Staffordshire County Council v NGR Land Developments Ltd [2002] EWCA Civ 856; [2003] JPL 56, CA

- F *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85; [2017] 1 All ER 307, SC(Sc)

No additional cases were cited in argument.

APPEAL from the Court of Appeal

- G The developer, Hillside Parks Ltd, brought proceedings against the defendant, Snowdonia National Park Authority, claiming declarations that planning permissions granted in 1967 by Merioneth County Council, the defendant's predecessors in title as the local planning authority, for the development of 401 dwellings on the Balkan Hill site in Snowdonia National Park remained valid and could lawfully be completed in accordance with a declaration granted by Drake J on 9 July 1987. On 8 October 2019 Judge Keyser QC sitting in the Queen's Bench Division [2019] EWHC 2587 (QB); [2022] 1 P & CR 5 dismissed the claim.

- H The developer appealed. On 3 November 2020 the Court of Appeal (David Richards, Singh and Nicola Davies LJ) [2020] EWCA Civ 1440; [2021] JPL 698 dismissed the appeal.

Pursuant to permission granted by the Supreme Court (Lord Reed PSC, Lord Leggatt and Lord Stephens JJSC) on 13 December 2021 the developer

appealed. The issue on the appeal was agreed to be: “When there are successive planning permissions relating to the same site, and the later permissions are for changes to one part of a wider development approved in the original planning permission, is the effect of implementing the later permissions that the original permissions are completely unimplementable? Or can the original permission still be implemented in relation to areas unaffected by the later permissions?”

The facts are stated in the judgment of Lord Sales and Lord Leggatt JJSC, post, paras 2–12.

Charles Banner KC, Robin Green and Matthew Finn (instructed by *Aaron & Partners LLP, Chester*) for the developer.

Gwion Lewis KC (instructed by *Geldards LLP, Cardiff*) for the local authority.

The court took time for consideration.

2 November 2022. LORD SALES and LORD LEGGATT JJSC (with whom LORD REED PSC, LORD BRIGGS, and LADY ROSE JJSC agreed) handed down the following judgment.

1 This appeal raises issues of importance in planning law about the relationship between successive grants of planning permission for development on the same land and, in particular, about the effect of implementing one planning permission on another planning permission relating to the same site.

The factual background

2 The site to which the appeal relates is known as “Balkan Hill” and comprises around 29 acres of land near Aberdyfi in the Snowdonia National Park. In January 1967 the local planning authority granted full planning permission for the development of 401 dwellings on the Balkan Hill site in accordance with a detailed plan referred to as the “Master Plan”. The Master Plan showed the proposed location of each house and the layout of a road system for the estate. It is the current status of this planning permission (“the 1967 permission”) which is in dispute in this case.

3 The ownership of the Balkan Hill site has changed twice since the 1967 permission was granted. The current owner is the appellant, Hillside Parks Ltd, which acquired the site in 1988. The identity of the local planning authority has also changed over the years. It is now Snowdonia National Park Authority, the respondent to this appeal. Nothing turns on these changes and we will refer without distinction to the appellant or whoever owned the site at any given time as “the Developer” and to the respondent or whichever body was the local planning authority at any given time as “the Authority”.

4 The progress of development at the Balkan Hill site can best be described as glacial. In the period of more than half a century since the 1967 permission was granted, only 41 houses have been built. None of these houses has been built in accordance with the Master Plan. The Developer has applied for and been granted a series of additional planning permissions permitting development which has taken place on parts of the site. The question which now arises is whether the Developer is entitled to carry out further development at the Balkan Hill site pursuant to the 1967 permission;

A or whether, as the Authority contends, development carried out in accordance with other permissions has had the effect that the Developer cannot now rely on the 1967 permission.

5 The validity of the 1967 permission was previously the subject of litigation which was decided in favour of the Developer in 1987. The present proceedings are largely concerned with events since then, but it is
B necessary to say something by way of background about earlier events.

Development between 1967 and 1987

6 From the outset, the Developer ran into difficulties. Work was carried out to construct short sections of road to give access to the south of the site in accordance with the Master Plan. However, excavation to lay the foundations for the first two houses to be built revealed that they were sited
C on an old quarry which caused a problem with the ground level. Accordingly, the Developer applied for planning permission to build the houses in a slightly different position from that shown on the Master Plan and to alter their design in some respects. This permission was granted in April 1967.

7 Thereafter development proceeded very slowly indeed. By 1985 only 19 dwellings had been built, all on the very southernmost part of the site.
D None of these dwellings was built in accordance with the Master Plan and in some cases the departure from it was substantial. All the dwellings constructed were the subject of specific planning permissions granted by the Authority, of which there are said to have been eight in total.

Drake J's judgment

8 In 1985 a dispute arose about whether the 1967 permission remained
E valid. The permission had been granted subject to just one specified condition, namely, "agreement being reached on water supply before any work is carried out". The Authority contended that this condition had never been fulfilled, with the result that such development as was carried out was unlawful; and that, as no lawful development was begun within the statutory time limit, the 1967 permission had lapsed so that no development
F could now lawfully take place under it. The Developer disputed this and brought proceedings in the High Court to establish that the development permitted by the 1967 permission had been lawfully begun within the time limit and could lawfully be continued.

9 The action came to trial before Drake J. In his (unreported) judgment given on 9 July 1987, the judge found that the condition requiring agreement on the water supply had been fulfilled for such development as had already
G taken place on the Balkan Hill site and was capable of being satisfied in relation to further development so long as the prior agreement of the responsible water supply authority was obtained. The judge also found that the development permitted by the 1967 permission had been begun by what he found to be the relevant deadline of 1 April 1974, since long before that date the Developer had constructed sections of road and a number of
H buildings. The judge considered that, although these buildings had been the subject of individual grants of planning permission, each such permission was "merely a variation" of the 1967 permission. He also expressed the view that "the Master Plan remains in force, and if the development is allowed to progress further it can be completed substantially in accordance with the Master Plan". The judge's decision was embodied in declarations,

which included a declaration that the development permitted by the 1967 permission had been begun and “may lawfully be completed at any time in the future”.

10 At the trial before Drake J, the Authority did not make any argument such as it makes in these proceedings that the 1967 permission had become incapable of implementation as a result of departures from the Master Plan. Nor does any consideration appear to have been given to how as a matter of legal analysis the variations of the 1967 permission had been achieved given that the planning legislation did not at that time give the local planning authority power to make any change to a planning permission previously granted. (Even now, as we discuss below, the power to amend a planning permission is very limited.)

Development after 1987

11 Since Drake J’s judgment was given, the further development which has taken place on the Balkan Hill site has, as before, departed from the Master Plan. This further development has all been in the north-west part of the site. Not only do the positions, configurations and sizes of the houses built differ significantly from the Master Plan, but an estate road has been constructed which runs over land on which several houses are sited in the Master Plan; in addition, houses and some garages have been built on land across which one of the main internal estate roads shown in the Master Plan was to run. As previously, the Developer applied for a series of specific planning permissions for development which departed from the Master Plan. Some of the permissions granted describe the permission as a “variation” of the 1967 permission but some do not use that or any similar term. In total, eight such permissions have been granted by the Authority since 1987. It will be necessary to return to some of them in greater detail later in this judgment, but in summary (listed in the order in which the applications were made) they are as follows:

(i) Permission granted on 27 June 1996 for the erection of one dwellinghouse as a “variation” to the 1967 permission (“permission A”).

(ii) Permission granted on 20 June 1997 for the erection of two terraces forming one attached dwelling, six apartment units and 8 garages with apartments over, as a “variation” to the 1967 permission (“permission B”).

(iii) Permission granted on 18 September 2000 for the erection of a two storey detached dwellinghouse and garage on “Plot 5” of the site (“permission C”). This permission has not been implemented.

(iv) Permission granted on 4 March 2005 for the erection of a two storey dwelling and detached garage on “Plot 17” of the site (“permission D”).

(v) Permission granted on 24 August 2004 for the erection of five detached houses and five garages as a “variation” to the 1967 permission (“permission E”).

(vi) Permission granted on 25 August 2005 for the erection of a detached dwelling on “Plot 3 of Phase 1” of the site (“permission F”). This permission was not implemented and was superseded by permission H below.

(vii) Permission granted on 20 May 2009 for the construction of three pairs of dwellings (“permission G”). Although not apparent on the face of the permission, the proposed location of these dwellings was on part of the land which was the subject of permission E.

A (viii) Permission granted on 5 January 2011 for the erection of one dwelling on “Plot 3” of the site (“permission H”). This permission superseded permission F.

12 With the exception of permissions C and F, we understand that all these planning permissions have been implemented.

B *The present proceedings*

13 In May 2017 the Authority wrote to the Developer asserting that it was now impossible to implement the 1967 permission further and requiring the Developer immediately to stop all works at the Balkan Hill site until the planning situation had been regularised.

C 14 After correspondence including an exchange of counsel’s opinions had failed to resolve the issue, the Developer brought these proceedings seeking declarations that the Authority was bound by Drake J’s judgment to treat the 1967 permission as valid as a matter of res judicata; and that in any event the 1967 permission remains valid and may be carried on to completion.

D 15 The trial took place before Judge Keyser QC sitting as a judge of the High Court. He refused to grant the declarations sought and dismissed the Developer’s claim: see [2022] 1 P & CR 5. The judge approached the issues by first considering whether Drake J was wrong in law to decide that the remainder of the development permitted by the 1967 permission could lawfully be completed at any time in the future. He concluded that Drake J had not been wrong in law to reach that conclusion on the basis that the additional planning permissions granted before 1987 were all variations of the 1967 permission. The judge considered that in these circumstances he did not need to decide whether the Authority is bound by Drake J’s declarations as a matter of res judicata. He went on, however, to hold that, as a result of the physical alterations to the land which have taken place since 1987, it is now physically impossible to complete the development fully in accordance with the 1967 permission, and that this has the consequence that further development under that permission would be unlawful.

F 16 The Developer appealed. For reasons given by Singh LJ with whom David Richards and Nicola Davies LJ agreed, the Court of Appeal dismissed the appeal: [2021] JPL 698. In essence they did so on the basis that the judge was entitled to conclude that, in the light of factual developments since the judgment of Drake J in 1987, it is no longer possible to implement the 1967 permission. In those circumstances the res judicata issue did not arise.

G *This appeal*

H 17 This court granted the Developer permission to appeal on the issue of whether any further development may lawfully be carried out under the 1967 permission, but not on the res judicata issue. The Authority does not now seek to argue that the 1967 permission became incapable of implementation as a result of anything that happened before Drake J’s judgment in 1987. Nor does it seek to impeach anything that Drake J decided. We therefore proceed on the footing that the individual permissions granted before 1987 operated as what were, in their effect, variations of the 1967 permission, as Drake J held. On this appeal it is not necessary or relevant to consider whether Drake J’s view of the effect of those permissions was correct. We are

concerned only with the effect of the additional permissions granted after Drake J's judgment was given in 1987 and the further development which has taken place since then.

18 Judge Keyser accepted (at para 62 of his judgment) that much of the Balkan Hill site is unaffected by this further development, in the sense that it would still be physically possible to build houses and roads on much of the site which conform to the Master Plan. The Developer contends that, on a correct legal analysis, further development on these vacant parts of the site may still lawfully be carried out pursuant to the 1967 permission and that the courts below were wrong to hold otherwise. Before considering the Developer's arguments for this contention, we draw attention to some central features of the legal framework.

The planning legislation

19 Planning control is a creature of legislation. The main elements of the statutory scheme remain the same as they were when first introduced across England and Wales by the Town and Country Planning Act 1947. The principal Act is now the Town and Country Planning Act 1990 (the "1990 Act"). By section 57 of the 1990 Act, planning permission is required for the carrying out of any development of land. The term "development" is defined in section 55(1) to mean "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". In this case we are concerned with the former type of development (operational development) and not with change in use.

20 A planning permission is simply a permission to develop land and does not itself impose any obligation to carry out development for which permission is given. Under section 70(1) of the 1990 Act a local planning authority may, however, grant planning permission subject to such conditions as they think fit (which may include entry into planning obligations enforceable under section 106 of the 1990 Act). There is a statutory condition that the development to which the permission relates must be begun within a specified period. Provided, however, that the development is begun within this period, there is no time limit for completing it, unless a completion notice is served under section 94 of the 1990 Act.

21 A fundamental feature of planning permission is that it runs with the land. Section 75(1) of the 1990 Act states that "any grant of planning permission . . . to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it".

Powers to vary a planning permission

22 We have mentioned that under the planning legislation a local planning authority has only limited powers to vary a planning permission after it has been granted. The relevant statutory powers are as follows.

23 Section 73 of the 1990 Act gives the local planning authority a power to dispense with or vary conditions subject to which a planning permission was granted. However, this power cannot be used to change the description of the development: *Finney v Welsh Ministers* [2020] PTSR 455.

A 24 Section 96A of the 1990 Act, added in 2009, provides that:

“(1) A local planning authority may make a change to any planning permission . . . relating to land in their area if they are satisfied that the change is not material.”

B What qualifies as a non-material change is not defined but is left to the judgment of the local planning authority, subject only to a requirement in subsection (2) to “have regard to the effect of the change, together with any previous changes made under this section, on the planning permission as originally granted.” (We mention in passing that the Developer does not rely on section 96A or suggest that permission H—the only planning permission relating to the Balkan Hill site granted after section 96A came into force—was an exercise of this power.)

C 25 In addition, clause 98 of the Levelling-Up and Regeneration Bill currently before Parliament will, if enacted, insert a new section 73B into the 1990 Act giving the local planning authority power to grant a planning permission that varies an existing permission but only if the local planning authority is satisfied that “its effect will not be substantially different from that of the existing permission”.

D *Interpreting a planning permission*

E 26 The scope of a planning permission depends on the terms of the document recording the grant. As with any legal document, its interpretation is a matter of law for the court. Recent decisions of this court have made it clear that planning permissions are to be interpreted according to the same general principles that apply in English law to the interpretation of any other document that has legal effect. The exercise is an objective one, concerned not with what the maker of the document subjectively intended or wanted to convey but with what a reasonable reader would understand the words used, considered in their particular context, to mean: see *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, paras 33–34 (Lord Hodge JSC) and para 53 (Lord Carnwath JSC); *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317, paras 15–19.

F 27 Differences in the nature of legal documents do, however, affect the scope of the contextual material to which regard may be had in interpreting the text. Because a planning permission is not personal to the applicant and enures for the benefit of the land, it cannot be assumed that the holder of the permission will be aware of all the background facts known to the person who applied for it. Furthermore, a planning permission is a public document on which third parties are entitled to rely. These characteristics dictate that the meaning of the document should be ascertainable from the document itself, other public documents to which it refers such as the planning application and plans and drawings submitted with the application, and physical inspection of the land to which it relates. The reasonable reader of the permission cannot be expected to have regard to other material such as correspondence passing between the parties. See e.g. *Slough Estates v Slough Borough Council* (No 2) [1971] AC 958, 962 (Lord Reid); *Trump International Golf Club*, para 33 (Lord Hodge JSC). In this case, we are concerned with grants of full planning permission, in relation to which it is to be expected that a reasonable reader would understand that the detailed

plans submitted with the application have particular significance: *Barnett v Secretary of State for Communities and Local Government* [2009] JPL 243, para 24 (Sullivan J); affirmed [2009] JPL 1597, paras 17–22 (Keene LJ); R Harwood, *Planning Permission* (2016), para 28.9.

Inconsistent planning permissions

28 As counsel for the Developer have emphasised in their submissions, the planning legislation is intended to operate as a comprehensive code. There is, however, no provision of the legislation which regulates the situation where two or more planning permissions granted for development on the same site are, or are claimed to be, mutually inconsistent. The courts have therefore had to work out the principles to be applied.

The Pilkington case

29 The leading case is the decision of a three-judge Divisional Court in *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527. The facts were that the owner of a plot of land was granted planning permission to build a bungalow on the plot. After the bungalow was built, he discovered an earlier planning permission granted to the previous owner to build a bungalow on a different part of the same plot of land. The description of the development in the earlier permission and the relevant plan showed that it was contemplated that the rest of the plot would be used as a smallholding. The question was whether the landowner could lawfully build another bungalow in the location specified in the earlier permission. The Divisional Court held that he could not.

30 Lord Widgery CJ (with whose judgment Bridge and May JJ agreed) pointed out that a landowner “is entitled to make any number of applications for planning permission which his fancy dictates,” even though they may be mutually inconsistent with one another. The landowner may wish, for example, to “test the market” by putting in applications for alternative schemes before deciding which one to implement. In general, it is the duty of the local planning authority to regard each application as a proposal for a separate and independent development and to consider the application on its own merits. In saying this, Lord Widgery CJ expressly set to one side cases “where one application deliberately and expressly refers to or incorporates another” (p 1531).

31 Where two separate applications are granted in respect of the same site, one of them is then implemented, and the question then arises—as it did in the *Pilkington* case—whether it is lawful to carry out the development contemplated by the other permission, Lord Widgery CJ stated the test as being “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” (p 1532B). Applying this test, the Divisional Court held that, having regard to what had been built pursuant to the later permission, the development contemplated by the earlier planning permission could not be carried out. This was because the development contemplated by that permission was not simply the building of a bungalow, but “the building of a bungalow in a particular site as ancillary to the smallholding which was to occupy the rest of the site” (p 1532D).

- A 32 The *Pilkington* case has been approved and followed on numerous occasions, including in several decisions of the Court of Appeal: see eg *Hoveringham Gravels Ltd v Chiltern District Council* (1977) 35 P & CR 295; *Durham County Council v Secretary of State for the Environment* (1989) 60 P & CR 507; and *Staffordshire County Council v NGR Land Developments Ltd* [2003] JPL 56. The Authority contends, and the courts below held, that the present case is one where, on a straightforward application of the *Pilkington* test, development carried out under later permissions granted after 1987 has rendered the 1967 permission incapable of further implementation.
- B

The Developer's case

- C 33 On this appeal counsel for the Developer seek to distinguish the *Pilkington* case in three (alternative) ways. First, they submit that the principle for which the case is authority is, or is analogous to, a principle of abandonment whereby the right to develop land in accordance with a planning permission will be lost if a landowner acts in a way which would lead a reasonable person to conclude that the right has been abandoned. That test, they say, is not satisfied in the present case. Second, they submit that (unless it expressly says otherwise) a planning permission, such as the 1967 permission, for the construction of multiple buildings is properly interpreted as permitting the construction of any sub-set of these buildings, and there is no reason why the landowner cannot combine such development on parts of the site with development on other parts of the site authorised by other planning permissions. The third argument advanced is that, even if the 1967 permission is not severable in this way, each of the additional permissions implemented since 1987 is to be construed as, in substance, a variation of the 1967 permission, in the same way as Drake J found was the effect of the individual permissions granted before 1987. Hence the 1967 permission, as varied, remains valid and capable of further implementation.
- D
- E

No principle of abandonment

- F 34 We consider first the Developer's argument that the decision in the *Pilkington* case should be analysed as resting on a principle of abandonment. Counsel for the Developer submit that the two planning permissions at issue in the *Pilkington* case were plainly irreconcilable so that Mr Pilkington had a choice between implementing one or the other. His conduct in building the first bungalow on the site would have led a reasonable person to assume that he had abandoned the right to implement the other planning permission.
- G They submit that this analysis in terms of abandonment has the merit of keeping judicial gloss on the legislative code to a minimum. The second step in the argument is to contend that in this case the conduct of the Developer in carrying out building operations authorised by the additional permissions granted after 1987 would not have led a reasonable person to conclude that the Developer had abandoned the 1967 permission.
- H 35 We do not accept that the decision in the *Pilkington* case can be explained on the basis of a principle of abandonment, nor indeed that there is any principle in planning law whereby a planning permission can be abandoned.

36 In the first place, this explanation is directly contrary to the court's reasoning in the *Pilkington* case. Lord Widgery CJ said in terms, at p 1532H:

“My views on this matter are not based on any election on the part of Mr Pilkington; they are not based on any abandonment of an earlier permission . . . I base my decision on the physical impossibility of carrying out that which was authorised in [the earlier planning permission].”

37 More fundamentally, the suggested explanation is also inconsistent with the decision of the House of Lords in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132. In that case the House of Lords unanimously held that there is no principle, and no room for any principle, in planning law whereby a planning permission may be extinguished by abandonment. Lord Scarman, with whom the other members of the appellate committee agreed, gave two main reasons for this conclusion. The primary reason was that Parliament has provided a comprehensive code of planning control and the courts should not introduce into planning law principles or rules derived from private law unless expressly authorised by Parliament or necessary to give effect to the purpose of the legislation (pp 140H–141C). From what is now section 75(1) of the 1990 Act (quoted at para 21 above) Lord Scarman derived the “clear implication” that “only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein” (p 141G–H). Introducing a doctrine of abandonment into planning law would be inconsistent with this, as it would allow the land to lose the benefit of a planning permission by a means not provided for either by the legislation or by the terms of the planning permission itself. It can therefore be seen that the Developer’s assertion that recognising a principle of abandonment would avoid an impermissible judicial gloss on the legislative code is misplaced. It was precisely because it would involve such an impermissible gloss that the House of Lords decided that no such principle may properly be imported into planning law.

38 Secondly, Lord Scarman emphasised that the existence or otherwise of a valid planning permission should be capable of ascertainment by inspection of the planning register and of the land in question. That follows from the nature of planning permission as running with the land and as affecting third parties. Introducing a doctrine of abandonment, not provided for in the planning legislation, would be inconsistent with this requirement of public accessibility. As Lord Scarman observed, at p 139E, if such a doctrine were recognised:

“The planning permission would be entered in a public register; but not so its abandonment. Nor would it be possible by inspection of the land to discover whether the permission had been abandoned, for the absence of implementation of a planning permission is no evidence that a valid permission does not exist.”

39 Lord Scarman discussed the *Pilkington* case as one of a number of judicial decisions which, “upon first sight and before analysis, might seem to suggest that there is room in the planning law for a principle, or an exception, allowing the extinguishment of a planning permission by abandonment” (p 143A–B). Counsel for the Developers have sought to rely on this discussion as indicating that the *Pilkington* case may be regarded as establishing an exception to the general rule that a planning permission

A cannot be extinguished by abandonment. Lord Scarman went on, however, to explain why, on analysis, the *Pilkington* decision—which he described as “certainly a common sense decision, and, in my judgment, correct in law”—was not based on a concept of abandonment (see pp 144G–145C).
 B Rather, its rationale was that the building of the first bungalow had “destroyed” the smallholding and made the development authorised by the earlier planning permission incapable of implementation. Lord Scarman was satisfied that there was, or need be, no uncertainty arising from the application of this principle:

C “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.”

D 40 Counsel for the Developer have not argued that this court should depart from the decision of the House of Lords in *Pioneer Aggregates* nor made any criticism of Lord Scarman’s reasoning. We would endorse that reasoning, which also confirms that the correct explanation of the *Pilkington* case is, just as Lord Widgery CJ stated, that the development carried out in building a bungalow under the later permission had rendered the earlier planning permission incapable of implementation.

The Pilkington principle

E 41 The principle underlying the *Pilkington* case can be analysed further. In the passage of his judgment quoted at para 36 above Lord Widgery CJ said that his decision was based on the “physical impossibility” of carrying out what was authorised by the unimplemented planning permission; and elsewhere in his judgment he used the phrase “practical possibility” (see p 1532C). Two points arise from this. First, it is important to recognise that the test of physical impossibility applies to the whole site covered by the unimplemented planning permission, and not just the part of the site on which the landowner now wishes to build. Thus, in the *Pilkington* case, as pointed
 F out in later cases, it remained perfectly possible to build a bungalow in the position authorised by the earlier, unimplemented planning permission, as that part of the site remained vacant. The reason why it was not physically possible to carry out the development authorised by the earlier permission was that the proposal for which permission was granted involved using the rest of the land as a smallholding and this could not be achieved when part of
 G that land was occupied by the first bungalow: see *R v Arfon Borough Council, Ex p Walton Commercial Group Ltd* [1997] JPL 237; *Staffordshire County Council v NGR Land Developments Ltd* [2003] JPL 56, para 56; and *R (Robert Hitchens Ltd) v Worcestershire County Council* [2016] JPL 373, para 42.

H 42 A second point to note concerns Lord Widgery CJ’s formulation of the relevant test (in the passage quoted at para 31 above) as “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” (emphasis added). The words “or authorised to be done” ought, we think, to have been omitted as they are not consistent with the ratio of the decision.

43 On the facts of the *Pilkington* case the planning permission which had already been implemented included a condition that the bungalow built in accordance with that permission should be “the only dwelling to be erected” on the plot. Lord Widgery CJ, however, specifically stated that his decision did not in any way depend on the fact that building the second bungalow would be a breach of this condition (see p 1532H). What mattered, as he made clear, was whether it was physically possible to carry out the development authorised by the terms of the unimplemented permission. That depends upon (a) the terms of the unimplemented permission and (b) what works have actually been done. It would not make sense to have regard to the terms of the permission under which development has already taken place, as a central theme of the judgment is that mere inconsistency between the two permissions does not prevent the second permission from being implemented. What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms.

44 This point is illustrated by *Prestige Homes (Southern) Ltd v Secretary of State for the Environment* (1992) 64 PCR 502, where a house had been built pursuant to a planning permission which was subject to a condition that the existing trees on the site should be retained. The question then arose whether a separate planning permission to build a house on part of the site (which did not include the land on which a house had already been built but did include some of the trees) was capable of being implemented. The local planning authority argued that it could not be implemented because the house contemplated by the second permission could not be built without felling some of the trees on the site, which would be contrary to the terms of the first permission. Mr Malcolm Spence QC, sitting as a Deputy Judge, held that this objection was misplaced. Applying the reasoning in the *Pilkington* case, all that mattered was that there was no physical impossibility in carrying out the development authorised by the second permission, which there was not. The *Pilkington* case did not decide that mere incompatibility with the terms of another permission already implemented has the consequence that a permission which is capable of being implemented is of no effect. This decision was approved and similar reasoning applied by the Court of Appeal in *Staffordshire County Council v NGR Land Developments Ltd* [2003] JPL 56.

45 In essence, the principle illustrated by the *Pilkington* case is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission). Unlike a doctrine of abandonment, this principle is consistent with the legislative code. Indeed, as Lord Scarman observed in *Pioneer Aggregates* at p 145C, it serves to “strengthen and support the planning control imposed by the legislation”. Where the test of physical impossibility is met, the reason why further development carried out in reliance on the permission is unlawful is simply that the development is not authorised by the terms of the permission, with the result that it does not comply with section 57(1).

Multi-unit developments

46 In the *Pilkington* case the planning permission which Mr Pilkington wanted to implement was for the construction of only a single dwelling. By

- A contrast, in the present case the 1967 permission authorised the construction of 401 dwellings along with an internal road network on a large site covering some 29 acres of land. Where a planning permission is granted for the development of a site, such as a housing estate, comprising multiple units, it is a question of interpretation whether the permission authorises a number of independent acts of development, each of which is separately permitted by it, or whether it is to be construed as a permission for a single scheme which cannot be disaggregated in this way. Counsel for the Developer submit that (in the absence of some clear contrary indication) the former interpretation is to be preferred, as it gives developers a necessary degree of flexibility about which parts of the approved scheme they build and when. They contend that the 1967 permission ought to be interpreted in this way as giving a freestanding permission to construct each element of the Master Plan. If this interpretation is correct, the ability to carry out any particular element of the Master Plan does not depend on whether it is still physically possible to develop other parts of the site in the manner authorised by the 1967 permission. The development that has taken place since 1987 would therefore not preclude further reliance on the 1967 permission in relation to parts of the Balkan Hill site which have not yet been developed.

The Lucas case

- 47 In support of their contention that a planning permission for a multi-unit development is properly interpreted as severable into a set of discrete permissions to construct each individual element of the scheme (however exactly these elements are individuated), counsel for the Developer rely on the decision and reasoning of Winn J in *F Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1964) 17 P & CR 111. The facts of that case were that a developer was granted planning permission in 1952 to develop a plot of land by building a cul-de-sac off a lane, with seven pairs of semi-detached houses on each side of the cul-de-sac. No construction work was at that stage carried out. In 1957 the developer was granted planning permission to develop the same plot by building six detached houses facing the lane with long, narrow curtilages at their backs. Two of these detached houses were built, making it physically impossible to build one of the two rows of houses contemplated by the 1952 planning permission. The developer nevertheless decided to build the cul-de-sac and the 14 houses on the other side of it, relying on that permission. Winn J granted a declaration that this development was lawful.

- 48 In his judgment Winn J recognised that the local planning authority, in granting the 1952 planning permission, may have wanted to achieve “a well-laid-out, symmetrical, balanced housing estate” (p 116). However, he treated this as a matter of motivation only, and not as affecting the correct interpretation of the permission. He accepted the developer’s argument that the 1952 permission was properly to be regarded as comprising separate permissions to erect each of the houses shown on a plan which had accompanied the application. That meant that it authorised the developer to build the 14 houses that it wished to build even though it was now physically impossible to achieve the overall layout contemplated by the 1952 permission.

49 That was on its face an improbable meaning to give to the 1952 planning permission. Winn J did not refer to any term of that permission which required it to be interpreted in such a way. In the absence of such a term, we cannot see how the planning authority, by granting the 1952 planning permission, could reasonably be taken to have authorised the developer to mix and match building whichever of the 28 houses it chose with other buildings constructed on the site as part of an entirely different and inconsistent scheme of development. Yet this was treated as being the effect of the 1952 planning permission. Nothing mentioned in the judgment justifies such a conclusion and we think it clear that the case was wrongly decided.

50 The aspect of the case which Winn J left out of account in his analysis is that planning permission for a multi-unit development is applied for and is granted for that development as an integrated whole. In deciding whether to grant the permission, the local planning authority will generally have had to consider, and may be taken to have considered, a range of factors relevant to the proposed development taken as a whole, including matters such as the total number of buildings proposed to be constructed, the overall layout and physical appearance of the proposed development, the infrastructure required, its sustainability in planning terms and whether the public benefits of the proposed development as a whole outweigh any planning objections. In granting permission for such a scheme, the planning authority cannot be taken (absent some clear contrary indication) to have authorised the developer to combine building only part of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site. Therefore, it is not correct to interpret such a planning permission as severable, as Winn J did.

51 It appears that Winn J was led to a wrong conclusion from the way the case was argued. The alternative interpretation to the one he accepted was presented as being that the 1952 planning permission was conditional upon completion of the whole scheme of development covered by the permission. Winn J understandably rejected that suggestion, observing (at p 117) that:

“[it] cannot have [been] 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 . . .”

Later in his judgment (at pp 117–118) the judge further emphasised the practical difficulties that would arise if the validity of the planning permission depended “as a condition precedent or subsequent on the completion of the whole project in contemplation of which the permission was granted”.

52 The reasons for rejecting such an interpretation are compelling. Section 57(1) requires that planning permission is required for the carrying out of any development of land, so a grant of planning permission has to be effective from the time when the development commences. When permission is granted for a multi-unit development, the permission authorises each stage of that development for so long as it remains practically feasible for the whole

- A development to be implemented. The statute itself imposes no condition precedent or subsequent that the authorisation granted be implemented in full. Where the earlier stages of the development are carried out in accordance with the planning permission which has been granted, the development so carried out complies with the requirement in section 57(1) and hence is lawful. In the context of this statutory regime, it would make no sense to grant planning permission for the construction of a multi-unit development conditional upon completion of the whole scheme, whether as a condition precedent or subsequent.

- 53 If completion of the whole scheme was a condition precedent to the permission, it would never be permissible to begin development. Treating completion of the whole as a condition subsequent, such that failure to complete the whole scheme would retrospectively remove permission for what had been built, would be almost equally unworkable. It would create intolerable uncertainty and potential unfairness, not least for parties who purchased completed units. Unless the condition subsequent was precisely defined, it would also be unclear when or whether it would apply in a situation where, for example, the developer ran out of money or simply decided to stop construction work but it remained physically possible to complete the development. Parliament cannot have intended accrued property rights to be made vulnerable to enforcement action taken under the Planning Acts in such circumstances, and the terms in which section 57(1) is cast do not lend any support to such an interpretation.

- 54 The reasons given by Winn J were good reasons to conclude that, if the developer had constructed the cul-de-sac and the 14 houses on one side of it while the rest of the site remained vacant, such development would have been permitted by the 1952 planning permission whether or not the other 14 houses were subsequently built. It did not follow, however, that the local planning authority had authorised the developer to construct the cul-de-sac and the 14 houses in a situation where two detached houses had already been built on part of the site in accordance with a mutually inconsistent scheme.

- 55 The analytical error made in the *Lucas* case was to fail to distinguish between two significantly different propositions. The first is that, from a spatial point of view, a planning permission to develop a plot of land is not severable into separate permissions applicable to discrete parts of the site. The second is that, from a temporal point of view, development authorised by a planning permission is only authorised if the whole of the development is carried out. The rejection of the second proposition does not undermine the first.

The Sage case

- 56 An argument made on behalf of the Authority in the courts below involved a similar error to that made in the *Lucas* case, albeit that the Authority sought to draw the opposite conclusion from that drawn by Winn J. The Authority argued that if a proposed development is not or cannot be completed fully in accordance with any planning permission under which it is carried out, the whole development will be unlawful. This is a version of the condition subsequent analysis which Winn J rightly rejected.

57 In support of this argument, counsel for the Authority relied on *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 WLR 983, a decision of the House of Lords, and the reference made to that case in *Singh v Secretary of State for Communities and Local Government* [2010] EWHC 1621 (Admin).

58 Section 171B(1) of the 1990 Act imposes a time limit of four years for taking enforcement action where building operations have been carried out without planning permission. Time runs from the date when “the operations were substantially completed”. In *Sage* an enforcement notice was served in relation to a building which had been partly constructed and for which no planning permission had been granted. No building work had been carried out during the previous four years. The developer argued that the relevant question was when those operations which amounted to a breach of planning control had been “substantially completed” and that, as the building operations that remained to be done were not operations which, by themselves, required planning permission, they should be left out of account. It followed that all the relevant operations had been completed more than four years previously so that the planning authority was out of time in serving the enforcement notice.

59 The House of Lords rejected this argument. They held that, in applying section 171B(1), regard should be had to the totality of the operations which the developer originally contemplated and intended to carry out: the relevant question was whether these had been substantially completed. Viewed in this way, on the findings made by the planning inspector in that case, the operations had not been substantially completed and the time limit for taking enforcement action had therefore not expired.

60 In the course of his speech (with which the other Law Lords agreed) Lord Hobhouse of Woodborough referred to what he called the “holistic approach” of planning law and said, at para 23:

“As counsel for Mr Sage accepted, if a building operation is not carried out . . . fully in accordance with the permission, the *whole* operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved.” (Emphasis in original.)

In *Singh*, para 20, Hickinbottom J took this to mean 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, failing which the whole development is unlawful . . .” (Emphasis in original.)

It followed, he thought, that where some parts of a development are physically incapable of being implemented, or completed, then the whole development becomes unlawful (para 25).

61 Counsel for the Authority submitted to the Court of Appeal that this “holistic approach” entails that if development for which planning permission has been granted cannot be completed because of the impact of operations carried out under another permission, then it is not only subsequent development but all development carried out in reliance on the original permission that is unlawful, including any such development that has already taken place. The Court of Appeal noted, at para 68, that, if correct, this “would have the consequence that there could be enforcement

A 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.” That would indeed be a most unreasonable result, but the Court of Appeal preferred to express no view on whether the analysis is correct, saying that the question did not need to be decided.

B 62 It is important to recognise that in the *Sage* case no planning permission had been granted for any of the building operations carried out. The remarks of Lord Hobhouse about carrying out an operation fully in accordance with a planning permission were therefore obiter. The ratio of the decision is that, for the purpose of section 171B(1) of the 1990 Act, building operations carried out without planning permission are not substantially completed until construction of the whole building contemplated by the landowner is substantially completed. It was the requirement to have regard for this purpose to the whole of the development contemplated by the landowner which was characterised as a “holistic approach”.

C 63 It is unclear exactly what counsel for Mr Sage accepted, as recorded by Lord Hobhouse in the passage quoted at para 60 above. If the concession was that, in carrying out a building operation, any deviation from the planning permission automatically renders everything built unlawful, we doubt that this can be correct, even in relation to a single building. A case comment in the *Journal of Planning Law* on the later case of *R (Robert Hitchins Ltd) v Worcestershire County Council* [2016] JPL 373, 387, refers to authorities where failure to conform exactly to a planning permission has been held not to prevent some development having taken place under the permission. If, alternatively, the concession was that failure to complete a building operation for which planning permission has been granted renders the whole operation including any development carried out unlawful, then this certainly cannot be supported. Even in relation to a single building, if construction stops when the building has been only partly built, the remedy of the local planning authority, as mentioned earlier, is to serve a completion notice under section 94 of the 1990 Act. Moreover, even when such a notice is served, failure to complete the development within the required period only invalidates the planning permission going forward: see *Cardiff City Council v National Assembly for Wales* [2007] 1 P & CR 9. Section 95(5) specifically provides that, although the planning permission becomes invalid at the expiration of the period specified in the notice, this “shall not affect any permission so far as development carried out under it before the end of [that period] is concerned.” This provision presupposes that the planning permission authorises each step of development taken in the course of its implementation.

H 64 The reference made in *Singh* to the remarks of Lord Hobhouse was, in our view, misplaced but was also unnecessary and irrelevant to the result. *Singh* involved a straightforward application of the *Pilkington* principle. Construction of an extension at the back of the claimant’s house for which planning permission had been granted had been commenced within the statutory time limit. But a planning inspector found that it had since become physically impossible to complete the development in accordance with the permission because of the impact of work done under another permission to construct a new house alongside the existing house. Seeking to complete the development relying on the earlier permission would therefore be unlawful.

Hickinbottom J refused an application to quash the inspector's decision, holding that the inspector had correctly interpreted and applied the law on "impossibility". Although the judge referred in the passages mentioned at para 60 above to the "whole development" becoming unlawful, it seems clear from paras 19 and 20 of his judgment that he had in mind only "subsequent development" and was not intending to suggest that the development initially carried out under the permission had been rendered retrospectively unlawful. He would have been wrong to do so.

65 In any event, neither of these cases was concerned with a multi-unit development. An attempt to read across the remarks of Lord Hobhouse to such a context was made in the *Robert Hitchins* case, where two successive planning permissions had been granted in almost identical terms to develop a site with up to 200 dwellings. The only difference was that the first permission was subject to a planning obligation to make a financial contribution towards transport services whereas the second permission, granted at a later date, was not. The developer had begun the development under the first permission and had paid the first instalment of the transport contribution which had fallen due before the second permission was granted. The developer then claimed to have switched horses and completed the development under the second permission. The judge found that the developer was entitled to act and had acted in this way, with the result that no further instalments of the transport contribution were payable. An appeal against that decision was dismissed.

66 One of the grounds of appeal was that the judge ought to have concluded, applying what Lord Hobhouse said in *Sage*, that because the building operations had been partly carried out under the first permission, they could not be carried out fully in accordance with the second permission, with the consequence that any operations carried out under that permission were unlawful. The Court of Appeal rejected that argument. Amongst other reasons for doing so, Richards LJ pointed out, at para 49, that, if the argument were correct:

"it would mean . . . that if planning permission was granted for 200 houses of which 150 were progressively built out in accordance with the plans and were occupied, all the dwellings so built and occupied would be unlawful unless and until the remaining 50 dwellings were built, even if the 150 were all individually in accordance with the plans and there was no breach of any condition of the permission. That proposition is unsupported by authority and cannot in my view be right."

We agree.

67 On proper analysis, the developer was able to proceed to implement the second permission, since the partial development carried out pursuant to the first permission was compatible with doing so. No difficulty arose from the *Pilkington* principle. The decision and analysis in the *Robert Hitchins* case reflect the established position that any number of planning permissions can be granted in respect of the same land and a developer is free to choose which one it implements, so long as it can do so and does so in accordance with its terms.

68 In summary, failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express

- A provision making it severable) a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible.

Departures must be material

- 69 The *Pilkington* principle should not be pressed too far. Rightly in our view, the Authority has not argued on this appeal that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission—all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: see *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, 230. What is or is not material is plainly a matter of fact and degree.
- 70 There is no inconsistency here with section 96A of the 1990 Act (referred to at para 24 above). If the planning authority makes a change to a planning permission under section 96A because satisfied that the change is not material, this will have the benefit for the landowner that it can be certain that the altered pattern of development is indeed within the scope of the permission. It could not afterwards be said that there has been any departure at all from the scheme for which permission has been granted. If, on the other hand, the landowner alters the pattern of development in an immaterial way without first obtaining a variation under section 96A, it does not follow that the development must be treated as unauthorised by the original, unvaried permission. In such a case the landowner will simply be more exposed to possible arguments in later enforcement proceedings that the change was in fact material, which would then have to be decided by a planning inspector or a court. That has always been the position under the planning legislation, including before section 96A was added to give the facility to amend a permission.

Conclusion on multi-unit developments

- 71 We agree with the view expressed by the Court of Appeal in this case that where, as here, a planning permission is granted for the development of a site, such as a housing estate, comprising multiple units, it is unlikely to be the correct interpretation of the permission that it is severable: see [2021] JPL 698, para 90. That is for the reasons given in para 50 above.
- 72 The scheme for development of the Balkan Hill site on the Master Plan which was the subject of the 1967 permission seems to us to be a paradigm instance of such an integrated scheme which cannot be severed into component parts. It follows that carrying out under an independent planning permission on any part of the Balkan Hill site development which departed in a material way from that scheme would make it physically impossible and hence unlawful to carry out any further development under the 1967 permission.

The “variation” argument

73 The Developer’s third argument, on which the appellant’s leading counsel, Charles Banner KC, put most emphasis in his oral submissions, seeks to avoid this conclusion by asserting that the development on the Balkan Hill site since 1987 has been carried out under planning permissions which were not independent of the 1967 permission. Rather, he submitted, these permissions were intended to operate along with the 1967 permission by authorising what were, in effect, local variations of the original development scheme on particular parts of the site while leaving the 1967 permission otherwise unaffected. Mr Banner pointed out that in the *Pilkington* case Lord Widgery CJ excluded from the scope of the court’s decision cases where one planning application expressly refers to or incorporates another (see para 30 above). He submitted that the post-1987 permissions are all of this kind as they refer either specifically or by clear implication to the 1967 permission and must therefore be read with it. Mr Banner also submitted that it would cause serious practical inconvenience if a developer who, when carrying out a large development, encounters a local difficulty or wishes for other reasons to depart from the approved scheme in one particular area of the site cannot obtain permission to do so without losing the benefit of the original permission and having to apply for a fresh planning permission for the remaining development on other parts of the site.

74 In our view, that is indeed the legal position where, as here, a developer has been granted a full planning permission for one entire scheme and wishes to depart from it in a material way. It is a consequence of the very limited powers that a local planning authority currently has to make changes to an existing planning permission. But although this feature of the planning legislation means that developers may face practical hurdles, the problems should not be exaggerated. Despite the limited power to amend an existing planning permission, there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications. The position then would be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second.

75 The Authority has argued that, because the planning legislation does not confer any power on a local planning authority to make a material change to an existing planning permission, a later planning permission cannot have the effect of modifying in any material way the development scheme authorised by an earlier permission.

76 The trial judge, Judge Keyser QC, did not find this argument persuasive and nor do we. We agree with him that, although there cannot strictly be a variation of a planning permission (save as mentioned in paras 24 above), there is “no reason why a grant of permission might not, on its true construction, authorise development in accordance with an earlier permission (eg the Master Plan) but with specified modifications”: para 48. That seems to us to be how, at least *prima facie*, a planning permission described as a “variation” of an earlier planning permission would reasonably be understood. The legal analysis which best gives effect to the expressed intention is to construe the permission described as a “variation” as a permission to carry out the development described in the original permission as modified to accommodate the development specifically

- A authorised by the new permission (and as modified by any previous such “variations”). However, if an application for a permission described as a “variation” is properly to be analysed in this way, ordinarily it would have to be accompanied by a plan which showed how the proposed new permission incorporated the changes indicated into a coherent design for the whole site. Mere use of the “variation” label by itself is not sufficient to show how the new permission ought properly to be interpreted, when read as a whole and
- B having regard to the relevant context.

- 77 Where an application for a variation of a previous permission is properly to be regarded as an application for a fresh permission for the whole site, this may of course mean that the application is required to be accompanied by certain documentation relevant to the whole site, such as an environmental impact assessment. Where the variation is comparatively
- C minor and circumstances have not changed, it may be possible to re-use or update such documentation submitted in support of the application for the previous permission. Whether this is possible or not will depend upon the particular circumstances.

The effect of the post-1987 permissions

- D 78 Each of the additional planning permissions granted after 1987 (listed at para 11 above) states that the Authority hereby permits the development briefly described in the permission notice “in accordance with the plans and application submitted to the Authority”. To ascertain the effect and precise scope of the permission, it would therefore be relevant to examine the plans and application submitted to the Authority by the Developer. However, the Developer did not put in evidence in these proceedings any of the relevant
- E plans and applications. The court was provided only with the permission notices themselves, the Master Plan, plans showing the development built on the Balkan Hill site as at July 1987 and when these proceedings were begun in 2019, and selected correspondence between the parties.

- 79 The absence of the planning applications and accompanying plans is explained by the fact that in the courts below the Developer’s case was presented at a high level of generality. The Developer argued that there were
- F no material differences between the pre-1987 additional permissions (some of which were expressed to be “variations” of the 1967 permission and some of which were not) and the post-1987 additional permissions; and that, as Drake J decided that the pre-1987 additional permissions were variations of the 1967 permission, the same must be true of the later permissions. So far as appears from the skeleton arguments and judgments in the courts below,
- G no attempt was made to examine and construe the post-1987 permissions individually.

- 80 The attempt to extrapolate from Drake J’s acceptance that the pre-1987 additional permissions were in some way lawful variations the conclusion that the post-1987 additional permissions must be regarded as variations (in the sense of new permissions granted for development of the whole site with relevant changes) is, however, untenable. The fact that
- H Drake J’s judgment is to be taken as conclusive in relation to matters as they stood in 1987 cannot prevent the Authority from disputing, as it does, the meaning and effect of permissions which did not yet exist when that judgment was given. It is for the Developer to make good the contention that the additional planning permissions granted after 1987 are properly to be

construed as modifying the original development scheme rather than as independent permissions. In his oral argument in this court Mr Banner KC sought to do this by addressing each of the individual post-1987 permissions.

The permissions described as “variations”

81 Of the six post-1987 planning permissions listed at para 11 above which have been implemented, three (permissions A, B and E) are expressed on their face to be “variations” of the original 1967 permission. However, the development which took place under each of them is substantially at variance from what was shown in the Master Plan. Without sight of the applications or evidence that they were accompanied by plans of the kind referred to in para 76 above, it cannot be said that these permissions authorised a new development scheme for the whole site. A reasonable reader would have understood them to relate only to specific sites within the Balkan Hill area.

82 The position is clearer still in relation to the other three permissions (D, G and H) since they were not stated to be “variations” of the 1967 permission.

The permissions referring to plot numbers

83 In each of permissions D and H the brief description of the development in the permission notice referred to a specified plot number in “Hillside Park”. It is an agreed fact that these references were to plot numbers used in the original Master Plan to which the 1967 permission related. The Developer contends that this would convey to the reasonable reader that the permission was intended to authorise a localised modification of the Master Plan so as to permit the development described in the permission on the particular plot referred to while leaving the 1967 permission otherwise intact.

84 We cannot accept this submission. Although the copies of the original Master Plan provided to the court do not contain plot numbers, we accept based on the parties’ agreement that the locations of the plots of land to which permissions D and H relate were identified by reference to the original Master Plan. That only shows, however, that the Master Plan was used for the purpose of geographical reference: in effect as a map. It does not mean that either of permissions D or H was intended to modify the scheme shown in the Master Plan rather than to permit a discrete development on the specified part of the site. That might have been a proper inference to draw if the application had been accompanied by a plan, which the Authority approved, showing how the proposed development on the plot concerned would fit with the scheme shown on the Master Plan, as a coherent integrated whole. However, the Developer has not put in evidence any such plan nor suggested that any such plan exists. All the indications are that the plans submitted when applying for permissions D, G and H showed only the proposed development on the land in question and did not attempt to integrate the proposed development with the development shown in the Master Plan. So, for example, no attempt appears to have been made to indicate how the roads shown on the plans for these additional permissions would be linked to the road network shown on the Master Plan.

85 Mr Banner KC submitted that a reasonable reader, aware of the planning history of the Balkan Hill site, would not understand permissions D and H to build a few houses on particular plots to be intended to operate at the expense of the original permission granted for a major scheme to

A construct 401 dwellings which was being rolled out across the Balkan Hill site. He suggested that to interpret permissions D and H as having that effect would be unreal.

B 86 We are not persuaded by this submission for two reasons. First, it is wrong to assume that the previous planning history of the site is relevant to the interpretation of these permissions. As explained in the *Pilkington* case (see para 30 above), it is the duty of the local planning authority to regard every application for planning permission, unless it refers to an earlier permission, as a proposal for a separate and independent development and to consider the application on its own merits. The reader of a planning permission should accordingly assume that the application has been dealt with in this way. Hence a planning permission should be regarded as a self-contained permission for an independent development unless it says otherwise.

C 87 Second, even if regard is had to the previous planning history of the Balkan Hill site, it does not support the suggestion that the Developer was rolling out across the site the scheme for a development of 401 dwellings authorised by the 1967 permission. As noted at the beginning of this judgment, none of the houses built on the site has been built in accordance with the Master Plan and some of the departures from it have been substantial. An objective observer who looked at the planning history in D 2005 when permission D was granted, or in 2011 when permission H was granted, would therefore see a pattern of development significantly different from that authorised by the 1967 permission and would see that every house built in the 40 years since it was granted had been built in accordance with a subsequent specific planning permission. There was nothing in this history which showed that the Developer still intended to carry out any development in accordance with the 1967 permission. Moreover, it would E have been clear that the development carried out pursuant to the additional permissions granted since 1987 meant that the Master Plan for the 1967 permission could not be implemented according to its terms and no alternative updated version of it had been filed in support of the applications for those permissions. Nor was there any evidence that any of the additional documents to be expected in relation to a fresh application for permission F for a development of the whole site (see para 77 above) had been filed.

88 On the material available we are therefore unable to construe permissions D and H as modifying the development scheme authorised by the 1967 permission. A reasonable reader of those permissions would understand that they related solely to the specific limited areas of land to which they applied. It follows that the development carried out under these G permissions, by departing in material ways from the Master Plan, made it impossible for the Developer thereafter to carry out development in accordance with the 1967 permission.

Permission G

H 89 The last of the additional permissions granted after 1987 which has been implemented is permission G. This was not expressed to be a variation of the 1967 permission nor did the permission notice even refer to a plot number on the Master Plan. The development for which the permission was granted is described in the permission notice as: “Full application for construction of three pairs of dwellings, Land at Hillside Park, Aberdyfi.” Again, there is no evidence that the application for this permission was

accompanied by a revised version of the Master Plan showing how the development would form part of an integrated development of the whole site.

90 No reasonable person would, in our view, interpret this permission as intended to authorise a local variation of the scheme authorised by the 1967 permission on the basis set out above rather than as an independent permission applicable only to the specific site to which it relates. The proposed development is mutually inconsistent with the 1967 scheme. The easternmost pair of dwellings constructed pursuant to permission G is sited across an estate road which in the Master Plan served as an access route to the entire northern part of the site. Instead of that access road, a road has been built which is designed to serve only as a communal private road giving access to the eight dwellings authorised by permissions E and G. For good measure, this local road cuts across the site of a building shown on the Master Plan.

91 Again, we have not seen the plans and application submitted to the Authority but there is no evidence that any plan was submitted which sought to integrate the proposed development with the development shown on the Master Plan. Nor is there any evidence that the application was accompanied by the additional documents to be expected if it had been intended to be for a fresh permission relating to the whole site. It follows that carrying out the development authorised by permission G has made it physically impossible to carry out the development authorised by the 1967 permission.

92 The Developer sought to avoid this conclusion by relying on a letter from the Authority to the Developer dated 10 October 2008. The first paragraph of this letter indicates that it was written in response to a request for the Authority to approve a plan to construct two pairs of attached houses on part of the site covered by permission E as “minor amendments” to the 1967 permission. The letter then states:

“The situation is that [permission E] for five detached dwellings and five garages supersedes the 1967 permission. As [permission E] has been commenced, that is not the extant permission on this part of Hillside Park. Therefore, I cannot treat the submission for the two pairs of attached houses as an amendment to the 1967 permission.

“For your information, I agree with you that the 1967 permission has been proven to be ‘A full permission which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details’. This means that it is only that exact permission as approved that can be implemented without the submission of further applications . . . For the avoidance of doubt, once a variation to the 1967 permission is approved and commenced, then the 1967 permission on that part of the site ceases to be valid.”

93 Permission G does not refer to this letter. Indeed, the letter—which was written several months before the application was submitted on 7 April 2009—appears to relate to an earlier proposal for development which was not the proposal for which permission was ultimately sought and granted. Thus, the letter refers to “two pairs of attached houses” rather than the “construction of three pairs of dwellings” described in permission G. For the reasons given in para 27 above, we see no justification for treating this letter as part of the context to which a reasonable reader would have regard in interpreting permission G.

A 94 For good measure we would add that, even if regard is had to the letter, it does not assist the Developer. It specifically rejects a request to treat the proposed development as an amendment to the 1967 permission and expresses the view that permission E had superseded the 1967 permission and was the extant permission on that part of the Balkan Hill site. The letter gave no assurance that carrying out the proposed development would be compatible with further implementation of the 1967 permission on other parts of the site. Even if such an opinion had been expressed by the Authority, we do not see how it could as a matter of law affect the correct interpretation of permission G—all the more so in view of the fact that the location of the easternmost pair of houses built under permission G (which may not even have been one of the two pairs of houses referred to in the letter) directly conflicts with Master Plan.

C 95 The difficulties for the Developer’s case do not end there. The plan produced by the Authority for the purpose of these proceedings showing the buildings constructed on the Balkan Hill site as at 2019 depicts, immediately to the east of the houses authorised by permission B, a terrace of six houses and a block of garages built on land not covered by any of the additional permissions. These buildings do not accord with the Master Plan. The houses encroach on the site of one the main estate roads shown on the Master Plan and the garages have been built directly across the site of that road. There is no suggestion on the plan that this development was authorised by any additional permission, let alone one that could be said to operate as a “variation” of the 1967 permission. At the end of the hearing we accordingly asked the parties to provide clarification of the status of these buildings.

E 96 Documents subsequently provided to the court include a drawing number 97/3/A1/1 dated February 1997 (the “1997 drawing”), submitted with the planning application for permission B. This shows the two terraces of houses which were the subject of permission B but not the further terrace of six houses and garages which have been built on land to the east of that plot. The first reference in the documents provided to us to those further buildings is in a letter from the Developer’s architect to a development control officer at the Authority dated 23 May 2004, some seven years later. F This letter states that the “approved Phase 1 lay out, as you know, provides for six attached houses linked together. Units 18 to 23.” The “approved Phase 1” layout referred to in this letter, which now includes the six attached houses numbered 18 to 23, is shown in an amended version of the 1997 drawing which indicates that it was “Amended Jan 2000”.

G 97 The letter dated 23 May 2004 went on to say that, in order to improve this lay-out, it had been revised to provide for three separate pairs of attached houses providing landscaped spaces between each pair of houses instead of six attached houses, and also to make provision for garages. It appears from some further correspondence that the proposed revised layout was not approved by the development officer. The Developer then went ahead and built a terrace of six attached houses (“units 18–23”) as shown on the 1997 drawing as amended in January 2000.

H 98 The Developer submits that it is to be inferred from this correspondence that the Authority had approved the construction of the terrace of six houses labelled units 18–23 in accordance with the amended drawing, presumably in January 2006. No evidence has been provided, however, that planning permission was ever granted for this development,

let alone for the block of garages which have also been constructed on this part of the site. The most that the references to the “approved” layout can be taken to signify is that the development control officer had indicated that he was content with the proposed layout. But that did not dispense with the requirement to obtain a grant of planning permission. A fortiori there is no evidence to suggest that permission was given to treat the development as a variation of the Master Plan.

99 As the Authority accepts, because this further development was completed more than four years ago, it is now immune from planning control in accordance with section 171B of the 1990 Act. But its effect is, again, to make it physically impossible to carry out the development authorised by the 1967 permission.

Conclusion

100 The courts below were right to hold that the 1967 permission was a permission to carry out a single scheme of development on the Balkan Hill site and cannot be construed as separately permitting particular parts of the scheme to be built alongside development on the site authorised by independent permissions. It is possible in principle for a local planning authority to grant a planning permission which approves a modification of such an entire scheme rather than constituting a separate permission referable just to part of the scheme. The Developer has failed to show, however, that the additional planning permissions under which development has been carried out on the Balkan Hill site since 1987 should be construed in this way. Therefore, that development is inconsistent with the 1967 permission and has had the effect that it is physically impossible to develop the Balkan Hill site in accordance with the Master Plan approved by the 1967 permission (as subsequently modified down to 1987). Furthermore, other development has been carried out for which the Developer has failed to show that any planning permission was obtained. This development also makes it physically impossible to develop the site in accordance with the Master Plan approved by the 1967 permission (as subsequently modified). The courts below were therefore right to dismiss the Developer’s claim and this appeal must also be dismissed.

Appeal dismissed.

SHIRANIKHA HERBERT, Barrister

APPENDIX 9 – 13



Compulsory Purchase Order Decision

Inquiry Held on 26-28 October 2022

Site visit made on 28 October 2022

by John Felgate BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State for Levelling Up, Housing and Communities

Decision date: 3 January 2023

Case Ref: PCU/CPOP/T0355/3295397

The Royal Borough of Windsor & Maidenhead (Nicholsons Shopping Centre and Surrounding Area at High Street, Queen Street and King Street, Maidenhead) Compulsory Purchase Order 2022

- The Order was made under Section 226(1)(a) of The Town and Country Planning Act 1990, Section 13 of The Local Government (Miscellaneous Provisions) Act 1976 and the Acquisition of Land Act 1981.
 - The Order was made by the Council of the Royal Borough of Windsor & Maidenhead (the acquiring authority), on 22 February 2022.
 - The Order authorises the compulsory acquisition of all interests in the land coloured pink and the compulsory acquisition of new rights over the land coloured blue, on the Order Maps numbered 1-4, as defined and described in the Order Schedule.
 - At the close of the inquiry, there were 11 remaining duly-made objections, with three other duly-made objections having been withdrawn prior to or during the inquiry.
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DECISION

1. The Compulsory Purchase Order is not confirmed.

INTRODUCTORY MATTERS

Background

2. The Order Lands are located in the town centre of Maidenhead, within the area bounded by High Street, Queen Street, King Street and Broadway. The greater part of this area comprises the Nicholsons Shopping Centre, an enclosed, indoor shopping mall, developed mainly in the 1970s with some later additions. The freehold interest in the shopping centre is held by Denhead SARL, a 'special purpose vehicle' company incorporated in Luxembourg. In addition, the Order Lands also include the Broadway multi-storey car park, with associated retail units fronting onto King Street, and a 4-storey office building known as Siena Court. The freeholds of these land parcels are owned by the Royal Borough of Windsor and Maidenhead (RBWM) Council.
3. On 31 March 2021, the Council and Denhead SARL entered into a Development Agreement relating to the proposed redevelopment of their combined holdings in the Order Lands. The Development Agreement is also supported by a Land Swap Agreement, designed to rationalise the parties' respective interests in order to facilitate the carrying out of the development.

4. At around the same time, in March 2021, the Council resolved to grant planning permission for a comprehensive mixed-use redevelopment of the site, to be known as the 'Nicholson Quarter' development. The proposed scheme provides for a range of flexible-use units for retail, restaurants/cafes/drinking establishments, hot food takeaways, financial and professional services, assembly and leisure, and non-residential institutions, together with offices, business uses, residential development, Class C2 accommodation for the elderly, car parking and public open space. Under the terms of the hybrid application, some of these elements are specified in full detail, and others in outline. The applicant for the development was Areli Real Estate Limited, whose role is described as Denhead SARL's operating partner and development manager. Following the completion of a Section 106 agreement, the planning permission was granted on 21 October 2022.

The Order

5. The Compulsory Purchase Order was made on 22 February 2022. If confirmed, the Order would authorise the compulsory acquisition of all interests in the Order Lands, and of specified rights over various adjoining properties. The Order's stated purpose is: *"...facilitating the carrying out of development, redevelopment or improvement on or in relation to the land, namely a mixed-use development comprising a mixture of employment, residential, retail, leisure, community and elderly care homes in the heart of Maidenhead town centre, together with improvements to the public realm and open space"*.
6. The interests to be acquired include the leasehold interests and occupational licences in the retail units and ancillary areas of the Nicholsons Shopping Centre, and in the parking decks and retail units of the Broadway car park. In the majority of cases, these interests are said to have now been acquired by voluntary agreement, or their terms varied to allow vacant possession to be secured prior to the planned commencement of the development. Also included is a strip of unregistered land forming part of the highway of King Street.
7. The rights to be acquired over other properties include rights of access and general construction, which would include the right to enter land, and to manage access to it, and to carry out works including protective works, boundary treatments, re-grading, resurfacing, landscaping, support works, and accommodation and reconfiguration works. In addition, rights are sought which variously include rights to oversail with cranes, to erect scaffolding and hoardings, to carry out works to service media, plant and fire escapes, and to gain access for the purposes of delivering materials and machinery, and to form temporary accesses, and to carry out maintenance or repairs. In some cases, party wall rights are to be acquired which would include rights to carry out works of demolition, support, making good, and roof protection. In all cases, these rights relate only to works to be carried out during the course of the construction of the development.

Compliance with statutory requirements

8. The Order is accompanied by a Statement of Reasons. The Statement sets out the background to the Order and records that the Council's decisions to use compulsory purchase powers to bring forward the redevelopment of the site, and to make the Order, were taken through formal resolutions at two Cabinet

meetings, held on 26 February 2020 on 25 March 2021. These details have not been challenged by any party, and I have no reason to question them.

9. At the present inquiry, it was noted by some parties that the Statement of Reasons incorrectly describes the development plan for the area as including the Maidenhead Town Centre Area Action Plan, adopted in September 2011. As of the date of making the Order, that plan had in fact been superseded by the adoption of the Maidenhead Borough Local Plan, on 8 February 2022. Whilst this was a clear error on the Council's part, it does not seem to me to be one which would be likely to affect the validity or lawfulness of the Order itself. The substantive issue of the relationship of the Order to the relevant adopted planning policies will be addressed elsewhere in this decision.
10. On 23 May 2022, in its role as the acquiring authority, the Council issued a General Certificate in support of the Order. The Certificate confirms that notices of the Order were published in a local newspaper, and affixed at various places adjacent to the site, and also served by post on those known to have qualifying interests. Although the initial notices contained an error in the address for objections, they were re-served with the necessary correction, and the objection period was extended accordingly. It is not disputed that copies of the Order documents were made available at Maidenhead Library. The General Certificate was also accompanied by a Protected Assets Certificate. I am satisfied that all of these statutory requirements were properly complied with.
11. During the inquiry, Mr Hill, an interested person, questioned whether the relevant procedure for giving notice of the inquiry had been complied with, in accordance with the Compulsory Purchase (Inquiries Procedure) Rules 2007. However, for non-ministerial orders, the relevant requirement in this regard is set out at Section 11(2) of those Rules. At the inquiry, the acquiring authority produced evidence of compliance, in the form of photographs of site notices, and a certificate of billposting. In the absence of any direction from the authorising authority (in this case the Planning Inspectorate), a notice in a local newspaper is not required. Nor is there any specific requirement for the date to be published on the Council's website. In the circumstances, I am satisfied that the relevant statutory procedures were fully complied with in this regard.

The objections to the Order

12. A total of 14 objections to the Order were made. Of these, one was withdrawn prior to the opening of the inquiry (by B Bailes), and two more were withdrawn during it (Hanwell Holdings Ltd, and S Pospischil & Ms K Potts), leaving 11 remaining objections as at the inquiry's close.
13. Of these, three of the objections are from persons holding leasehold interests which are proposed to be acquired through the Order: Lee and Dean Page, Aegon UK Property Fund Ltd, and WH Smith Retail Holdings Ltd.
14. Eight of the others are from parties with interests in properties over which new rights would be taken: Lloyds Bank PLC, M James, R Harding, Brock House Investments Ltd, Telefonica UK Ltd, McDonalds Global Markets LLC, and T Fraser. The final objector, MNK Estates (UK) Ltd, has no known interests in any directly affected property.

The inquiry

15. The inquiry sat for three days, on the 26, 27 and 28 October 2022, at the Maidenhead Town Hall. Following a further exchange of written submissions, the inquiry was closed in writing on 14 November 2022.
16. The objection made by Messrs L and D Page was supported by an appearance at the inquiry. All of the other remaining objectors opted to proceed by way of written submissions, or to rely on their original objections.
17. In addition, three other interested persons were also permitted to speak at the inquiry.

Site visits

18. During the inquiry, I carried out accompanied visits to Nicholson House and Smokeys Nightclub, which are the subject of the objections by Aegon UK and L & D Page respectively. No other objectors requested an accompanied visit, but nevertheless, I was able to view the exterior of all of the remaining objectors' properties on an unaccompanied basis.
19. In addition, I also carried out a series of further unaccompanied visits during the period of the inquiry, in which I viewed the remainder of the Order Lands, plus much of the surrounding area.

Post-inquiry correspondence

20. Since the close of the inquiry, it has been brought to my attention that a legal challenge has been commenced, by way of a claim for judicial review, against the planning permission for the development of the Order Lands, granted on 21 October 2022. However, those proceedings are as yet at an early stage, and may take some time to reach a conclusion. In the meantime, the permission stands. I am not persuaded that the commencement of this challenge is sufficient grounds to justify delaying my decision on the CPO.

THE CASE FOR CONFIRMATION OF THE ORDER

The existing situation

21. The acquiring authority identifies numerous shortcomings and deficiencies in the existing development on the Order Lands. Internally, the Nicholson shopping centre in its existing form is said to offer an uninteresting and somewhat sterile environment, with no sense of place and little to attract customers to spend time there. Externally, the shopping centre offers unattractive blank facades which turn their back on the surrounding streets and neighbouring properties. The multi-storey car park is described as monolithic in scale and purely functional in its design.
22. In addition, the only route through the site in a north-south direction is via a single corridor exit from the shopping centre, and then through the car park by way of the lift or stairs, to a single entry point on Broadway. This is an uninviting and somewhat daunting route, and in any event is only available during opening hours. Together therefore, the existing development creates a substantial physical barrier to pedestrian movement through and around the town centre, including between the High Street and the railway station.

23. For the most part, these criticisms of the existing buildings' design and layout are not disputed. From my own observations, I find them all to be well-founded.
24. The Authority goes on to argue that the retail units within the centre are not well suited to current day requirements, due to their excessive size, lack of variety and flexibility, and the deep-plan format which allows little scope for subdivision or adaptation. In the face of changing retail trends and shopping habits, trading performance is said to have dropped, vacancies have risen, and a downward spiral has set in, manifested in diminishing levels of footfall, occupancy and trading margins. These effects are also said to be exacerbated by rising maintenance costs and consequent high service charges.
25. As a result, the centre as a whole is now regarded by the Authority as no longer a viable asset, nor one into which any landlord would be likely to invest the significant funds that would be needed to arrest the decline. As evidence, the Authority point to the fact that the Centre's previous owner went into administration, and that the sale to Denhead SARL in 2019 was at a price some 30% below the value that was put on the site only four years earlier, and 70% less than the figure for which it sold in 2007.
26. Attention is also drawn to the Retail and Town Centre Update Study, in October 2019, which found that despite having a catchment population with well above average spending power, Maidenhead was losing trade to surrounding towns due to the unbalanced and poorly configured nature of its retail stock. In this regard, the Nicholson Centre in particular was singled out as inefficient and outdated, and ripe for redevelopment.
27. The Authority's assertions on these matters are not entirely unchallenged. Some objectors suggest that the shopping centre's decline has been brought about intentionally. Others see nothing inherently lacking in the centre as it now is. However, there can be no doubting that the Nicholson Centre is a product of its time, and that trends in retailing have changed significantly since then. On the evidence available, it seems to me that the Authority is more than likely to be right in its assessment that the shopping centre building is no longer capable of meeting modern needs.
28. There is also some force in the Authority's contention that the present time is a good one to pursue some form of radical redevelopment. The recent opening of the Maidenhead station on the new Elizabeth Line railway has evidently sparked considerable interest in the town. The progress of several major developments, including the Landing, Watermark, Waterside Quarter and Chapel Arches sites, has injected a wave of new investment in the local property market. And similar influences appear to be at work elsewhere in the Thames valley, leading to the perception of a 'silicon corridor' effect. Consequently, despite the current economic difficulties at national level, with high inflation, energy prices and interest rates, and the uncertainties resulting from recent political changes, it seems to me that in this particular location there is logic in the argument that this is the right time to capitalise on the area's sense of momentum. I agree that to do so would be in both the local and national interest.
29. Given the Order site's key position at the very heart of the town, I agree that it is important that it should be used in a way that contributes positively to Maidenhead's identity, and meets the needs and aspirations of the resident

community and local businesses. Having regard to the above matters, it is clear to me that the existing, somewhat mediocre shopping centre and car park buildings have a negative effect on the town centre's character and appearance, and on the ability of users to move freely around the town centre. The shopping centre also fails to offer the type of facilities that are required in today's market. In the light of these findings I am satisfied that, in general terms, the replacement of the existing buildings would have the potential to benefit the town's economic, social and environmental well-being.

The benefits of the proposed Nicholson Quarter development

30. At ground floor level, the proposed redevelopment scheme would provide for around 66 new, flexible retail units, suitable for a range of uses including shops, services, cafes, restaurants and leisure uses, with a total usable area of around 8,360 sq m. Although this would be a reduction in retail floorspace compared to the existing Nicholson Centre, in terms of the number of units it would represent a slight increase. Importantly, whilst a range of different sizes would be provided, these would be weighted mainly towards smaller units, which are seen as better geared to the emerging, post-covid pattern of demand, focussing on locally-based, independent retailers and 'artisan-style' shops. Based on the evidence presented, I agree with the Authority that the type of retail provision envisaged in the proposed scheme seems well suited to Maidenhead's present and likely future needs. As such, the development would contribute to improving the town centre's vitality and viability.
31. These new units would be arranged in a series of attractive, interconnected outdoor streets, small yards and squares, designed as social spaces, to accommodate planting, seating, café tables, market stalls and other activities. The two existing pedestrian connections to the High Street would be supplemented by a third, via what is now White Hart Road, and the connection to Queen Street via Brock Lane would be maintained and enhanced. A new north-south pedestrian axis would be created, with access onto Broadway, and the east-west axis via Brock Lane would be extended through the site to emerge onto King Street. At the convergence of these routes there would be a new public square, with smaller secondary spaces at other key points. All of these pedestrian routes and spaces would have active frontages, comprising mainly retail or similar uses.
32. To my mind, this layout would improve markedly on the existing development at the site in several ways. It would enhance the town centre's permeability and connectivity. It would better integrate the site with the existing street pattern, knitting it into the town's urban grain. It would provide inviting spaces for shoppers, office workers and residents to meet and relax. It would bring a sense of life and activity to otherwise dead spaces, including in the evenings. It would create natural surveillance and improved personal safety. And it would create opportunities for an attractively designed public realm, with a new sense of place, at the heart of the town centre. In all these respects, it seems to me that the development now proposed would represent a substantial improvement over the existing indoor shopping centre that it would replace.
33. On its upper floors, the development would provide for in excess of 29,000 sq m of new Class B1 office workspace, in a range of sizes and configurations, from 375 sq m to 2,600 sq m. Whilst some existing office floorspace would also be lost, mainly at Siena Court, the net addition would still amount to over

23,000 sq m. This is said to equate to about 30% of the town's forecast needs within the current Local Plan period, to the year 2033. Based on the evidence, Maidenhead is clearly a well-established regional office centre, with a buoyant market and strong demand. Although there are other office developments also in the pipeline, and some older space available for reletting, there is no evidence of any significant oversupply. I see no reason to doubt that the office elements in the proposed scheme would meet an established need, and as such, would help to sustain the local economy.

34. In terms of housing, the proposed scheme for the Order Lands would provide for up to 346 open-market apartments, plus 307 Class C2 elderly persons' units with extra care facilities, amounting to over 650 new dwellings in total. Whilst the Council currently claims a housing supply in excess of five years, it was unable to do so prior to granting planning permission for the Nicholson Quarter development, in March 2021. I also note that the Council's housing delivery test results show a pattern of persistent under-delivery for several years, before the adoption of the new Local Plan in February 2022. It is clear from this that meeting local housing needs in the Royal Borough has long been, and continues to be, a considerable challenge. The residential elements of the proposed scheme would make a substantial contribution to local housing needs. I note that there is no certainty that the development would provide any 'affordable' housing, because any such provision would depend on the outcome of a further viability review, but this does not change my view that securing the provision of around 650 dwelling units, on previously developed land in a central location, would be a substantial benefit to the town.
35. With regard to parking, the proposed scheme would provide just over 1,300 car or vehicle spaces in total. Of these, about 700 would be for public parking, and 88 would be replacements for existing private spaces which would be lost. The remainder would be dedicated spaces for the new offices, apartments, and extra-care housing. Between them, these car parks would also be capable of providing up to 125 charging points for electric vehicles. Over 800 cycle parking spaces are also proposed, in an area where little if any dedicated cycle provision appears to exist now. All of these numbers appear to broadly accord with the relevant planning policies relating to car and cycle parking. In my view, these elements of the scheme strike a sensible balance between the aims of attracting footfall and activity to the new centre, whilst encouraging sustainable modes of transport. As such, the development now proposed would bring about an improvement over the existing situation, benefitting the town's transport infrastructure, and improving the way that its movement networks function.
36. The proposed development would provide the opportunity for a range of well-designed, high quality buildings, employing modern technology, meeting current standards of energy and water efficiency. In so far as some parts of the scheme have as yet reached only the outline permission stage, I note that the reserved matters for those phases are to be controlled by reference to an approved detailed Design Code. And on a technical level, modern standards are guaranteed by the need to comply with national building regulations. In addition, the scheme would substantially increase the density of development on the site, and thus make much better and more efficient use of land in such a highly sustainable location. In all these respects, the development now proposed would represent a considerable improvement on the existing undistinguished and outdated buildings on the site.

37. The Nicholson Quarter development, excluding land acquisition and finance, is estimated to cost around £380m. Of this, some £326m is accounted for in construction costs, , and the remainder on marketing, sales, fees and contingencies. It is not unrealistic to assume that a proportion of the materials, labour and services required would be sourced locally, and therefore contribute to the local economy. The construction phase itself is expected to create around 2,400 jobs, over a 3 - 4 year period. When complete, the office and retail elements are estimated to provide for over 2,200 FTE permanent jobs. This new workforce, together with the resident population of the development, would add to the town centre's footfall, and support local businesses in the daytime and evening economies, with the additional local spending estimated at up to £11.4m per annum. Furthermore, the improved retail and leisure offer created, with its greater distinctiveness and sense of local identity, would help the town to retain more of its own retail expenditure, reducing leakage to neighbouring centres. And in addition, the development would also have the potential to act as a catalyst for further investment and regeneration in the town.
38. Having regard to all the above considerations, I am satisfied that the proposed redevelopment of the Order Lands would bring clear benefits to the town of Maidenhead, and the wider area, in terms of its social, economic and environmental well-being.

Relationship to the planning framework for the area

39. In the Borough Local Plan (the BLP), the Order Lands are identified as site AL1, which is allocated for a mixed use development, providing retail and community uses, 15,000 sq m of employment space, approximately 500 residential units, and a public square. Policy QP1a states that Maidenhead town centre is to be renewed and enhanced, and identifies the redevelopment of the Nicholson Centre as a key contributory element in achieving that aim.
40. Policy SP1 identifies Maidenhead town centre as part of a strategic growth location, and as a major focus for sustainable growth and regeneration, for new housing, employment, retail and leisure. Policy TR3 supports proposals that promote and enhance the role of the town centre, and particularly those that enhance or diversify retail activity.
41. Objectors question whether the detailed criteria in some of these policies, or other relevant policies such as design, car parking, affordable housing, or the provision made for specific uses, have been met in full. These issues will undoubtedly have been relevant to the Council's decision, as Local Planning Authority, as to whether to grant planning permission; and as far as I can tell, they were indeed taken into account in that decision. However, for the purposes of my decision regarding the CPO, the question is one of broad principles, i.e. whether the scheme is in general accordance with the adopted policy framework for the area.
42. To my mind, the development now proposed for the Order Lands clearly accords with the aims of the site-specific and area-specific policies of the development plan, as set out above. As such, it is aligned with the planning framework for the area.

Prospect that the scheme will proceed

43. According to the evidence put before the inquiry, the Nicholson Quarter development is to be funded by Tikehau Capital, a privately-owned, French-based investment and asset management business, which is Denhead SARL's parent company. Tikehau is said to have access to substantial funds for investment in projects of this type, and already has available or committed equity from shareholders and institutional investors, sufficient to more than meet the entire costs of the development from this source if necessary. Alternatively, the company is also confident of being able to attract additional investment or debt financing from other sources. Whilst the evidence on these matters has not been substantiated in detail, I have no reason to doubt it. Based on the evidence before me, I am satisfied that the necessary resources are available.
44. A number of viability appraisals have been carried out for Denhead and their partner Areli Real Estate, and in some cases these have been subject to formal review on behalf of the Council. Some objectors contend that the number of different assessments and methodologies, and apparently differing results, indicates some uncertainty or lack of clarity as to the scheme's viability. However, none of the assessments suggest that the development is unviable. Rather, the results show differing levels of profit, and of return on costs. To my mind, these differences are not particularly surprising, given their differing purposes and dates, and the inevitable changes in costs and values over time. The most up-to-date appraisal is that carried out by the Authority's witness Mr Garside, for the purposes of his inquiry evidence. That appraisal, which appears to me to be comprehensive and robust, shows an overall return of just over 20%. I have no doubt that further appraisals will be needed prior to the start of any development, and that the results may vary from Mr Garside's present figure, as circumstances continue to change, and indeed as the details of the scheme itself continue to evolve. But the same would apply to any development of this scale. I note the various detailed criticisms of these figures made by objectors, but there is no requirement for viability to be proven beyond all doubt; I have considered the matter on the balance of probability. Based on the best evidence before me now, I can see no reason to doubt that, in general terms, the development as a whole can be regarded as financially viable.
45. In addition, I note that the developers have identified a range of 'de-risking' strategies, including forward sales, pre-lets, partnering and joint ventures. If necessary, such measures could potentially enable the development to proceed, or indeed to continue, even if the rate of return were to fall below that which would normally be required. In my view, this is a prudent approach, ensuring a degree of resilience against future economic and market conditions. This reinforces my view that the scheme should be viewed as viable.
46. From the information provided, the combined effect of the Development Agreement and Land Swap Agreement is that, if and when various conditions are fulfilled, Denhead SARL would then have the right to exercise an option to acquire the Council-owned parts of the site. This would trigger a further series of obligations on both sides, including the start of demolition and excavation works by the developers, and the construction of the new car park by the Council. As objectors point out, the optional element in this arrangement does not amount to a binding commitment to go ahead with the development. But

nevertheless, it is evident that both parties have already committed a great deal of time and money to reach this stage. Indeed Denhead states that it has so far incurred expenditure of £35m on acquisition costs, running costs, and professional fees, with a further £1.5m said to have been committed in respect of the on-going CPO process. Whilst these figures have not been substantiated in detail, to my mind they appear broadly commensurate with the scale of the project, and I see no reason to doubt their accuracy. The Council too must clearly have invested considerable amounts of officer and member time and costs. To my mind, both parties have demonstrated a high level of commitment to the project, and I see no reason to doubt the continuing desire on both sides to bring the scheme to fruition.

47. From the evidence provided, Tikehau Capital's previous experience in property development has been predominantly outside the UK. But nevertheless, it does appear to have relevant experience in large projects elsewhere. Denhead SARL, as a recently-formed special purpose company, has no apparent track record in its own name, in terms of completed projects. Much the same applies to Areli, which was formed in 2018. But nonetheless, these companies are apparently each able to call on an experienced management team, augmented by external agencies, with directly relevant experience and expertise. I see no reason to doubt that the developer and their advisers have the necessary capabilities to deliver the development, and to manage the project through to completion.
48. Stopping-up Orders are needed in respect of a few small areas of public highway. These have been applied for, and the Department for Transport has confirmed that no objections were received within the relevant period. Consequently there seems no reason to doubt that the necessary Orders will be granted in due course. Aegon UK suggests that rights held in connection with Nicholson House may allow construction works to be prevented, but this assertion has not been substantiated. In any event it seems likely that the power under S.203 of the Housing and Planning Act 2016, to override easements and other rights in certain circumstances, could be used if necessary. Based on all the evidence before me, there do not appear to be any insuperable legal or physical impediments to the development.
49. Taking account of all the above matters, I am satisfied that, if the CPO were confirmed, the proposed redevelopment of the Order Lands would appear to have a good prospect of going ahead.

Overall summary of the case for confirmation of the Order

50. For the reasons set out above, I agree that the redevelopment of the Order Lands, as now proposed, would accord with the development plan strategy for the area, and would bring significant benefits for the social, economic and environmental well-being of the town. I also accept that, if the CPO were confirmed, there is clear evidence that the scheme is viable, and that the necessary funding, expertise and commitment would be available. The proposed development would therefore have a good prospect of proceeding. These considerations all weigh in favour of confirmation.

THE OBJECTIONS

Objection by Mr Lee Page and Mr Dean Page (trading as Smokeys Nightclub)

The objection

51. Lee and Dean Page are partners in the business which trades as 'Smokeys', a nightclub located in Unit 24a of the Nicholson Centre. On the Order Map, the plots occupied by the club, together with its outdoor terrace and ancillary areas, are Nos 29, 32, 33, 34, and 1/18. The club has the benefit of a lease granted to Lee and Dean's father Ron Page, which runs to 23 June 2030. Ron Page recently passed away, with this part of his estate passing to Lee, Dean and their mother Tracey Page. The CPO proposes to compulsorily acquire all interests in the club's premises.
52. The main grounds of objection are that no suitable relocation premises have been offered, and that consequently the business faces a threat of extinguishment.

The role of Smokeys Nightclub

53. The business has evolved out of that which was started by Ron Page in 1962, first as a café, and then as a cabaret venue, before taking on its present form as a nightclub in 1995. It has operated from the present premises since 1967. In 2007 the premises were extended to add the terrace and a second bar area, and in 2017 a major refurbishment and rebranding was carried out, said to have cost around £500,000. The name Smokey Joe's was adopted in 1995, and shortened to Smokeys in 2017. The business has always been owned and managed by members of the family.
54. The present premises are said to offer a net usable space of just over 4,000 sq ft (370 sq m) internally, plus the outside terrace, with an overall capacity for over 400 persons. Customers come primarily to drink, socialise, dance and listen to music. Although the average age is said to be 28, the overall age range is said to be broad; and the inquiry heard oral evidence from one such customer, Mr Sidwell, which appeared to corroborate this point. At its peak, prior to the Covid-19 lockdown period, the club is said to have had an overall attendance of around 100,000 persons a year. Currently it is also said to have 15,000 followers on social media.
55. The club offers regular live music acts, and over the years has hosted many artists who either were already, or went on to become, nationally or internationally well-known names. It is clear that the Page family take great pride in the club's role, in bringing high quality entertainers to Maidenhead, and also in helping new performers to get started. By their account, Smokeys is the only venue of its type, and the only one offering live music in this type of setting, in Maidenhead or the wider area. The importance of creative industries in the Borough is recognised in the RBWM Corporate Plan for 2021-26.
56. The club's licence allows it to stay open to 04.00 on most nights, and to 03.00 on the others, which is seen as a significant factor in attracting a regular clientele, and an important feature in the club's business model. Despite these hours, it is claimed that the club has been free from any significant complaints, and enjoys good relationships with the police and licensing authorities. In part this is attributed to the location of the existing premises, with the advantage of having no residential neighbours in close proximity.

57. The business is said to employ between 30 to 50 full or part time staff, depending on seasonal demands and trading conditions, with up to 20 being on site at any one time. Most of these are said to be young people, typically school leavers in their first job. Again, Lee and Dean Page are evidently proud of their record in training and developing their staff, and preparing them for the demands of the employment market.
58. According to the evidence presented, Smokeys has been instrumental in organising and supporting the regular 'Fi-Fest' summer musical event, attended by many. It has also given support to a number of local charities through sponsorship and training opportunities. In addition, it is said that the club has provided a home for persons identifying as 'LGBTQ+', by hosting regular dedicated events and a dedicated, private LGBTQ+ page on the club's website, and also providing facilities for specific groups, and generally by promoting inclusiveness throughout in the running of the club. The Authority questions the extent of the club's role in providing specifically for the needs of the 'LGBTQ+' community, but I see no reason not to accept the evidence of the club's owners on this point.
59. In March 2019, following the Community Planning Weekend held by Areli in preparation for the Nicholson Quarter scheme, the Reportback Presentation recorded a desire amongst participants for a 're-provided nightclub'. This appears to be a reference to the potential loss of Smokeys, and an indication of public support for the club's retention within the redevelopment.
60. For the most part, the evidence presented by Lee and Dean Page on all the above matters is undisputed. Based on this evidence, and my observations on my site visit, I agree that in its local context, Smokeys Nightclub is a notable, and in many ways a unique facility. It provides a leisure facility for evenings out and late-night entertainment, which evidently meets the needs of substantial numbers of loyal and regular customers, in the town and its hinterland. It is clearly appreciated and valued by those people. It also contributes to the area's social and cultural life. And in a small way, it is part of Maidenhead's history. In contrast, the loss of the club would diminish the opportunities available to local people for pleasurable relaxation and social activity. It would also reduce job opportunities, particularly in the youth sector, and openings for aspiring performers to advance their careers.
61. For all these reasons, I conclude that Smokeys Nightclub has an importance to the town which exceeds its apparent size as measured merely in terms of floorspace, turnover or financial value. The loss of Smokeys, if that were to occur, would have a significant adverse impact extending beyond the direct effects on the business itself and its owners, including on customers, staff and performers. As such, the business is one which is worthy of some effort to retain or relocate within the locality if possible.

Planning status

62. The use of premises as a nightclub is defined in the BLP as a 'main town centre use'. At national level, a similar definition is also contained in the National Planning Policy Framework (the NPPF). BLP Policy TR1 requires that the preferred locations for main town centre uses are Maidenhead and Windsor town centres, followed by district and local centres.

63. In the case of Smokeys therefore, the club's existing location in the Nicholson Centre is compliant with the most relevant development plan policy relating to leisure facilities of this kind. If the club were to relocate, another location within Maidenhead or Windsor town centres would equally comply. Any premises outside of these two centres would be sequentially less preferable, and any location outside of a town, district or local centre would be non-compliant.

Personal circumstances

64. Lee and Dean Page state that they have worked in their business, initially alongside Ron and Tracey Page, and now on their own account, for the whole of their working lives. Because of their involvement together as business partners, and the history of the business within their family, they say they see Smokeys as a central part of their family life. As such, they have an emotional attachment to it as well as relying on it financially.
65. Both also have their own family responsibilities, [REDACTED]
[REDACTED]. Neither brother, by their own account, has any working experience in any other industry. Both are concerned for their futures, and those of their dependants, if the club is unable to continue.
66. These matters are unchallenged. To my mind, the evidence that Lee and Dean Page gave at the inquiry was measured and credible. I have little doubt that the effects on them and their families would be not only financial, but also mental and emotional. In all likelihood, the overall impact would be severe. This reinforces my conclusion that the loss of Smokeys Nightclub is an outcome to be avoided if other options are available.

Negotiations and engagement

The Guidance

67. The relevant Guidance¹ states that an acquiring authority will be expected to demonstrate that they have taken reasonable steps to acquire the land in question by agreement, and that compulsory purchase should be a last resort (Tier 1, paragraph 2). The same paragraph recognises that the use of compulsory powers will necessarily interfere with affected owners' human rights. The Guidance goes on to say that, in order to reach an early settlement, reasonable initial offers should be made, and authorities should engage constructively with claimants about relocation issues and mitigation or accommodation issues (paragraph 3).
68. It recommends undertaking negotiations in parallel with the preparation and making of an Order, as this can help to build good working relations with affected parties, and to show that the authority is willing to treat their concerns with respect; authorities should be able to show that meaningful and genuine attempts at negotiation have been pursued (paragraph 17). Paragraph 19 contains further advice on the kinds of ways in which Authorities can assist owners, so as to minimise uncertainty and anxiety.

¹ Guidance on Compulsory Purchase and the Crichel Down Rules, 2019

Period up to February 2020

69. In the present case, Denhead SARL and Areli Real Estate began discussions with the Council, with a view to a comprehensive development, in 2017. Those discussions also involved the Council's in-house property arm, RBWM Property Company Limited. Denhead completed the purchase of the Nicholson Centre in March 2019. Later that month, the company conducted a Community Planning Weekend, to gather input from the public. For its part, the Council approved in principle heads of terms for the sale of the Council-owned interests in the site to Denhead, on 1 March 2019, then gave delegated authority to negotiate the detailed terms on 25 April, and full approval to those terms on 23 July 2019.
70. A meeting was held between Areli representatives and members of the Page family on 13 January 2020. By Dean Page's account, the meeting was brief. After outlining the draft scheme, one of Areli's directors allegedly told the Pages that a nightclub could not be accommodated, and suggested changing the business to a restaurant². This account is not necessarily accepted by the Authority or those supporting the Order. But none of their inquiry witnesses was present at the meeting in question, and no written record appears to have been taken. Mr Page's first-hand account is therefore the only evidence on the point, and I have no basis on which to doubt its accuracy.
71. In a follow-up email dated 14 January 2019, Areli suggested the family consider relocating to existing premises, used as offices, above Holland & Barrett, in the town centre. This was viewed by the Pages but was considered to be unsuitable, due to its narrow floorplan on three floors, small capacity, fire escape issues, and what were seen as incompatible neighbouring uses³.
72. On 12 February 2020, Denhead SARL and the Council exchanged contracts on the Land Swap Agreement. A few days later, on 26 February, the Council's Cabinet approved the use of the Council's compulsory purchase powers for the development⁴. The details of this decision, and the reasoning behind it, have not been put before the inquiry, but as far as one can tell, this appears to have been the starting point which initiated the necessary preparatory work for the making of the Order.
73. At this stage, in relation to Smokeys Nightclub, the position was that the Pages had received a single approach, resulting in one meeting and one email. No offer had been made to acquire the Pages' lease by agreement, nor had any interest in doing so been indicated. One potential relocation opportunity had been suggested, but with little apparent consideration to the club's requirements. The discussion that had taken place with Areli appears to have started from the premise that the nightclub's lease would be brought to an end; even though at that stage the Council had made no formal or public decision to begin compulsory acquisition. The email of 14 January was perfunctory, to the point of being curt. As far as one can tell, no attempt had been made to engage constructively, or to establish any kind of working relationship. Nor had the concerns of the Page family been treated with respect. Nothing that had occurred up to this point amounted to a meaningful or genuine attempt to acquire their interest by negotiation.

² Dean Page's proof, para 21, and in his oral evidence

³ Doc H16 Pages' Timeline, and D Page oral evidence

⁴ Mr Brazier-Dubber's proof, para 8.2.6

Period from February 2020 to March 2021

74. In March 2020, the Pages were contacted by Areli's agent, suggesting another possible relocation site, in a former snooker hall, also in Maidenhead town centre. According to Dean Page, the premises were not on the market, so the family viewed it externally. In doing so, they identified a number of shortcomings that appeared to make it unsuitable⁵. Subsequently the agent suggested a third building, a former laundry, in a village location. This was also found unsuitable.
75. On 5 May 2020, the Pages received an email from Areli's agent⁶, seeking their agreement to a surrender of their existing lease. In return the family was offered statutory compensation plus a financial premium. Continued temporary occupation of the club's premises was also offered, on a rent-free basis, but terminable at three months' notice. The email also referred in general terms to providing further assistance with finding relocation premises. The offer was not taken up.
76. On 15 June 2020, Areli's planning application for the Nicholson Quarter was submitted and validated. In July, the Page family contacted local councillors to seek help, and on 10 July a meeting was held with the Leader of the Council, at which the family asked whether a replacement nightclub could be provided within the development. The Leader confirmed in an email dated 15 August that this request had been passed on to Areli.
77. On 10 September 2020, a meeting was held between agents for Areli and the Page family⁷. The meeting is said to have discussed terms for the surrender of the existing lease and matters relating to relocation. There is no indication that anything was put in writing, and no further detail of the discussion. No further correspondence or contact appears to have ensued.
78. On 6 November 2020, after further prompting by the Page family, a meeting was held between them and Barbara Richardson, the then head of the RBWM Property Company. At that meeting, Ms Richardson raised the possibility of relocating Smokeys within part of a 'flexible use' unit on the ground floor of the proposed new car park, fronting Broadway, in Zone 4 of the development. Zone 4 is the part of the scheme that would be built and owned by the Council, rather than Areli. The unit in question did not form part of the scheme as originally submitted, but was to be included as part of a suite of revised plans that were being prepared. Those revised plans were later submitted as an amendment to the planning application, on 16 November 2020.
79. The 6 November meeting led to an exchange of emails and further discussions between the Pages and Ms Richardson, between 16 November – 22 December 2020. During this exchange the family expressed enthusiasm for the Broadway unit in principle, and provided details of their requirements, and in return sought further details, including the configuration, measurements, heights and more detailed plans. Amongst other things, they emphasised on several occasions their need for a legally-compliant outdoor smoking area, which could also double as a 'break-out' space⁸. Ms Richardson provided some of this

⁵ D Page proof para 35, Doc H16 Pages' Timeline, and oral evidence

⁶ Doc H16, Pages' Timeline

⁷ Doc H42, Negotiation Record Sheet

⁸ Doc 42c: emails from Page family dated 16 and 18 November 2020

further information, and undertook to discuss the Pages' other outstanding requests with Areli and Council officers.

80. On 13 January 2021, Ms Richardson reported that she had made some progress with these discussions, and that Areli had agreed in principle to meet the nightclub's fitting-out costs for the Broadway unit, subject to agreeing a budget. She was also taking a report to the Council's Cabinet to get approval in principle for a subsidised rent arrangement for an initial period. On 1 February 2021, she and the Pages held a virtual meeting to review progress. The family set out again that they would need to be sure that the unit offered could meet their requirements, and again requested more detailed plans⁹.
81. On 2 March 2021, the day before the Planning Committee meeting that was due to consider the Areli application, Tracey Page emailed to Barbara Richardson, emphasising the importance for the nightclub of having an attached outdoor space that could serve as a smoking area, and which would be fully within the club's control, for reasons of noise and security. Confirmation was sought that this could be achieved¹⁰. Ms Richardson replied on 3 March, enclosing two 'high level' example plans, and expressing the view that the relevant legal requirements could be met. Formal advice would be taken from the Council's Licensing officers.
82. In a further exchange on the same day, Mrs Page sought further reassurance in the form of a "categorical guarantee" that the smoking area could be achieved. She also expressed reservations about the L-shaped configuration depicted, with regard to the effects on the siting of the club's performance stage, and evacuation and security issues¹¹. Ms Richardson replied that she was confident that these concerns could be accommodated with further detailed work from the architects and others. Later that day, the Committee resolved to grant planning permission, subject to the completion of the S.106 agreement.
83. On 25 March 2021 the Council's Cabinet granted authorisation to officers to proceed with the making of the CPO. The report presented to that meeting stated that *"Whilst there is constructive dialogue with all occupiers who have not yet agreed lease terms, in some instances there is a notable difference of opinion as to the level of payment due to secure varied lease terms. The use of compulsory purchase powers is therefore necessary, to ensure that vacant possession of the retail accommodation can be secured...."*. Shortly afterwards, on 31 March 2021, the Council and Denhead entered into the Development Agreement.
84. Summarising this period, from February 2020 to March 2021, what the Page family received from Areli and RBWM, in total, amounted to an approach for the surrender of their existing lease, and latterly an offer to explore the potential for their relocation to the proposed new unit on Broadway.
85. With regard to a surrender, the developers' offer had included a premium in addition to statutory compensation, and it is not for me to judge the adequacy of that offer in financial terms. However, given the circumstances, of a long established family business, and two relatively young current partners with their working lives ahead of them and families to support, it should have been

⁹ Doc H16, Pages' Timeline

¹⁰ Doc H23, T Page email 2 March 2021

¹¹ Doc H23, T Page email 3 March 2021

obvious that Lee and Dean Page's main priority would be to secure the continuation of their business. Consequently, for them this would require a settlement that not only covered their losses and other costs, but also allowed them the certainty of a suitable relocation.

86. In this regard, the efforts made by Areli and their agents seem to have been little more than a token. There is no evidence of any attempt having been made to establish the nightclub's requirements, other than in terms of square footage. In total, three opportunities had been identified and all were rejected. As far as I am aware, there is no suggestion that the Pages' reactions to those properties were misplaced. And yet no attempt seems to have been made by Areli to explore with them how to improve the chances of finding something more suitable. After the rejection of the third property, sometime in the summer of 2020, it appears that no further action was taken by Areli or their agents with regard to any other relocation sites. Whilst the Pages say they also conducted their own search, and were equally unsuccessful, that should not obscure the fact that the onus of finding a solution clearly fell on those who were proposing their displacement. From the start, Areli seem to have treated this task as a low priority, and then within a short time gave up altogether. RBWM were slow to react to this failure. At this time the CPO had not yet been made, and thus there was no legal requirement for Smokeys to move. It was incumbent on the promoters of the Order at this stage to see what could be achieved by persuasion, but no such persuasion had taken place.
87. Eventually the Council had come forward with the possibility of being able to offer part of the Broadway car park unit, and Barbara Richardson in particular evidently worked hard to progress that option. To that extent, by March 2021, the Council had now begun to engage constructively. But it is equally clear that this had only happened belatedly, after the Page family went above the heads of Areli and Council officers. Up to that point, the Council and RBWM seem to have been content to take a passive role. And in any event, despite Ms Richardson's efforts, she had not been able to assure the Pages on their principal concern, regarding the ability to provide a legally-compliant and fully controlled outdoor smoking area, which could also serve as a break-out space, overcoming noise and security issues, and replicating the role of the club's existing terrace. It had therefore not yet been established whether the Broadway unit would be capable of meeting the Pages' reasonable request for at least like-for-like capability.
88. As a result of these unresolved issues, as at 25 March 2021, when the decision was taken to proceed to make the CPO, the Council had not made any concrete offer, nor would the family have been in a position to make a decision on any such offer. Had there been a viable relocation opportunity at the Broadway unit, it seems probable that the Pages would have been willing to negotiate terms, but as things stood, they could not. The negotiation process therefore still had some way to go before it could reach any conclusion. It follows that at this stage the use of compulsory acquisition could not reasonably have been seen as a last resort.

Period from March 2021 to February 2022

89. In an email dated 6 April 2021, Tracey Page continued to press Barbara Richardson for answers on the question of the smoking area. In a holding reply dated 7 April, Ms Richardson acknowledged the importance of the issue and

stated that work was being done to find a solution¹². Another message, dated 27 May, indicated that the answer depended on input from the Council's Building Control department¹³. After a delay, a further email from her dated 2 August 2021 indicated continuing uncertainty regarding both Building Regulations and Licensing, and acknowledged the need for more detailed plans to resolve these issues¹⁴.

90. Shortly after this, it appears that Ms Richardson left her post with RBWM Property Company. Over the next 7 months or so, no further progress appears to have been made, and no further contact made with the Pages. But nonetheless, the Council's position was that they were working on a solution, and had said nothing to indicate that such a solution might not still be achievable.
91. On 22 February 2022, the CPO was made and published, and notices sent to the affected parties, including the Page family. At this date however, the position remained as it was 11 months earlier, that there was no clarity as to whether the nightclub's requirements could be met at the Broadway unit. No actual offer had been made to the Page family with regard to that unit. Nor had any other realistic relocation site been identified. Throughout this period since March 2021, there had been little engagement of any kind from the Council's side, despite the action being very clearly in their court. The working relationship achieved during the latter months of Ms Richardson's tenure had been largely lost. No meaningful negotiation had taken place for nearly a year.
92. Prior to 25 March 2021, the Pages had clearly been open to an offer in relation to the Broadway unit, as long as that unit could be shown to meet their requirements. Nothing that happened between that date and 22 February 2022 suggests that the family had changed their position in that regard, in any way at all. As of this latter date therefore, the prospect of a deal for Smokeys' relocation to Broadway remained potentially available. It follows that, at the date of the making of the Order on 22 February 2022, the position remained that compulsory purchase was not yet a last resort, and could not properly have been seen as such.

Period March – October 2022

93. Following the making of the CPO, two virtual meetings were held between the Pages and Chris Pearse of RBWM Property Company. At the first of these, on 4 March 2022, Mr Pearse agreed to help by asking Areli for further plans of the Broadway unit. At the second, on 11 March, Mr Pearse produced some basic plans for discussion, showing alternative ways of subdividing the unit. However, he then revealed that a smoking area was not now regarded as feasible, due to problems in meeting Building Regulations¹⁵. The Pages asked about an alternative option, of setting back the ground floor frontage to create a semi-external, glazed space, but according to the Authority's meeting note, it was left back with them to "*send over their ideas*" on this.
94. In a subsequent exchange of emails, on 19 March 2022 Lee Page continued to press for further information, with a view to exploring other options for the unit's configuration. In reply, on 24 March, Mr Pearse stated that the Council

¹² Doc H21, email from B Richardson 7 April 2021

¹³ Doc H22, email from B Richardson 27 May 2021

¹⁴ Doc H20, email from B Richardson 2 August 2021

¹⁵ Doc H42 Negotiation Record Sheet

now intended to re-engage with Areli's design team, and that once this appointment was made, they would be able to "*properly lay out a 4,000 sq ft unit for you in a regular rectangular shape*"¹⁶.

95. On 28 June 2022, Chris Pearse sent to the Pages a 'Heads of Terms' for the Broadway unit, setting out two options as to alternative rent levels and rent-free periods. The accompanying plan showed a re-configured, largely rectangular unit, but again without any external area.
96. On 1 July 2022, David Conboy on behalf of Areli contacted the Pages, to discuss compensation. A meeting was held on 19 July, for Mr Conboy to make an assessment of the existing nightclub premises. The family sought further information from Mr Conboy regarding the Broadway unit, including ceiling heights; this was outside his brief, but he undertook to pass on their questions. Mr Conboy did confirm that a smoking area could not be provided. He also conveyed the fact that the intended programme would mean a time lag of 18-24 months, between vacant possession being required in September 2023, and the Broadway unit being ready for occupation in 2025. The meeting note records that the Pages were previously unaware of this timescale¹⁷.
97. On 21 July 2022, Mr Conboy had a telephone discussion with the Pages' agent Giles Blagden. Mr Conboy proposed separating out the issue of compensation from that of relocation, to arrive at what would effectively be a 'clean break' figure. This would include an amount in respect of fitting-out costs for a future relocation, but not tied to any particular site. The Broadway unit could be offered to the Pages on the basis of an option agreement or first refusal, leaving the family free to consider any other premises in the meantime. Mr Conboy thought that this would be more favourable to the Pages than compensation based on extinguishment of the business¹⁸.
98. This suggested way forward was confirmed by Mr Conboy in an email dated 10 August 2022. A plan showing ceiling heights for the Broadway unit was attached. Details of Smokeys' 2017 refurbishment fit-out costs were also sought. A further exchange between Mr Conboy and Mr Blagden took place on 30 August, in which discussion returned to the possibility of creating an enclosed external space at the front of the unit, which had been left with the Pages to explore; Mr Blagden commented to the effect that his clients had found this difficult, based on the limited plans available to them¹⁹.
99. In a phone call to Mr Blagden on 4 October 2022, Mr Conboy set out his proposed figures for a financial settlement for the surrender of the nightclub lease. The amount offered was made up of a sum for fitting-out at any future new premises, a sum for fees, surveys and other incidentals, and a sum for re-establishment of the business. In total, this exceeded the value of the previous offer, made in May 2020, by about four times. On 7 October, Mr Blagden rejected this offer but tabled a counter-proposal. On 11 October, Mr Conboy increased the Areli offer by about a further 12%. This appears to have been the last significant interaction between the parties before the start of the present inquiry.

¹⁶ Doc H24a: C Pearse email, 24 March 2022

¹⁷ Doc H42 Negotiation Record Sheet

¹⁸ Doc H42 Negotiation Record Sheet

¹⁹ Doc H42a, email from G Blagden 30 Aug 2022

100. Over the course of these final negotiations therefore, from the making of the CPO onwards, the events of note were two. Firstly the possibility of providing an outdoor space at the Broadway unit was withdrawn. This was a major obstacle to any prospect of relocation to the Broadway unit, because throughout their 16 months of discussions with RBWM Property Company, the Pages had made it clear that this was their most important requirement. As to how this position came about, it appears not to be disputed that officers had tried their best to find a solution. But as far as one can tell, little or nothing seems to have been documented in terms of the options and possible solutions considered, and the reasons for their rejection, leaving the family in the position of being unable to challenge the eventual conclusion, or indeed to engage effectively in this part of the discussion. This impression is reinforced by the apparent reluctance of officers to explore Lee Page's suggestion of setting back of the front glazing.
101. Be all this as it may, it is difficult to understand why it took so long for officers to reach their conclusion that a smoking area could not be achieved, and to convey this news to the Pages. The information and expertise that were needed for this must have been freely available to either the Council or Areli. The time that was lost in this part of the process clearly undermined the Pages' negotiating position and, with hindsight, led to them wasting time that could have been spent on searching for other opportunities.
102. The second development during this final period was the new offer made to the Page family for a financial settlement. Again it is not for me to judge the adequacy of the offer itself. However, the fact that the new offer was so much higher than the one made in May 2020 suggests that the earlier one could not have been realistic; and despite the fact that the Pages responded with a counter-offer, the figures presented by either side were still a long way apart. In addition, the gap of more than two years between the offers reinforces the impression of a lack of genuine or constructive engagement in the interim. In any event, with regard to the issue of relocation, which was always the Pages' main priority, the offer provided nothing more than a potential option, for a unit which by then was known to be unable to meet the nightclub's needs. In this respect the offer afforded no security for the future of the business.

Matters raised since the cessation of negotiations

103. In their evidence to the inquiry, Lee and Dean Page made reference to a number of other potential issues relating to the Broadway unit, including matters relating to headroom for performance staging, ventilation, fire exits, waste storage, licensing, and the proximity to a bus stop. I agree that it would have been better if these issues had been raised at an earlier stage. But it seems likely that that task would have been made easier had RBWM been able to supply the more detailed plans and visual information that the Pages requested on numerous occasions.
104. In any event, by this stage RBWM and Areli had had over three and a half years to understand the needs of the business and how it worked. Had there been proper and meaningful engagement, with attention being given to the business's practical requirements, then it seems likely that these additional issues could have been anticipated and dealt with. Even if the issues in question may have been capable of resolution, they were potentially significant.

105. To my mind, the fact that such issues remained unidentified, so long after Areli's initial approach to the Pages, which made it necessary to consider relocation, is a further indication of the lack of meaningful engagement on their part, and that of RBWM.

Commentary on the negotiations as a whole

106. The Page family's existing lease gives statutory protection to their nightclub business up to June 2030. As the Guidance makes clear, they were entitled to be treated with respect, and to expect a constructive approach, having due regard for their own aspirations for the future of their business. In this context, the family's desire to secure the continuation of their business, through a relocation, either within the Nicholson Quarter or elsewhere, was a natural and reasonable aim, and one that should have been central to any meaningful negotiations. The club's evident popularity and public support might also have been expected to be taken into account in gauging what was an appropriate way of responding to the business's needs. Even though the planned development was seen as bringing important benefits to the town, RBWM and their partners were still under a duty to have regard to the impacts on affected owners, and to mitigate such effects where reasonably possible.
107. However, throughout this process, the only relocation site identified by RBWM or Areli that was ever a serious prospect was the Broadway car park unit. Although a handful of other sites were tentatively suggested, it seems fairly clear that little or no effort was expended on any of those other options. The Broadway unit ultimately proved to be unsuitable, leaving the Page family facing the prospect of having to close their business without any acceptable replacement premises in sight. And even after this, the development's promoters failed to renew the search for any other relocation options. The failure of the Authority and their partners, over a period of more than three years, to provide the Pages with any viable relocation options to keep their business alive, demonstrated a lack of genuinely constructive engagement.
108. Furthermore, despite the efforts made by some officers, the repeated failure to provide plans with the level of detail reasonably requested by the Pages, and the delays in exploring the issues and constraints relating to the smoking area, showed a lack of urgency and corporate commitment on the part of both RBWM and Areli. As a result of these failings, it was only after the CPO was made that the Pages were confronted with having no remaining relocation options. It was also only then that they were apparently given any information about the timescale, and the need for an 18-24 month closure period. In the circumstances, the unexplained delay in reaching this point was unacceptable, and a further indication that the Authority and their partners failed to engage constructively, and failed to treat the Pages with proper respect.
109. In reviewing the above matters, it is salient in my view to note that at all times throughout the process, it was open to the development partners to consider making provision for a nightclub with Smokeys' requirements, elsewhere within the Nicholson Quarter development itself. Nothing prevented the developer from exploring such a solution, either by redesigning Zone 4 to enable the Broadway unit to meet the club's needs, or by making provision in one of the scheme's other zones. Nor did anything prevent the Council from seeking this. The submission of revised application plans in

November 2020 presented an opportunity for such an approach. Areli were evidently concerned about the potential incompatibility with new residential apartments. But in planning terms, the town centre is a preferred location for a nightclub; and whilst residential development is a noise-sensitive use, that sensitivity has to be judged in the context of the town centre location, and the support that planning policy gives to mixed uses in that area, including both housing and leisure uses. The Nicholson Quarter would occupy a large proportion of the town centre, and avowedly aims to become the town's 'new heart'. If night-time entertainment uses such as Smokeys are not located there, their options elsewhere would be somewhat limited. There is no evidence that Areli or RBWM seriously considered any other possibilities for the club's relocation within the scheme apart from in the Broadway unit. In the circumstances, this in my view is further evidence of the development partners' failure to engage constructively, to mitigate the effects on the Page family and their nightclub business.

110. Whilst Areli belatedly came forward with a renewed compensation offer, shortly before the present inquiry, it was unacceptable of them to delay doing so until so late in the day. The size of the difference between this offer and their previous one, in May 2020, strongly implies that the original one was unrealistic. Furthermore, in the light of events, it is clear that that original offer was put forward on a 'take it or leave it' basis, rather than as a basis for genuine negotiation. Neither of the offers addressed in any meaningful way the Pages' desire to relocate the business. Although the most recent offer included a sum for fitting out, the costs of such works could not be fully known until a relocation site had been identified. The unnecessary delay in making any serious offer, and the failure of that offer to acknowledge the Pages' strong preference for relocation over extinguishment, reinforces the conclusions that I have come to as to the nature of the engagement process, as set out above.
111. It is possible that the Pages' insistence on an external smoking and break-out area went beyond what some other operators might require. But the point of the exercise was to relocate the existing business, not simply to make generic provision for any nightclub. In their existing premises, Smokeys has the benefit of an external terrace, which is evidently well-used. It was not unreasonable for the owners to want to achieve a like-for-like replacement for that facility.
112. It might also be possible to identify other faults with the Pages' contribution to the process. The family could have been more proactive at times. They could have been clearer about their requirements. They could have engaged their own designer to help steer the process. Had they done these things, they might have been in a better position now. But the Pages were not the instigators of the redevelopment; the job of smoothing the path for that development fell to RBWM and their partners, not to those who happened to lie in the way. The failures of RBWM and Areli to deal with the smoking area issue more expediently, and to give more effective help in exploring other relocation sites, were not caused by any shortcomings on the part of the Page family.
113. In the light of all the above, I conclude that, in their dealings with the Page family, the acquiring authority RBWM and their partners Areli failed to meet the requirements of the CPO Guidance. They failed to engage constructively

with regard to the relocation of Smokeys, or to establish good working relations with the owners, or to treat them with appropriate respect. Had better efforts been made, it is possible that a mutually satisfactory relocation could have been arranged. In the case of Smokeys therefore, it has not been demonstrated that the present proposal for compulsory purchase has been arrived at only as a last resort.

Human rights

114. Article 1 of the First Protocol of the Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, provides protection for the peaceful enjoyment of possessions. The unexpired term of the Pages' existing lease is such a possession, and the compulsory acquisition of that lease would therefore infringe Lee and Dean Page's rights to the peaceful enjoyment of their property. Such rights under Article 1 are qualified, rather than absolute, and therefore must be weighed against the wider public interest, having regard to the impacts on them and the proportionality of such impacts.

Conclusions on the objection by L & D Page

115. The compulsory acquisition of the Page family's lease on Unit 24a of the Nicholson Centre would in all probability result in the forced closure of Lee and Dean Page's business, Smokeys Nightclub. As things stand, the club has no satisfactory alternative premises into which it could relocate. It has no apparent prospect of finding such premises prior to the date when vacant possession would be required, and no clear prospect within any reasonable timescale, even after that date. The most likely outcome seems to be that the club would not reopen, and the business would cease trading.
116. For the two objectors, this would mean, at the least, the loss of their employment and income. In addition, they would lose the business which has been the focus of their family life for two generations. This would inevitably be a severe blow, with potential adverse consequences for their well-being, and that of their families, including children.
117. Lee and Dean Page would receive compensation. However, given the particular circumstances of their business, there is no guarantee that this would leave them in a position equal to that which they have now.
118. In any event, the potential injury to them has been exacerbated by the unsatisfactory way that they have been treated during the gestation of the proposed development and throughout the CPO process. That process has been largely characterised, on the part of the Order's promoters, by a lack of care for the Pages' legitimate concerns, a lack of constructive or meaningful negotiation, and a failure to take opportunities to mitigate the impact on them. From the way that these matters were handled, the compulsory purchase of the Pages' interest appears to have been treated as inevitable from the start, rather than a last resort.
119. For Maidenhead, the closure of Smokeys Nightclub would mean the loss of a leisure facility and performance venue which is evidently valued by many and seen as an asset to the town.
120. For the reasons that I have identified elsewhere in this decision, I am satisfied that the development of the Nicholson Quarter would bring substantial

benefits to the town, and for the Borough as a whole. However, the harm that Lee and Dean Page would suffer due to the compulsory acquisition of their business would be severe. It has not been demonstrated that the public benefits of the development could not be gained without the need for such a degree of harm to these objectors. In these circumstances, the injury caused to Lee and Dean Page, as a result of the interference with their rights of ownership, would be disproportionate to the benefits.

121. I conclude that a compelling case for the compulsory acquisition of Smokeys Nightclub has not been shown.

Objection by Aegon UK Property Fund Ltd

The objection

122. Aegon UK Property Fund Limited holds long leases on the 8-storey office block Nicholson House, and two floors of the existing multi-storey car park. The unexpired terms are 967 years and 112 years respectively.
123. The CPO proposes to compulsorily acquire Aegon's interests in the multi-storey car park (Plots Nos 1/51 and 2/3 on the Order Map). In the case of Nicholson House itself, the Order proposes to acquire just the basement (Plot B1), which houses electricity switchgear and also serves parts of the shopping centre. The loss of the basement, and its severance from the remainder of the building, have not been objected to.
124. In relation to the above-ground parts of Nicholson House (Plots Nos 101, 102 and 173), the Order proposes to acquire new rights, in respect of access and general construction, oversailing, scaffolding and hoardings, service media, and party wall works.
125. The grounds of objection are discussed below.

Grounds

Exclusion of Nicholson House

126. Aegon objects to the fact that the Order does not propose to acquire Nicholson House as a whole, other than the basement. In the objector's view the proposed Nicholson Quarter development should include the complete demolition and redevelopment of the existing office building. From the start, Aegon has expressed a willingness to sell its leasehold interest, and discussions were held with Areli on this basis. The company maintains that the inclusion of the building would avoid any problems during construction and result in a better scheme.
127. I accept that the inclusion of Nicholson House might potentially have had some advantages for the development; possibly including the ability to deliver additional public benefits, although the nature and extent of any such advantages have not been demonstrated. However, the scheme that is relied on to justify the CPO is the one for which planning permission has been granted, and that scheme excludes all the above-ground parts of Nicholson House. There is no evidence that the acquisition of the whole building is necessary to deliver the Nicholson Quarter as currently permitted.
128. Furthermore, for the reasons set out elsewhere in this decision, I have found that the permitted scheme would accord with the area's planning framework,

and deliver significant benefits to economic, social and environmental well-being. It is therefore not necessary to extend the development, by the inclusion of Nicholson House, to satisfy this requirement.

129. From the objector's point of view, the acquisition of Nicholson House by Denhead SARL would relieve them of their concerns regarding the impacts of construction work on the building itself and its occupiers, and also regarding any on-going effects on future lettings. But these are matters which can be taken into account in the assessment of compensation.
130. It follows therefore that a modification to the CPO to require the inclusion of the whole of Nicholson House cannot be justified. Nor would it be reasonable to refuse to confirm the Order on this basis.

Lack of negotiation

131. The basis of the objection on this ground is primarily that no financial consideration was offered to Aegon as compensation, either for the new rights sought, or for the surrender of the lease on their parking spaces. The objector also alleges a lack of clear information about the terms of the CPO prior to the date when it became formally made.
132. From the evidence provided, it appears that discussions between Aegon and Areli Real Estate commenced in early 2019, at the initiative of Aegon's agent Oxygen. In these initial meetings and discussions, the main focus was on the possibility that Denhead SARL might wish to purchase Nicholson House by private treaty. That possibility continued to be discussed intermittently over the next few years, and evidently Aegon remained keen in principle throughout, but eventually Denhead chose not to proceed with any acquisition of the building.
133. According to The Authority's summary²⁰, a proposal for the temporary and permanent relocation of Aegon's parking spaces was first made in an email from Areli to Oxygen on 31 January 2020, and this was rejected. The next discussion on that matter took place at a meeting on 3 February 2021, when Areli informed Aegon that a CPO was being considered. As well as car parking, issues relating to construction impacts, and temporary access for Nicholson House were discussed, and a suggestion was made by Areli for some form of co-operation agreement on these issues. Following some further correspondence, the idea of a co-operation agreement was raised again in an email from Areli on 4 May 2021. This apparently received a cautious but generally welcoming response in an email from Oxygen on 2 July 2021, and was discussed at a meeting shortly afterwards on 21 July 2021.
134. At a further meeting on 2 August 2021, Areli tabled a draft Heads of Terms, on a 'without prejudice' basis. The document has not been produced in evidence to the present inquiry, but it is not in dispute that it included proposals for the surrender of Aegon's car parking lease, the provision of replacement spaces, and the granting of construction rights over Nicholson House. In an email dated 13 September 2021, Aegon rejected these terms and sought to return the discussion to a sale of the building. At a further meeting on 22 September 2021, and some subsequent phone calls and emails over the next few months, the parties maintained and re-stated these

²⁰ Doc H39, Negotiation Record Sheet

respective positions. This remained the position up to the point when the CPO was made, on 22 February 2022.

135. Since then, discussions have taken place with a somewhat increased frequency. According to the Authority's note²¹, Areli have provided further information including demolition and delivery strategy reports; they have put forward proposals for a rent guarantee scheme; and to mitigate any losses, by locating their contractors' technical personnel in Nicholson House during the construction period; and they have offered to collaborate with Aegon over both parties' respective plans for works to the building. Aegon have rejected the rent guarantee scheme, and maintained their preference for an outright sale of the building. The evidence on these matters does not appear to be disputed.
136. I agree that it might have been better if the Heads of Terms had included a financial proposal of some sort, even if nominal, to recognise that what was being sought at that stage was a voluntary agreement that would benefit primarily Areli and their partners. It might also have benefited from including more detail regarding the proposed new rights, and about the intended works affecting Nicholson House. But nevertheless, the document was by all accounts a draft, and it was open to Aegon to propose amendments or additions. In putting forward their proposal, Areli had shown a willingness to negotiate an agreement, which with reasonable good will on both sides could have avoided the need for powers of compulsion in this case. In the light of Aegon's apparent refusal to consider anything other than a sale, Areli and RBWM had no choice but to pursue the CPO route in respect of the particular plots covered by Aegon's interests.
137. I note that Aegon's letter to RBWM's Chief Executive in July 2021 is said to have gone unanswered, but there is equally no evidence that the letter was followed up by Aegon themselves. This does not change my view as to where the responsibility lies for the failure of these negotiations.
138. In relation to this objection therefore, I am satisfied that the Authority and their partners took reasonable steps to acquire the necessary rights by agreement, and that compulsory purchase was used only as a last resort.

Effects on the structural stability of Nicholson House

139. Nicholson House and the Nicholson Shopping Centre are physically attached to each other, and the proposed development would require them to be separated. The rights conferred by the CPO would include a right to demolish adjacent structures and provide new temporary and permanent support.
140. However, it is common ground that Nicholson House was constructed as a stand-alone building, before the shopping centre. The written and oral evidence of the Authority's construction witness Tim Cole makes clear that he is now satisfied that neither building depends on the other for vertical support. This evidence is supported by a demolition strategy report and photographs. There is no technical evidence to the contrary.
141. This being so, there seems no reason to foresee any particular technical difficulties in separating the shopping centre from Nicholson House, and then carrying out the demolition of the shopping centre. It follows that the

²¹ Doc H39, Negotiation Record Sheet

granting of the proposed new rights, including those for party wall operations and general construction, would not appear likely to pose any risk to Nicholson House's structural integrity or stability.

142. As far as I am aware, all existing legal protections and remedies against damage or injury would continue to apply.

143. I therefore find no basis for refusing to confirm the Order on this ground.

Pedestrian access to Nicholson House during construction

144. During the construction period, the existing pedestrian access to Nicholson House, through the shopping centre, would become part of a construction site where demolition and building work would need to take place. Occupiers and visitors would have to pass through that area to gain access.

145. However, Mr Cole's evidence shows how safe access could be provided, using an enclosed, rigid, protective steel corridor. This could be fitted out and finished to a specification to be agreed. From the examples provided, this appears to offer a safe, tried and tested solution. All existing building site safety regulations would continue to apply.

146. I have no doubt that users would suffer some temporary reduction in amenity, but the degree of inconvenience, would be relatively minor. The objection on this ground does not justify withholding confirmation of the Order.

Environmental impacts on Nicholson House during construction

147. During the construction period, building works would be going on around Nicholson House on three sides. Occupiers and visitors would be likely to experience some noise, vibration and dust from construction activities. Views from the building's windows would also be dominated for a while by these activities. To a degree, these impacts could be controlled and mitigated, as set out in the Construction Environmental Management Plan, but even so, I agree it is likely that users of Nicholson House would suffer some reduction of amenity for the duration of the works.

148. However, these effects are largely ones that would arise from the construction of the development anyway, irrespective of the rights that would be gained through the CPO. The confirmation of the Order would enable some limited additional construction works that could not otherwise take place, and these would include some works to Nicholson House itself; including the severing of the connections with the shopping centre, and the recladding and alterations to the ground floor walls. But in the context of all the other works taking place in the building's vicinity, the works that are proposed to Nicholson House would be a relatively small element. The additional environmental impacts resulting from the rights provided by the Order would thus be minor.

149. In any event, temporary noise and visual impacts are a normal part of any major construction project, and are taken into account in the planning process. Noise or other impacts amounting to a statutory nuisance would be preventable under the Environmental Protection Act 1990.

150. None of these matters therefore provides any proper basis for refusing to confirm the Order.

Effects on car parking for Nicholson House

151. Aegon's existing leased parking spaces would all be compulsorily acquired. But during construction, replacement parking of a like-for-like number is proposed at the Hines Meadow car park, which is only a fairly short walk away. On completion of the development, permanent reprovision is proposed in the new car park within the development, which would be a similar distance from Nicholson House as at present.
152. Some inconvenience would be caused to tenants of Nicholson House as a result of the greater distance of the temporary provision. But if this were to result in Aegon incurring a loss of rental income, such loss would appear to be capable of qualifying for compensation. No significant detriment seems likely to arise from the proposed permanent parking arrangements following completion.
153. Neither of these proposed temporary or permanent arrangements is guaranteed by way of planning conditions or obligations. However an agreement was evidently offered and turned down. And be that as it may, in the event of any failure by the developer to adhere to the stated proposals, resulting in loss due to a reduction in value, this would again be recoverable through the compensation process.

Fire escape and emergency access

154. Provisions for maintaining fire and emergency access, both during construction and after, have been set out in some detail in the evidence of Mr Cole and Mr Adams. These proposals seem to me well thought out and I have no reason to doubt their adequacy. The developer and contractor would in any event be bound by all relevant safety legislation.

Effects on lettings at Nicholson House

155. On my visit to Nicholson House, I saw that several of the office suites are currently unoccupied and on the market for re-letting. The prospect of major building works may be a factor in the current downturn in the level of occupancy, but so could other factors. It is acknowledged that, when construction starts, new lettings are likely to be adversely affected, albeit that on the eventual completion of the works, the improved external environment may mean that the eventual lasting impact is a positive one.
156. But losses attributable to the development will again generally fall within the scope of the compensation provisions. There seems no reason to doubt that any such losses relating to the likely temporary adverse impact on new lettings can if necessary be dealt with in this way.

Effects on NHS services

157. Part of the Nicholson House office space is let to the Berkshire Healthcare NHS Foundation Trust for the provision of mental health services. The users of those services may include some who are vulnerable or have special needs.
158. However, there is no evidence that the Trust's services would be affected. Building access would be maintained. Parking would continue to be provided. Whilst this would involve a longer walk during the construction period, there is no evidence that this would be a particular problem for patients of this

service. Disabled parking is proposed to be maintained for those who need it. Despite the likely impact on environmental conditions within the building during the construction period, there is no evidence that it would become unusable for the provision of health services. The Trust has not objected to the CPO.

Effects on future residential conversion

159. Prior approval exists for the conversion of Nicholson House to 37 residential apartments. Although there appears to be no immediate intention to implement this permission, I appreciate the desire of the owners to preserve the benefit of it.
160. During construction the environment of the building would be affected in the ways that I have identified, and this would be likely to have some impact on the prospects of marketing residential units during that period. But after completion, the overall effect on the surroundings would be an enhancement compared to the existing situation. The likelihood of any detrimental financial impact would therefore depend to a large extent on the timing of the residential conversion, which would be a decision which would be within the building owner's own control.
161. In any event, any impact in this respect would largely relate to the effects of the development itself, and not those of the CPO.

Viability, funding, and impediments to delivery of the development

162. The matters raised by Aegon UK in relation to these issues are discussed in paragraphs 43-49 of this decision. For the reasons explained there, I am satisfied that, if the Order were confirmed, the development would have a reasonable prospect of delivery.

Planning policy and affordable housing

163. The matters raised by the objector in relation to these issues are likewise discussed elsewhere in this decision, at paragraphs 39-42. For the reasons explained therein, I am satisfied that the development accords with the policy framework for the area.

State aid considerations

164. When RBWM entered into the development and Land Swap agreements with Denhead SARL, that company already owned the freehold of the majority of the Order Lands. There would therefore have been little point in the Council attempting to enter into any similar agreements relating to this site with any other party. In these circumstances, the Council's preference for Denhead SARL clearly did not have the effect of denying an opportunity to any other potential bidders, nor did it distort or inhibit fair competition.

Human rights

165. As with any CPO, the confirmation of the present Order would interfere with Aegon's rights under Article 1 of the First Protocol. But in view of the conclusions that I have come to above, the adverse impacts on them would be relatively minor, and for the most part any financial losses would qualify for compensation. The proposed scheme could not be developed without undertaking works to, or within the demise of Nicholson House, or without the

demolition of the existing car park. The effect on the objector would therefore not be disproportionate. In my judgement, the infringement with their rights of ownership would in this case be lawfully outweighed by the scheme's public benefits.

Conclusion on the objection by Aegon UK Property Fund Ltd

166. I conclude that none of the matters raised in the objection by Aegon UK, either individually or collectively, are of sufficient weight to outweigh the public benefits that would be realised through the proposed Nicholson Quarter development. The objection does not provide sufficient substantiated grounds to justify withholding confirmation of the Order.

Objection by WH Smith Retail Holdings Limited

The objection

167. WH Smith holds a lease on the retail premises known as Units 16-22 (evens), on two floors of the Nicholsons Shopping Centre (plots 35 and 1/19 on the Order Map). The lease runs to July 2025. The company is also listed in the Order Schedule as the occupier of a rear yard behind these premises (plot 37), and as one of the occupiers of the main first floor service deck (plot 1/9).

168. The CPO proposes to acquire all of these interests.

Grounds

Uncertainty over reprovion or relocation

169. WH Smith states that it wishes to retain a presence in Maidenhead, but has been unable to identify any suitable premises which will be available in time for the vacant possession date. No offer has been made to provide a new unit for WH Smith in the proposed development. No guarantee has been given as to whether the scheme will include any unit matching the company's requirements, nor whether any such unit would be made available to them.

170. The Authority says that it has suggested various options which are available, or will become so, but acknowledges that these were found unsuitable by the objector. Continuing assistance is said to have been offered. The Nicholson Quarter development will provide new retail units, and it is likely that suitable provision can be made.

171. I appreciate that the prospect of the scheme creates uncertainty, and I can understand the objector's desire for a greater degree of reassurance. Clearly it would be to the advantage of all parties if a relocation site could be identified at an early stage. However, a range of sizes of retail units is planned in the proposed scheme, and it seems probable that there would be suitable options for a WH Smith shop within the development. Even if not, when the development opened there would be likely to be some movement amongst other retailers in the town, and thus other opportunities might well arise at that stage.

172. The situation that these objectors find themselves in is therefore different from that of Smokeys Nightclub, in that there is a reasonable prospect of suitable provision becoming available, without any apparent need for changes to the proposed scheme. I am not in a position to require any undertakings from any party on a commercial matter of this nature, nor can I make a

decision that is conditional upon such an arrangement. On balance, the lack of certainty for WH Smith, regarding reprovision or relocation, does not warrant a refusal to confirm the Order.

Loss of the Post Office

173. The Post Office counter within the objector's existing store is an important public facility, and if it were lost due to the proposed development, that would be a big loss for the town, causing inconvenience to many. However, there is no suggestion that the Post Office service in Maidenhead is tied to operating only through a branch of WH Smith. In the event that WH Smith was unable to relocate, it seems likely that alternative provision could be made, either independently or in association with another retailer.

Human rights

174. The loss of the existing lease, two years ahead of its natural expiry, would infringe the objector's rights to peaceful enjoyment of their possessions. But the financial loss would qualify for compensation, and there is no suggestion that either the company or any other person would suffer hardship. The proposed scheme could not be developed without the demolition of the existing shopping centre. Overall, the injury to the company's rights would be lawfully outweighed by the proposed development's benefits to the general public.

Conclusion on the objection by WH Smith Retail Holdings Ltd

175. Any losses suffered by the objector would be likely to be compensated, and in the circumstances, the harm suffered would not be so great as to justify withholding confirmation of the Order.

Objection by Lloyds Bank PLC

The objection

176. Lloyds Bank PLC is the leaseholder of 45 High Street, and by virtue of its lease the Bank benefits from rights of way over the yard to the rear of that property (plot 131 on the Order Map) and the accessway known as Bankside (plot 132). The lease runs to March 2027.

177. The CPO seeks new rights over both of these plots, for access and general construction, oversailing, and future access and maintenance. In the case of plot 132, rights for scaffolding and plant are also sought.

Grounds

Obstruction of access and emergency escape

178. The objector states that the rear yard and Bankside are needed as part of a designated fire and emergency escape route for staff and customers. The Bank has a legal requirement to ensure that this route is kept clear. Any obstruction to essential emergency routes by scaffolding, plant, or construction works could create a danger to the public and potentially result in the Bank needing to close.

179. In addition, these areas are said to be used for access to the Bank, for maintenance, by tradesmen, and for refuse collection. Obstruction of access for these purposes would cause inconvenience and operational difficulties.

180. However, from the evidence presented to the inquiry, it appears that any existing rights held by the objector or others over the land in question would not be extinguished, but rather the new rights which are sought under the CPO would sit alongside those rights. In any event, the developer and contractors would be bound by relevant site safety, fire safety and building regulations. In the extreme, compensation would be likely to be claimable for any loss of revenue suffered by the Bank.
181. In any event, the purpose of including these two plots appears to be principally for the purpose of carrying out a comprehensive upgrading of pavings, surfacing and hard landscaping treatments in the areas around the periphery of the development. This purpose would have long-term public benefits to be weighed against any temporary impacts.

Use of the rear access for bin storage

182. The objector states that use is made of the rear yard and Bankside for storing refuse bins. No evidence has been presented of any rights for use other than for access, but in any event, it seems likely that any interference with such use would be likely to be of relatively short duration.

Security

183. The objector raises a concern that the erection of scaffolding could give access to upstairs windows or flat roofs. However, no works are proposed to the Bank itself or other adjoining properties in High Street or Queen Street, so any scaffolding that may be required seems unlikely to be directly adjacent to the Bank premises.

Lack of negotiation

184. Discussions have evidently taken place, and a draft agreement prepared by the objector is under consideration. I appreciate that the objector would have preferred to see further progress on this, but the objector acknowledges that the developer has shown at least some willingness to engage.

Conclusion on the objection by Lloyds Bank PLC

185. The likelihood of significant harm being caused to the objector as a result of the new rights sought seems fairly remote. There is also a reasonable prospect of an agreement which would further reduce that risk. Balanced against the benefits of the development, the potential for harm is clearly outweighed. A refusal to confirm the Order on this basis would therefore not be justified.

Objection by Matthew James

The objection

186. Mr James owns the leasehold of one of the residential apartments at Cresset Court. The building as a whole is plot 120 on the Order Map.
187. The Order seeks to acquire new rights over Cresset Court, in relation to construction and general access, oversailing, scaffolding and party wall matters.

Grounds

Overlooking and loss of outlook

188. Mr James is concerned about a perceived loss of outlook and privacy at his apartment, arising from the proposed development when completed. However, matters relating to these issues have already been considered within the planning process, and were taken into account in the Council's decision to grant planning permission for the development.
189. The confirmation of the CPO would facilitate the carrying out of the development, but would not change or exacerbate its impacts on the privacy or outlook of neighbouring properties such as the objector's; those impacts would remain as already approved. The objection on these grounds therefore relates essentially to the merits of the original planning decision, rather than to the effects of the proposed CPO.
190. The decision that is now required, as to whether to confirm the CPO, is not an opportunity to reconsider those planning merits. As such, the objection on this ground is not relevant to my decision.

Loss of light

191. Mr James also states that the development would cause a loss of light to the bedroom of his apartment, reducing the proportion that is well-lit from 49% to 33%. In this respect, the Authority accepts that the property in question is presumed to have a right to light, for which a claim for compensation may be made. However, in this case, such rights are said to have been reserved to the owner of the freehold²².
192. In so far as this ground of objection relates to a general impact on light, as opposed to any legal rights of light, then the objection is again concerned with the merits of the original planning application, which has already been determined, and not the merits of the Order which is now under consideration.

Noise, dust and disturbance

193. As at Nicholson House, Cresset Court is surrounded by the Order Lands on three sides, and the apartments there would be likely to experience some noise, dust and disturbance during the construction phase. Whilst these impacts could be mitigated to a degree by the measures set out in the Construction Environmental Management Plan, it is likely that the residual effects would be noticeable to occupiers during the period of the works. However, these impacts have been taken into account during the planning process, and were considered not to outweigh the development's benefits.
194. The new rights sought under the present CPO would provide for the siting of scaffolding on land belonging to Cresset Court. This could potentially create some additional noise and disturbance during erection and dismantling, but these stages would be likely to be limited in duration. Scaffolding would not be expected to generate dust.
195. The Order would also authorise party wall works and general access and construction. But given that Cresset Court lies outside the planning

²² Doc H41: 'Compensation Eligibility of Objectors' schedule

application boundary, and the permission therefore does not authorise any actual development on Cresset Court land, it seems likely that any works undertaken at that property as a result of these particular rights would be minor.

196. In addition, the Order would also permit oversailing by cranes, but this would not normally be expected to give rise to any of the impacts which the objector is concerned about.
197. Consequently, in the context of the Nicholson Quarter development as a whole, any additional works in the vicinity of Cresset Court resulting from the confirmation of the CPO would be, at most, a minor additional element. The additional environmental impacts in terms of noise, dust and disturbance attributable to the Order would therefore be insignificant.

Conclusion on the objection by M James

198. I conclude that none of the matters raised in this objection provides any substantive basis for refusing to confirm the Order.

Objection by Robert Harding

The objection

199. Mr Harding has a 3-year sub-lease of part of the third floor office space at Nicholson House. On the Order Map this is part of plot 173. He is also listed as an occupier of part of plot 1/51, which is the first floor of the multi-storey car park.
200. The CPO proposes to compulsorily acquire all interests in the multi-storey car park. In relation to Nicholson House it proposes to acquire the basement, together with new rights in respect of access and general construction, oversailing, scaffolding and hoardings, service media, and party wall works.

Grounds

201. Mr Harding's objection is that in his view the Nicholson Shopping Centre and car park do not need to be redeveloped, and that to do so would be a waste of money. He also considers that Nicholson House provides good office accommodation.
202. My findings on the existing buildings, and the benefits of the proposed redevelopment, are set out in paragraphs 21-38 of this decision. To a degree, I agree with this objector, in so far as I have found that the need for redevelopment is not so overriding that it outweighs all of the objections before me. But nonetheless, the benefits of the scheme now proposed are substantial, and these benefits are recognised in my decision.
203. The development, were it to proceed, would be funded wholly by private investment. That is not to say that no public expenditure has been incurred; clearly the Council has put a good deal of time and manpower into the CPO and associated legal agreements. But the costs of construction and the risks associated with that process would be borne by the private sector, and as I have commented elsewhere, the scale of the investment involved, and the value to the local and national economy, seems to me to count in favour of the scheme.

204. I agree that the office space offered by Nicholson House serves an important function in maintaining some variation in the type, quality and cost of offices available in Maidenhead. In the proposed scheme, the existing office building is proposed to be retained, and its setting enhanced. Consequently, the overall effect on Nicholson House would be a beneficial one.

Conclusion on the objection by R Harding

205. The matters raised do not cause me to depart from my earlier conclusions, and thus do not warrant refusing the confirmation of the Order.

Objection by Brock House Investments Limited

The objection

206. Brock House Investments Limited owns long leases on nine flats at 57 High Street, which is numbered plot No 126 on the Order Map. The company is also listed as an occupier of parking spaces forming part of the first floor service yard of the Nicholson Shopping Centre, plot No 1/38.
207. The CPO proposes to acquire all interests in the service yard. It is also proposed to take rights over Brock House land in respect of access and general construction, oversailing, scaffolding, plant, fire escape and party walls.

Grounds

Car parking

208. The objection relates to the loss of the existing parking spaces in the multi-storey car park which are leased by the objector and allocated to occupiers of the flats at Brock House. These would be compulsorily acquired.
209. However, during construction, replacement parking of a like-for-like number is proposed at the Hines Meadow car park, which is a short walk away. On completion of the development, permanent reprovision is proposed in the new car park within the development, which would be approximately 100m from Brock House.
210. Some inconvenience would be caused to occupiers of Brock House as a result of the greater distance of the temporary provision. But if this were to result in the objector incurring a temporary loss of rental income, such loss would appear to be liable for compensation. No significant detriment seems likely to arise from the proposed permanent arrangements following completion.
211. Neither of these proposed temporary or permanent arrangements is guaranteed by way of planning conditions or obligations. However, in the event of any failure by the developer to adhere to the stated proposals, resulting in loss due to a reduction in value, this would again be recoverable through the compensation process.

Conclusion on objection by Brock House Investments Ltd

212. Any injurious effect on the objector arising from the changes to car parking arrangements is capable of being remedied by compensation. The objection therefore does not give rise to any justifiable reason to withhold confirmation of the Order.

Objection by Telefonica UK Limited

The objection

213. Telefonica UK Limited is the leaseholder of retail premises at 61 High Street. The rear part of the premises is identified as plot 124 on the Order Map.
214. The CPO seeks to acquire rights over this rear part of the property, for access and general construction, oversailing, scaffolding, plant, and fire escape.

Grounds

Effects on existing rights of way, fire escape and support

215. Telefonica UK states that 61 High Street benefits from rights of way, fire escape, and support from adjoining land and buildings, including parts of the Nicholson Shopping Centre. These adjoining plots are to be redeveloped as part of the proposed development, and existing rights over them would be extinguished by the CPO.
216. However, the evidence produced to the inquiry by Mr Conboy, Mr Cole and Mr Adams all explains at some length how it is proposed to provide a new fire escape for No 61 and other adjoining properties, replacing the existing arrangements; and also to widen and upgrade the existing network of shared rear access passages, and incorporate these into a proposed new public realm area as part of the development. This evidence also shows how access and fire escape to the objector's property can be maintained throughout the demolition and construction process. To my mind, the effect of these works would be to achieve an improvement over the existing arrangements serving the property.
217. The rights which are sought under the Order all appear to me to be necessary for the purpose of carrying out these alterations to the existing rear access and fire escapes. Such rights would only be required during the construction of these particular works, and their effect would be limited to that period. The new rights required are also proposed to be confined to a small part of the premises. I am therefore satisfied that the new rights sought are no more than what is strictly necessary in this case.
218. The provision of the proposed works serving No 61 does not appear to be secured by way of planning conditions or planning obligations, but nevertheless it seems clear that the developer would be obligated to ensure satisfactory provision for the property by virtue of other relevant legislative provisions. In any event, any failure in this respect would be likely to give rise to compensation.

Effects on the operation of the objector's business

219. The objector is concerned about a lack of clarity as to the extent of what would be permitted by the new rights, and the potential effects on the daily running of their business.
220. Having regard to the matters set out above, I consider that in this case the rights in question are sufficiently clear. For the reasons already stated, I am also satisfied that they are necessary, and therefore I do not consider them unduly onerous.

221. The right which is sought in relation to general construction states that exclusive possession will not be required of any part of the land for that purpose. Whilst there is no corresponding provision in relation to the other rights that are sought, there seems no reason why the exercise of any of the rights in question should be likely to result in the tenant being excluded from the premises to such an extent as to interfere with the running of their retail business.

Lack of negotiations

222. The objector states that, prior to the start of the inquiry, there was limited communication from either the acquiring authority or the developer, and no opportunity for negotiation. Latterly, a draft agreement had been received, but as at 27 October 2022, the terms as drafted were not considered acceptable.

223. The alleged lack of engagement is disputed by the Authority and Areli, who refer to discussions and correspondence with an agent acting for Telefonica, in March, August and September 2022, and also with the freeholder of the building.

224. I agree that the lateness of the draft agreement was poor practice. I am not able to judge the contents of the agreement, as the draft is not before me, but it appears that the discussions on this are on-going, and that some prospect of concluding it is seen as a possibility by both parties. Overall, I consider that the steps taken have been reasonable.

Funding for the development

225. My conclusions on the apparent availability of funds to carry out the Nicholson Quarter development, and related issues, are contained at paragraphs 43-49 of this decision. For the reasons already explained, I am satisfied that, if the Order were confirmed, the development would have a reasonable prospect of delivery.

Conclusion on the objection by Telefonica UK Ltd

226. I conclude that the matters raised in the objection by Telefonica UK Limited do not outweigh the benefits of the proposed development, and therefore do not justify refusing confirmation of the Order.

Objection by McDonald's Global Markets LLC and Others

The objection

227. The objection is made by McDonald's Global Markets LLC, McDonald's Restaurants Limited and APPT Corporation. These parties include the leaseholders and franchisee of the existing restaurant premises at 63-67 High Street. Parts of these premises are identified on the Order Map as plots 121, 122 and 123.

228. In the case of plot 123, the CPO seeks rights for access and general construction, oversailing, scaffolding, plant and fire escape. For plots 121 and 122, the Order seeks rights of oversailing only.

229. McDonald's Restaurants Limited is also listed as an occupier of parking spaces within the shopping centre service deck (plot 1/38), and the objectors

collectively state that they have rights over various parts of the shopping centre and surrounding land, including plots 68, 69, 86 and 1/48, for access, servicing, fire escape and support. In all of these plots, all interests are proposed to be acquired, and the buildings demolished.

Grounds

Servicing arrangements

230. The objectors raise concerns regarding the loss of their use of the shopping centre's service deck and goods lift. In the proposed development, loading and unloading for High Street units would take place from Nicholson Lane, using trollies. This would be at a greater distance from the objectors' premises than at present. However, the merits of this arrangement have been considered through the planning process and found acceptable, and the extinguishment of the objectors' rights with regard to the existing service deck are consistent with the planning permission. In the event that the resulting loss of convenience were to result in a reduction in the value of the objector's interest, or other financial loss, this would be a matter for compensation.

Fire escape

231. The objectors express concerns about the need to maintain a safe means of fire escape at all times. However, the evidence presented at the inquiry on behalf of the Authority and the developer explains how it is proposed to maintain the escape route from the objector's premises, during construction and afterwards, with only minor alterations to the existing arrangements. The rights that are sought appear to me to be the minimum that is needed to ensure that these works can take place.

Services and utilities

232. The objectors are concerned to maintain full services and utilities during construction. However, no specific rights in respect of these matters are proposed in the CPO, and in this regard therefore, the objectors' existing rights would be unaffected.

Hours of work

233. The objectors seek assurances that access to the restaurant for construction purposes would be limited to times outside of the restaurant's trading hours. The Order would permit access to the land for general construction purposes at all times. However, trading losses due to interference with business operations would be likely to be liable for compensation.

Boundary treatments

234. The objectors raise a concern regarding boundary treatments. A right to carry out boundary treatment works would be included in the provisions for general construction. However, the rights provided through the CPO would only remain in force for as long as needed to carry out the development. Nothing in the Order would prevent those with interests in the property from changing or replacing any boundary treatments after the completion of the development, subject to normal planning controls.

Construction impacts

235. The objectors suggest a need for protective provisions and safeguards during construction. However, matters of site safety would be the responsibility of the contractor. Matters of general environmental impact were considered during the planning process, and controls put in place through a Construction Environmental Management Plan. Those matters cannot be revisited now in the context of the present CPO.

Access and parking in the wider locality

236. Similar considerations apply to the issues raised by the objectors regarding access and public car parking in the wider area. These matters were also considered in the grant of planning permission. They are not affected by the CPO, and they have no bearing on my decision whether to confirm the Order.

Conclusion on the objection by McDonalds Global Markets LLC and Others

237. For the reasons given above, I find nothing in the matters raised in the objection by these objectors to justify withholding confirmation of the Order.

Objection by Tom Fraser

The objection

238. Mr Fraser represents the owners of Nos 34 and 34A Queen Street. Part of the rear yard attached to these properties is identified as plot 158 on the Order Map. Also attached to the property is part of the shared private access known as Queens Lane, which is numbered plot 157.

239. In the case of plot 158, the CPO seeks rights of access and general construction, oversailing, and access for the purpose of constructing temporary access to adjoining properties. At plot 157, the Order seeks these same rights, and in addition rights for scaffolding, plant and deliveries.

Grounds

Loss of light

240. The objection is stated to be to any works that affect the property including rights of light. In so far as the objection relates to rights of light, if such a right is proven, a remedy is available through compensation. If a right of light is not established, the objection on this ground appears to be primarily a planning matter, unrelated to the rights and acquisitions proposed in the present Order. No other specific grounds of objection are identified.

Conclusion on the objection by T Fraser

241. In the circumstances, I find nothing in the objection to justify withholding confirmation of the Order.

Objection by MNK Estates (UK) Limited

The objection

242. The objector refers to premises at 33-37 Queen Street. The CPO contains no proposals for the acquisition of any interests in this property, nor for the creation of any new rights over the property.

Grounds

Loss of light

243. The objection is stated to relate to rights of light. In so far as this ground is concerned, if such a right is proven, a remedy is again available through compensation. If the right to light is not established, the objection on this ground is a planning matter, unrelated to the present Order for compulsory purchase.

Disruption to businesses and residents

244. The objection refers also to long-term disruption due to the scale of the development. Again, this objection appears to be directed at the development's planning merits rather than those of the CPO.

Conclusion on the objection by MNK Estates (UK) Ltd

245. The objection provides no substantive grounds to warrant the non-confirmation of the Order.

INSPECTOR'S OVERALL CONCLUSIONS

246. For the reasons set out above, I am satisfied that the redevelopment of the Order Lands, in accordance with the planning permission for the Nicholson Quarter mixed-use scheme, would accord with the BLP's policy framework for the area, and would bring significant benefits for the social, economic and environmental well-being of the town. I have found no reason to doubt that the development is financially viable, and free from impediments, and that the necessary resources are available; as such, I accept that the scheme would have a good prospect of proceeding.

247. However, I have found that the compulsory acquisition of the lease for Smokeys Nightclub would be likely to result in the club's closure, contrary to the wishes of its owners, Lee and Dean Page. The nightclub has no apparent prospect of finding satisfactory alternative premises within a reasonable timescale, and there is a consequent likelihood that the business would be forced to cease trading. The impact on the Page brothers would be particularly severe, because of the club's historic central role in their family life, and also because of their own personal commitment to it. Moreover, the closure of Smokeys would also mean the loss of a valued facility for the town.

248. This position could potentially have been avoided, had there been a proper degree of constructive engagement on the part of the acquiring authority and its partners, and a genuine willingness to explore options for the club's relocation; including all options within the proposed scheme itself that might have been able to meet the club's reasonable requirements. The failure to pursue meaningful negotiations with the Page family means that, with regard to their particular interest, it does not appear that compulsory purchase is being proposed only as a last resort.

249. As a result, despite the proposed development's acknowledged public benefits, it has not been demonstrated that those benefits could not equally be gained without the likely need for Smokeys to close, and without the consequential adverse impacts for both the objectors and the town. In these circumstances, the interference with Lee and Dean Page's human rights would be disproportionate.

250. With regard to the other remaining objections to the CPO, I have found no others that carry sufficient weight as to justify refusing to confirm the proposed Order. But nevertheless, the objection by Lee and Dean Page carries enough weight on its own for me to conclude that in this case this must be the right and necessary outcome.
251. I fully accept that the benefits of the Nicholson Quarter scheme can only be achieved on this particular site, and that they can only be realised through a fully comprehensive development. There is no realistic prospect of any alternative scheme that would allow Smokeys Nightclub to remain in situ. And I am not in any doubt that any obstacle to the delivery of the present scheme would represent a significant setback to Maidenhead's regeneration. But these considerations do not outweigh my findings that the effects of the present Order on the objectors Lee and Dean Page would be disproportionate; and that the Order has not been shown to be a last resort.
252. I conclude that it has not been demonstrated that the confirmation of the Order is justified by a compelling case in the public interest.
253. The Order is therefore not confirmed.

J Felgate

INSPECTOR

APPEARANCES

FOR THE ACQUIRING AUTHORITY:

James Pereira KC, assisted by Daisy Noble of Counsel
(Instructed by Dentons LLP)

They called:

[REDACTED]
MRICS, BSC(Hons), PGDipTP, MSc

Managing director, RBWM Property Company

[REDACTED]
DipArch, MA Urban Design, RIBA,
ARB

Managing Partner, JTP Architects

[REDACTED]
HNC Building Construction

Project Manager, Blue Sky Building Ltd

[REDACTED]
BSc(Hons), MRICS, Registered Valuer

Director, Newsteer Real Estate Advisers

[REDACTED]
BA(Hons), MSc, MRTPI

Director, DP9 Planning Consultancy

[REDACTED]
MSc, MRICS

Development Director, Areli Real Estate

[REDACTED]
MSc MRICS

Director, Newsteer Real Estate Advisers

FOR L & D PAGE:

[REDACTED]
(Instructed by Blandy & Blandy)

She called:

[REDACTED] age

Joint owner of Smokeys Nightclub

[REDACTED]

Joint owner of Smokeys Nightclub

OTHER INTERESTED PERSONS:

[REDACTED]

Councillor for St Marys Ward
Local resident and customer of Smokeys
Local resident
Local Councillor

DOCUMENTS TABLED AT THE INQUIRY AND SINCE

(Numbers as per the list compiled by the acquiring authority, except where shown)

B16	Executed S106 agreement, dated 20 October 2022
B17	Planning permission Ref 20/01251, dated 21 October 2022
H14a	Equality Impact Assessment for CPO, 4 February 2021
H14b	Equality Impact Assessment for BLP, 30 November 2021
H15	Statement of Community Involvement, May 2020 (extract)
H16	'Timeline of emails and meetings' (L & D Page)
H17	Email from Areli, 14 Jan 2020 (Page doc 1)
H18	Email to councillors, 7 March 2021 (Page doc 3)
H19	Email to Cllr Haseler, 28 Feb 2021 (Page doc 4)
H20	Email from B Richardson, 2 Aug 2021 (Page doc 5)
H21	Emails to/from B Richardson, 6/7 April and 22 March 2021 (Page doc 6)
H22	Email from B Richardson, 27 May 2021 (Page doc 7)
H23	Emails to/from B Richardson, 25 Feb and 2/3 March 2021 (Page doc 8)
H24a	Emails to/from C Pearse, 19 and 24 March 2021 (Page doc 9)
H25	Plans attached to email dated 28 June 2022 (Page doc 10a)
H26	Heads of Terms (Page doc 10b)
H27	Emails from D Conboy, 1 July 2022 (Page doc 11)
H28	Emails to/from Cllrs Stimson and Carroll, 2 July 2020 (Page doc 12)
H29	Emails to/from Cllr Johnson, 6 Aug – 2 Oct 2020 (Page doc 13)
H30	Emails from G Blagden and J Wright, 9/10 March 2020 (Page doc 14)
H31	Letter from Areli, 28 Feb 2019
H32	Emails from G Blagden and B Richardson, 13 Jan 2021 (Page doc 17)
H33	Emails to/from J Lees and W Allen, 13, 16, 17 Nov 2020 (Page doc 20)
H34	Emails to/from Monitoring Officer, 16 – 22 March 2021 (Page doc 21)
H35	Local press item dated 1 April 2021 (Page doc 22)
H36	M Bodley – additional Appendices dated 26 Oct 2022
H37	Opening Statement on behalf of the Page family
H38	Stopping-Up Order correspondence with DfT
H39	RBWM's Negotiation Record Sheet – Nicholson House
H40	Opening Statement on behalf of the Authority
H41	'Compensation Eligibility of Objectors' - RBWM
H42	RBWM's Negotiation Record Sheet – Smokeys' Nightclub, with attached: H42a*: Emails D Conboy/G Blagden, 19 July – 30 Aug, 2022 H42b*: Plan – Zone 5 GF level H42c*: Emails to/from B Richardson and E Harris, 16 - 27 Nov, 2020 H42d*: Emails to/from B Richardson, 17 Dec 2020 – 13 Jan 2021 H42e*: 3 plans of GF unit with heights and measurements H42f*: Emails D Conboy/G Blagden, 19 July – 10 Aug, 2022
H43*	Inquiry notice, with photos and Certificate of Billposting
H44	Letter to Cllr Haseler, 28 Feb 2021 (Page doc 2, duplicate of H19)
H45	Smokeys' existing lease plan; and 5 x alternative layout options for Zone GF
H46	Smokeys' event advertisements
H47	Unit 24a, Smokeys' existing lease areas schedule and plans
H48	RBWM Licensing Policy
H49a	Transcript of Planning Committee meeting, 3 March 2021 (L & D Page)
H50	Closing Submissions on behalf of the Page family
H51	Closing Submissions on behalf of the Authority
H52	Letter from Blandy & Blandy, 1 Dec 2022 – re filing of JR claim
H53	Letter from Dentons LLP, 6 Dec 2022 - response

* Inspector's numbering

APPENDIX 9 – 14



National Highways

By email to: Raluca.mitu@nationalhighways.co.uk

National Transport Casework Team

Tyneside House
Skinnerburn Road
Newcastle Business Park
Newcastle upon Tyne
NE4 7AR

www.gov.uk

Email: nationalcasework@dft.gov.uk

Your Ref: 551514/SRO/DFT

Our Ref: NATTRAN/HE/HAO/249

Date: 8 June 2023

Dear Ms. Mitu,

THE HIGHWAYS ENGLAND (M27 SOUTHAMPTON JUNCTION 8 IMPROVEMENT SCHEME – M27 JUNCTION 8 AND WINDHOVER ROUNDABOUT) (SPECIAL ROAD) (SIDE ROADS) ORDER 2021 ("THE SRO")

THE HIGHWAYS ENGLAND (M27 SOUTHAMPTON JUNCTION 8 IMPROVEMENT – M27 JUNCTION 8 & WINDHOVER ROUNDABOUT) (SPECIAL ROAD) COMPULSORY PURCHASE ORDER 2021 ("THE CPO")

SECRETARY OF STATE'S DECISION - SRO AND CPO NOT TO BE CONFIRMED

1. I refer to National Highways (formerly Highways England) application for confirmation of the above-named Orders, which was submitted in July 2021. The Secretary of State for Transport ("the Secretary of State") has decided that the Orders will not be confirmed at present. This letter constitutes his decision to that effect.
2. The Orders had been made by National Highways to improve congestion, journey time reliability, resilience, and safety at the M27 J8 Windhover Roundabout.

CONSIDERATIONS FOR DECISION

3. 7 objections were received to the Orders, therefore the Secretary of State arranged for a joint Public Inquiry to be held at Highpoint Centre, Bursledon Road, Thornhill, Southampton between 10th May 2022 and 17th June 2022, before I Jenkins BSc CEng MICE MCIWEM, an Inspector appointed by the Secretary of State to hear those objections and representations. The main grounds of objection to the proposals were that other junctions nearby also needed improvements, the delivery

of the link road, flood risk and that there wasn't a compelling case in the public interest.

4. 3 objections were outstanding at the opening of the Inquiry and a further 2 representations supporting the scheme had been received. The Inspector has considered all the outstanding objections to and representations about the Orders both as made in writing and presented orally at the Inquiry and has since submitted his report to the Secretary of State. A copy of that report is enclosed with this letter. References in this letter to the Inspector's report are indicated by the abbreviation "IR" followed by the paragraph number in the report.
5. The Inspector summarises the case for National Highways at IR 4.1 to 4.14. The case for supporters of the scheme is summarised at IR 5.1 to 5.2. The case for the objectors is summarised at IR 6.1 to 7.2, including National Highways' response to individual objections. The Inspector's conclusions are detailed at IR 8.1 to 8.4 whilst his recommendations are given at IR 9.0. In light of his conclusions the Inspector has recommended that the Orders not be confirmed.
6. Following the close of the Inquiry, correspondence has been received from both National Highways and Mr Keeling's (one of the objectors) representatives. It is the Secretary of State's view that this correspondence reflects matters already dealt with in the course of the Inquiry and would not materially alter this decision. It will therefore not be commented on further.
7. The Secretary of State has considered carefully all the objections to, and representations about, the Orders, including alternative proposals put forward. He has considered the Inspector's report and has also considered the Orders in line with relevant guidance set out in *Guidance on Compulsory Purchase Process and The Criche Down Rules* and *The Highways Act 1980* in reaching this decision.

CONCLUSION

8. The Secretary of State has considered whether the purposes for which the CPO is required, sufficiently justify interfering with the human rights of those with an interest in the CPO and isn't satisfied that they do. In particular, the Secretary of State has considered the provisions of Article 1 of The First Protocol to the European Convention on Human Rights and the Human Rights Act 1998. In this respect, the Secretary of State isn't satisfied that confirming the CPO in its current form shows that a fair balance has been struck between the public interest and interests of the objectors, owners and lessees. Namely, it hasn't been clearly demonstrated that all of the land is required for the Orders to be properly implemented, including the land owned by one of the objectors, Mr Keeling, where an intended flood basin was to be situated.
9. The Secretary of State considers that the evidence provided by Mr Keeling in relation to flood data modelling, shows that the long-term risks of flooding may not be sufficiently addressed and that National Highways have not sufficiently proved that

the flood basin on Mr Keeling's land is necessary. This is highlighted at IR 8.2.4.46 to IR 8.2.4.50. The Secretary of State believes this is a convincing reason not to confirm the Orders at this time.

10. Having reflected on all aspects of the matter, the Secretary of State is satisfied there is a compelling case which would justify not confirming the CPO. Consequently, it would not be correct to confirm the SRO, as both Orders are intrinsically linked. As such, the Secretary of State agrees with the Inspector's conclusions and recommendations and has decided NOT to confirm 'The Highways England (M27 Southampton Junction 8 Improvement Scheme – M27 Junction 8 And Windhover Roundabout) (Special Road) (Side Roads) Order 2021' and 'The Highways England (M27 Southampton Junction 8 Improvement – M27 Junction 8 & Windhover Roundabout) (Special Road) Compulsory Purchase Order 2021'.
11. In making this decision, the Secretary of State has relied on the information that all parties have provided, that contained in the Orders, plans, diagrams and any statements or correspondence, as being factually correct.

AVAILABILITY OF DOCUMENTS

12. A copy of this letter, together with a copy of the Inspector's report, has been sent to those parties who appeared at the Inquiry, other interested parties and relevant Members of Parliament. Copies will be made available on request to any other persons directly concerned.
13. Please arrange for a copy of the Inspector's report and of this letter to be made available for inspection at all places used to deposit the Orders for public inspection at making stage. These are; The offices of National Highways Company Limited, Bridge House, 1 Walnut Tree Close, Guildford, GU1 4LZ; Hedge End Library, 11 Upper Northam Road, Hedge End, Southampton SO30 4DY; and Thornhill Community Library, 328 Hinkler Road, Thornhill, Southampton, SO19 6DF. It should also be available to view on the National Highways website at <https://nationalhighways.co.uk/our-roads/south-east/m27-southampton-junction-8/>.
14. Any person entitled to a copy of the Inspector's report may apply to the Secretary of State for Transport, at this address within 6 weeks of the receipt of this letter, to inspect any document, photograph or plan submitted by the Inspector with the Inspector's report.

RIGHT OF CHALLENGE

15. Notice is to be published of non-confirmation of the Orders. Any person who wishes to question the validity of the Secretary of State's decision on the grounds that the Secretary of State has exceeded his powers or has not complied with the relevant statutory requirements when reaching their decision may, under the provisions of Rule 54 of the Civil Procedure Rules, do so by application to the High Court. Such application must be made within six weeks of publication of the notice that the Orders

have not been confirmed. The High Court cannot entertain such an application before publication of the notice that the Secretary of State has not confirmed the Orders.

Yours sincerely,



Authorised by the Secretary of State
to sign in that behalf

APPENDIX 9 – 15



Neutral Citation Number: [2025] EWHC 2132 (Admin)

Case No: AC-2024-LON-001877

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2025

Before :

THE HONOURABLE MR JUSTICE MOULD

Between :

MANORANJITHAM SARAVANAMUTHU

Claimant

- and -

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

(2) LONDON BOROUGH OF NEWHAM

Defendants

**Gregory Jones KC and Armin Solimani (instructed by Irwin Mitchell LLP) for the
Claimant**

**Ruchi Parekh (instructed by Government Legal Department) for the First Defendant
Douglas Edwards KC and Michael Rhimes (instructed by Sharpe Pritchard LLP) for the
Second Defendant**

Hearing dates: 8-9 April 2025

Approved Judgment

This judgment was handed down remotely at 10:30am on Tuesday 12 August 2025 by
circulation to the parties or their representatives by e-mail and by release to the National
Archives.

.....
MR JUSTICE MOULD

MR JUSTICE MOULD :

Introduction

1. This is an application by the Claimant under section 23 of the Acquisition of Land Act 1981 [**"the 1981 Act"**] challenging the validity of a compulsory purchase order made by the Second Defendant and confirmed by the First Defendant under the powers conferred by section 226(1)(a) of the Town and Country Planning Act 1990 [**"the 1990 Act"**].
2. The London Borough of Newham (James Riley Point) Compulsory Purchase Order 2023 [**"the Order"**] was made by the Second Defendant on 4 July 2023. The Order authorises the compulsory purchase of the land described in the schedule to the Order [**"the Order land"**] for the stated purpose of facilitating the carrying out of a comprehensive scheme of development, redevelopment and improvement of James Riley Point, Carpenters Road, London E15 to deliver high quality refurbished homes, a community centre and improved public realm [**"the Scheme"**]. The Order states that the Scheme will contribute to achieving the promotion or improvement of the economic, social and environmental well-being of the area. Planning permission to carry out the development comprised in the Scheme was granted on 13 April 2023.
3. James Riley Point [**"JRP"**] is a 23-storey residential tower block situated on the Carpenters Estate. JRP contains 132 flats. The Second Defendant is the freehold owner of JRP. The Claimant is the leasehold owner of Flat 128 [**"the Premises"**], a three bedroomed flat on the 21st floor of JRP. The Claimant has occupied the Premises with her family since 1994. Initially she did so as tenant of the Second Defendant. On 10 June 2002, the Claimant acquired her leasehold interest in the Premises pursuant to the Second Defendant's right-to-buy scheme. The Claimant and her family occupied the Premises as their home until April 2022. I shall return later to the family's living arrangements since April 2022.
4. By early July 2023 when the Second Defendant made the Order, the Claimant was the sole remaining leaseholder in possession at JRP. Other leasehold owners had entered into agreements to give vacant possession to the Second Defendant. All the Second Defendant's tenants had vacated their flats. None of the flats were in actual occupation.
5. The Claimant and other members of her family objected to the making of the Order. In accordance with the procedure for confirmation of a compulsory purchase which is subject to remaining objections under Part 2 of the 1981 Act, the First Defendant appointed an inspector to hold a public local inquiry. The inspector held the inquiry over three days between 20 – 22 February 2024. He heard evidence from witnesses called on behalf of the Second Defendant as acquiring authority, and from the Claimant and other witnesses in support of her and her family's remaining objections to the Order.
6. On 23 April 2024, the inspector issued his written decision. He confirmed the Order without modification. Notice of confirmation of the Order was first published on 15 May 2024. This claim was issued on 4 June 2024.

Ground of challenge

7. The Claimant advances the following grounds of challenge to the validity of the Order –

- (1) In concluding that it had been demonstrated that the Scheme was funded and viable, with a realistic prospect that the Scheme would be delivered following confirmation of the Order, the inspector failed in his duty of reasonable inquiry, applying the principle stated in Secretary of State for Education v Tameside Metropolitan Borough Council [1977] AC 1014, 1065 [**“Tameside”**]. Further, the inspector failed to give proper or adequate reasons for those conclusions, and failed to have proper regard to a material consideration, namely the First Defendant’s inspector’s decision of 4 October 2022 not to confirm the London Borough of Barking and Dagenham Council (Vicarage Field and surrounding land) Compulsory Purchase Order 2021 [**“the Dagenham decision”**].
- (2) In concluding that the Second Defendant had taken reasonable steps to acquire the Claimant’s leasehold interest in the Premises by agreement, the inspector had failed to take into account the long history of failed attempts by the Second Defendant to refurbish JRP; and the living conditions endured by the Claimant’s family as a result of the Second Defendant’s failure to maintain the building. The inspector had misunderstood the terms of the so-called “uplift offer” made by the Second Defendant to the Claimant and to other remaining leaseholders at JRP in September 2022 and March 2023. The inspector had failed to reach any conclusion on the Claimant’s contentions that the Second Defendant was in breach of its obligations as landlord and housing authority. The inspector had failed to give proper or adequate reasons for his conclusions on these matters.
- (3) In concluding that the use of compulsory purchase powers to acquire the Claimant’s leasehold interest in the Premises was proportionate and rejecting the Claimant’s argument that compulsory purchase exceeded what was necessary to achieve the Second Defendant’s stated purposes, the inspector had failed to address the Claimant’s offer to grant a licence to the Second Defendant to enable the Scheme to be carried out. That offer obviated the need for the Second Defendant to resort to compulsory purchase of the Claimant’s leasehold interest in the premises.

The inspector’s decision letter

8. In the introduction to his decision letter [**“DL”**], the inspector said that the main grounds of objection to the Order advanced by the Claimant and her family were as follows –

- (1) The Second Defendant as acquiring authority had failed to make adequate attempts to acquire the Claimant’s leasehold interest in the Premises through negotiation and agreement.
- (2) The Second Defendant had been unable to demonstrate that the Scheme was viable and enjoyed a realistic prospect of being funded and delivered.
- (3) The Second Defendant’s resort to compulsory purchase powers to acquire the Claimant’s leasehold interest was unnecessary and excessive.

- (4) The Second Defendant had failed to discharge its public sector equality duty under section 149 of the Equality Act 2010.
9. In DL6, the inspector said that the Departmental guidance on compulsory purchase process and the Crichel Down Rules published in 2019 [**“the CPO Guidance”**] identifies matters to be considered in deciding whether to confirm a compulsory purchase order. He said that he had used the CPO Guidance as the structure for his decision.
 10. In DL7 to DL14, the inspector considered the national and local planning policy framework relating to the Scheme. He concluded that the Scheme was supported by national and local planning policy and that planning permission had been obtained in respect of the Scheme.
 11. In DL15 to DL21, the Inspector assessed the degree to which the Scheme would deliver social, economic and environmental benefits. He concluded that the Scheme would bring a number of significant benefits, including comprehensive, transformative change to this site in the Carpenters Estate, contributing to the Second Defendant’s ambition to provide mixed-use development with delivery of much needed housing including mainly affordable homes, and economic and environmental benefits. Given these benefits and the need to regenerate JRP, he found there to be a compelling case for the acquisition of the land included in the Order.
 12. In DL22 to DL26, the inspector set out his assessment of and conclusions on the proposed funding arrangements, the viability and the deliverability of the Scheme. He concluded that the Second Defendant had demonstrated that the Scheme was funded and viable, and that there was a reasonable prospect of its delivery within a reasonable time. As the inspector’s reasoning and conclusions on those matters form the subject matter of ground 1, I shall set them out when I consider that ground of challenge below.
 13. In DL27 the inspector turned to the outstanding objections from the Claimant and her family. For present purposes the relevant topics are his consideration of the objectors’ case that the Second Defendant had failed to make reasonable efforts to negotiate with the Claimant and her family; and his assessment of the objectors’ argument that the Second Defendant’s decision to resort to making the Order was an excessive use of their powers.
 14. The inspector addressed the first of those topics in DL28 to DL35. He concluded that the Second Defendant had taken reasonable steps to acquire the Order land by agreement, including the Claimant’s leasehold interest in the Premises. As his reasons for so concluding form the subject matter of ground 2, I shall return to them in more detail when I consider that ground of challenge.
 15. In DL36 to DL38 the inspector set out his analysis and conclusion in relation to the Claimant’s argument that the Order represented an excessive use of power. He said that one of the factors to be taken into account in considering whether to confirm a compulsory purchase order, is to ask whether the purpose for which the land is to be acquired could be achieved by means other than compulsory acquisition. It may be necessary to consider the appropriateness of any alternative proposals to or locations for the Scheme which may have been put forward, during the process of making and seeking confirmation of the Order. At DL37 and DL38 he concluded that the use of

compulsory purchase powers was necessary and proportionate in this case. The validity of that conclusion is challenged under ground 3 of this claim.

16. In DL 49 the inspector mentioned the Objector's reliance on the Dagenham decision. He said that he had been provided with neither a full copy of that decision nor an explanation of how it related to the decision whether to confirm the Order in this case. He therefore gave the Dagenham decision only limited weight. The inspector stated his overall conclusions in DL51 and DL52 –

“51. The Scheme underpinning the CPO is wholly in accordance with the development plan and has the benefit of planning permission.

52. I am satisfied that the Scheme would substantially contribute to the achievement of the promotion or improvement of the economic, social, and environmental well being of the area, and that these purposes could not be achieved by other means. Financial resources are also in place for the Scheme. The Order would interfere with the human rights of the Objectors, but I consider that the interference is proportionate and that there is a strong public interest in ensuring that the regeneration of the James Riley Point site takes place. Overall, and having taken all matters into account, I conclude that there is a compelling case in the public interest for the acquisition of the Order Land”.

Legal and policy framework

17. Section 226(1)(a) of the 1990 Act provides that a local authority has power to acquire compulsorily any land in their area if they think that acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land. The First Defendant's authorisation is needed in order to exercise that power of compulsory purchase.
18. The procedures enacted under Part 1 of the 1981 Act apply for the purpose of the First Defendant's determination whether to confirm a compulsory purchase order made by a local authority pursuant to section 226(1)(a) of the 1990 Act. Where, as in the present case, the First Defendant's appointed inspector decides that the compulsory purchase order should be confirmed, the acquiring authority must publicise that fact and serve notice of confirmation on any remaining objector. The compulsory purchase order becomes operative on the date on which notice of its confirmation is first published: see sections 15 and 26 of the 1981 Act.
19. Sections 23 and 24 of the 1981 Act enable an application to be made to the High Court questioning the validity of a compulsory purchase order. Insofar as material to the present claim, they provide –

“23(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, he may make an application to the High Court.

(2) If any person aggrieved by -

(a) a compulsory purchase order,

...

desires to question the validity thereof on the ground that any relevant requirement has not been complied with in relation to the order ... he may make an application to the High Court.

(3) In subsection (2) above “relevant requirement” means—

...

(b) any requirement of the Tribunals and Inquiries Act 1992 or of any rules made, or having effect as if made, under that Act.

(4) An application to the High Court under this section shall be made within six weeks —

...

(b) in the case of a compulsory purchase order to which the [Statutory Orders (Special Procedure) Act 1945] does not apply, from the date on which notice of the confirmation or making of the order is first published in accordance with this Act,

....

24(1) ...

(2) If on the application the court is satisfied that—

(a) the authorisation granted by the compulsory purchase order is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, or

(b) the interests of the applicant have been substantially prejudiced by any relevant requirement (as defined in section 23(3) above) not having been complied with,

the court may quash the compulsory purchase order or any provision contained therein... either generally or in so far as it affects any property of the applicant.

(3) If the court has power under subsection (2) to quash a compulsory purchase order it may instead quash the decision to confirm the order either generally or in so far as it affects any property of the applicant”.

20. Rule 19(1) of the Compulsory Purchase (Inquiries Procedure) Rules 2007 requires the authorising authority, in this case the inspector, to give notice of their decision and the reasons for it in writing to the acquiring authority and any remaining objector. The 2007 Rules were made under section 9 of the Tribunals and Inquiries Act 1992. The requirement to give reasons is accordingly a relevant requirement for the purposes of section 23(2) and 23(3) of the 1981 Act.

21. The principles upon which the court decides an application made under section 23 of the 1981 Act are well established. They were summarised by the Court of Appeal in Margate Town Centre Regeneration Company Ltd and others v Secretary of State for Communities and Local Government and Thanet DC [2013] EWCA Civ 1178 at [17]

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“17. The applicable law is not in dispute and so I will summarise the relevant principles briefly.

a) "A CPO should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected": see para. 16 of Circular 06/2004. To similar effect are certain observations of Lord Denning MR in Prest v Secretary of State for Wales [1982] 266 EG 527.

b) A consequence of principle (a) is that "the draconian nature of the order will itself render it more vulnerable to successful challenge on Wednesbury/Ashbridge grounds unless sufficient reasons are adduced affirmatively to justify it on the merits": per Slade LJ in De Rothschild v Secretary of State for Transport (1988) 57 P. & C.R. 330.

c) The grounds of challenge under section 23 do not entitle the court to revisit the merits of the decision, only to see whether there is any legal or procedural error in the confirmation: see the observations of Sullivan J, as he was, in R (James Powell and Others) v Secretary of State for Communities and Local Government [2007] EWHC 2051 (Admin) para.3.

d) When deciding whether or not to confirm an order, the Secretary of State must have regard to all material considerations and must not take into account immaterial considerations. But it is for the court to decide what are material considerations: see Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at 764 per Lord Keith of Kinkel.

e) The reasons for a decision must be intelligible and adequate. In determining whether those criteria are satisfied the decision letter must be read fairly as a whole, as if by a well-informed reader: South Buckinghamshire District Council v Porter (No.2) [2004] 1 WLR 1953 at 1964 per Lord Brown of Eaton-under-Heywood.

f) The Court should interfere only if the decision leaves a "genuine as opposed to a forensic doubt" as to what has been decided and why: Clarke Homes Limited v Secretary of State (1993) 66 P. & C.R.263, 271 per Sir Thomas Bingham M.R.

g) Where a decision maker has erred in law the decision should be quashed unless the court is satisfied that the decision maker would necessarily have made the same decision had the error not been made: see Simplex GE (Holdings) Ltd v Secretary of State for the Environment [1988] 3 PLR 25 at 42 per Staughton LJ."

Ground 1 – Viability

The issue

22. The Claimant’s challenge under ground 1 is to the validity of the inspector’s conclusions that the Scheme was funded and viable, and that there was a reasonable prospect of its delivery within a reasonable timescale. The Claimant contends that the inspector failed to fulfil his *Tameside* duty of reasonable inquiry in reaching those conclusions. It was contended that the inspector had failed to act in accordance with the CPO Guidance. He failed to have regard to the Dagenham decision, which was a material consideration in assessing whether the Scheme was viable and deliverable. It was argued that the inspector had failed to give proper, adequate and intelligible reasons for his conclusions.

The CPO Guidance

23. In order to address these issues, it is necessary to refer to the relevant paragraphs in the CPO Guidance, in the terms in which they were promulgated at the date of the inspector’s decision.
24. The CPO Guidance consists of a series of parts or “tiers”. Tier 1 provides policy guidance in the form of an overview of the key stages of compulsory purchase process. Tier 2 provides more focused and detailed policy guidance on specific areas of administrative action in which powers of compulsory acquisition are likely to be exercised.
25. Tier 1 Stage 2 is headed “*Justifying a compulsory purchase order*”. Paragraph 12 states the well-established principle that a compulsory purchase order should only be made where there is a compelling case in the public interest. Paragraph 13 states that in determining whether to confirm a compulsory purchase order, the minister will need to be able to take a balanced view between the intentions of the acquiring authority, the concerns of those with an interest in the land that is subject to the proposed compulsory purchase and the wider public interest. The minister will consider each case on its merits and no particular degree of justification is to be taken to be required in any given case. The guidance continues –

“It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time. If the acquiring authority does not:

- have a clear idea of how it intends to use the land which it is proposing to acquire; and*
- cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale*

it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making.”

26. The reader is then referred to the later section in Tier 2 of the CPO Guidance on the exercise of the compulsory purchase powers given by section 226 of the 1990 Act.
27. Paragraph 14 poses the question “*What information about the resource implications of the proposed scheme does an acquiring authority need to provide?*” and states –

“In preparing its justification for the compulsory purchase order, the acquiring authority should address:

*a) **sources of funding** – the acquiring authority should provide substantive information as to the sources of funding available for both acquiring the land and implementing the scheme for which the land is required. If the scheme is not intended to be independently financially viable, or the details cannot be finalised until there is certainty that the necessary land will be required, the acquiring authority should provide an indication of how any potential shortfalls are intended to be met. This should include:*

- the degree to which other bodies (including the private sector) have agreed to make financial contributions or underwrite the scheme; and*
- the basis on which the contributions or underwriting is to be made*

*b) **timing of that funding** – funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period (see section 4 of the Compulsory Purchase Act 1965) following the operative date; and only in exceptional circumstances would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years.*

Evidence should also be provided to show that sufficient funding could be made available immediately to cope with any acquisition resulting from a blight notice.”

28. Section 1 of Tier 2 of the CPO Guidance gives advice on exercising compulsory purchase powers under section 226 of the 1990 Act. Paragraph 106 describes the factors that the First Defendant will take into account in deciding whether to confirm a compulsory purchase order made under section 226(1)(a) of the 1990 Act -

“Any decision about whether to confirm an order made under section 226(1)(a) will be made on its own merits, but the factors which the Secretary of State can be expected to consider include:

- whether the purpose for which the land is being acquired fits in with the adopted Local Plan for the area or, where no such up to date Local Plan exists, with the draft Local Plan and the National Planning Policy Framework*
- the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area*
- whether the purpose for which the local authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the*

land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired

- *the potential financial viability of the scheme for which the land is being acquired. A general indication of funding intentions, and of any commitment from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed. The greater the uncertainty about the financial viability of the scheme, however, the more compelling the other grounds for undertaking the compulsory purchase will need to be. The timing of any available funding may also be important. For example, a strict time limit on the availability of the necessary funding may be an argument put forward by the acquiring authority to justify proceeding with the order before finalising the details of the replacement scheme and/or the statutory planning position.”*

Funding and delivery arrangements – the Second Defendant’s case

29. In their statement of case for confirmation of the Order, the Second Defendant said that they were the freeholder of the Order land and, subject to the outstanding third-party interests which they proposed to acquire, owned all the land needed to deliver the Scheme. They proposed to deliver the Scheme via the development agreement with their wholly owned housing provider, Populo Living [**“Populo”**]. The Second Defendant would continue to own the Scheme during and following the development.
30. The Second Defendant did not consider that there were any funding impediments to acquiring the Order land or delivering the Scheme. They were fully committed to delivering the Scheme, having already spent considerable resources acquiring relevant interests, negotiating to acquire further interests and obtaining the main planning approvals required to authorise and deliver the Scheme.
31. In paragraphs 5.20 to 5.24 of their statement of reasons for making the Order, the Second Defendant explained how they proposed both to fund and deliver the Scheme. Paragraphs 4.40 to 4.44 of their statement of case addressed those matters in essentially similar terms. The Second Defendant recognised that in order to make the Order, they were required to demonstrate that all the necessary resources were likely to be available both to pay land compensation and to ensure that there was no budgetary impediment to the Scheme being delivered. They said –

“Whilst the viability appraisal for the Scheme suggests that it is not commercially viable, the delivery strategy set out below and in the Cabinet report from 9th March 2023 shows firstly the Council’s commitment to entirely funding (and underwriting the costs of) this project and secondly how the costs could be recovered from the delivery of the masterplan in the future. While the Council intends to recover costs, the Cabinet report reiterates how the Scheme is to be brought forward as a stand-alone project that is not reliant on the viability or future delivery of the masterplan.

The Council intend to retain control over delivery of the project through a Design and Build approach with a main contractor. The Council will remain the Client with Populo Living (“Populo”), a company wholly owned by the Council, providing development management services, overseeing the delivery of the contract.

The Scheme is the first phase of the wider Carpenters Estate masterplan. It will deliver predominantly affordable housing, offering opportunity to decant existing secure tenants and homeowners. The creation of a community and sports centre, as well as delivering significant benefits in its own right, will facilitate vacant possession of a significant land parcel adjacent to Stratford Station and is part of a wider strategy to provide at least 50% affordable housing across the whole masterplan area. As such, while the Scheme is not structured to be commercially viable in its own right, it does not need to be so. It offers significant wider social and economic benefits demonstrating the Council's commitment to invest in the Carpenters Estate community and generates support for further investment in the masterplan.

In addition to the significant benefits that the Scheme itself will deliver, it is expected to act as a catalyst ahead of the wider masterplan and the Council is committed to funding the project on this basis as agreed at Cabinet on 9th March 2023. As set out in the Cabinet report, the initial masterplan financial appraisal shows how the cost of the Scheme can be recovered from future phases of the masterplan. However, the masterplan has not yet secured planning consent from LLDC and its implementation remains subject to future Cabinet decisions and so Cabinet agreed on 9th March 2021 to bring the JRP scheme forward as a standalone project.

On 9th March 2023 Cabinet agreed to make sufficient capital budget available to make the CPO and implement the Scheme independently of and irrespective of the masterplan outcome."

Funding and delivery arrangements – the Second Defendant's evidence

32. At the public inquiry, evidence in relation to the proposed arrangements for funding and delivering the Scheme was given by the Second Defendant's Director of Community Wealth Building, Darren Mackin. Mr Mackin's evidence was that the Second Defendant was committed both to bringing forward and funding the Scheme as a standalone project at the total budget agreed by Cabinet at its meeting on 9 March 2023. At that meeting, Cabinet had approved an overall budget of £78.1M plus CPO costs. The Second Defendant would be funding the Scheme through its capital programme, for which the principal source was borrowing from the Public Works Loan Board ["PWLB"] via the Second Defendant's housing revenue account.
33. Mr Mackin gave evidence that the Second Defendant did not consider there to be any funding impediment to acquiring the Order land or to delivery of the Scheme. The Second Defendant had expended considerable resources to date on acquiring the necessary land and rights to carry out the Scheme. Further land interests had been acquired by agreement. The requisite main planning approvals to authorise and to carry out the Scheme had been secured. The Scheme was a strategic priority for the Second Defendant, as it would contribute to the regeneration of Stratford, the most important town centre in Newham.
34. Mr Mackin said that Cabinet had appointed Populo to act as development manager for the Scheme. Populo would provide development management services and oversee delivery of the Scheme. The Scheme was to be delivered on a design and build contract. Populo were responsible for procurement of the contractor. Prior to the refurbishment works, a separate enabling works contractor would be appointed to carry out the demolition works needed to strip the building back to its frame. Mr Mackin gave

evidence that the enabling works programme was expected to begin in summer 2024 and the Scheme to be substantially completed well before the end of 2027.

35. The inspector also heard evidence from the project director at Populo, Nicholas Clough. Mr Clough provided a more detailed breakdown of the proposed works programme for delivery of the Scheme. The projected completion date for the main works was May 2027. Completion of the Scheme as a standalone project would allow the Second Defendant to decant tenants from elsewhere on the Carpenters Estate into the refurbished flats at JRP. The programme assumed that remaining leaseholders, including the Claimant and her family, would be able to return to their flats by December 2027.
36. Mr Clough gave evidence that both the enabling works and the main works contracts had been negotiated and contractors selected. Design work, the preparation of procurement packages for sub-contractors and pricing was in progress under a pre-construction services agreement, with a view to the main works contract being let in April 2025.

The March report

37. Mr Mackin referred the inspector to a series of Cabinet decisions taken by the current Mayoral administration of the Second Defendant since December 2018. The relevant reports were in evidence before the public inquiry. Mr Mackin made particular reference to decisions taken by the Cabinet in response to a report from officers which it considered on 9 March 2023 [**“the March report”**].
38. In the March report, Cabinet were advised that in order to progress with a compulsory purchase order as recommended, the Second Defendant would need to demonstrate at all the necessary resources were likely to be available both to pay the requisite land compensation and to implement the Scheme. At the date of the March report, the approved budget for the Scheme stood at £54.1M. A principal purpose of the March report was to seek Cabinet approval for an increase in that budget to £78.1M (plus CPO costs).
39. Section 4.2 of the March report addressed the Scheme budget and explained the increase of £24M since Cabinet approved a budget of £54.1M in July 2021 –

“As approved by Cabinet in July 2021, Populo has undertaken a two-stage procurement process to select a main contractor. As part of the procurement process, a target cost plan has been prepared along with an updated financial appraisal to provide the latest construction figures and overall project budget as set out in this report. The successful contractor’s cost information has been reviewed and checked for robustness by the appointed QS firm, Mott MacDonald. This process gives confidence in advance of Stage 1 and further provides confidence that the budget and the level of contingency for risk including cost inflation are sufficiently covered. It should be noted that since July 2021 there has been a number of geopolitical factors including the war in Ukraine, which have increased construction costs”.

40. Tables in the March report provided both a breakdown of the forecast cost of the Scheme of £78.1M (plus CPO costs) and an analysis of the £24M increase in cost from the figure of £54.1M approved in July 2021.

41. Section 4.3 of the March report advised Cabinet on the financial viability of the Scheme. The advice was that the Scheme was to be delivered as a “*self-standing project*” and also as the first phase of the masterplan for regeneration of the Carpenters Estate. The Scheme proposed predominantly affordable housing. It offered the opportunity to decant existing tenants and to enable remaining leaseholders to return following completion of the works. The March report continued –

“As such, the viability of the JRP scheme offers wider benefits acting as a loss-leader ahead of the wider masterplan. This report is therefore seeking approval to make sufficient capital budget available to proceed and implement the JRP scheme and to kickstart regeneration and rejuvenation of the Carpenters Estate. The masterplan financial appraisal is demonstrated to show the cost of the JRP scheme can be recovered from future phases of the masterplan, but the masterplan is still seeking planning consent from LLDC and its implementation remains subject to future cabinet decisions.”

42. The March report included specific advice from the Second Defendant’s Director of Finance –

“This report sets out the proposed increase in the budget for the JRP scheme, which forms part of the wider Carpenters estate programme. For the reasons set out in the report, an additional £24m expenditure (plus CPO costs) now needs to be budgeted for, and the report recommends doing so.

The report also assumes that a £12m GLA grant will no longer be available for the JRP scheme due to the delay in achieving vacant possession. Officers will continue to engage with the GLA to explore other opportunities to bring grant income into the scheme, but it is deemed prudent to assume no grant will be received at this stage. All else being equal, this will reduce the Programme cash flow by £36m thereby impacting on the wider Carpenters Programme Viability.

However, since July 2021 the private rental market has performed more strongly, financially, than anticipated at that time. Populo have engaged JLL to provide the private home rental and sales valuations and forecasts. JLL’s current valuations show an average 15% rise in private rental values from those included in the July 2021 Cabinet Report. In July 2021, the forecast was for an average 9% rise which was a reasonable assumption at the time, but like all models can only ever be an estimate. This additional 6% increase above the forecast has improved the private rental income stream, which is the largest income stream in the masterplan model, which has made a significant contribution to maintaining Programme viability. The updated Programme Viability Model for the overall masterplan will be reported to Cabinet later in 2023.”

Overview and scrutiny process

43. On 9 March 2023 Cabinet resolved to approve the increase in the budget for the Scheme recommended in the March report. The Cabinet’s decision was subsequently “*called-in*” for review by the Second Defendant’s Overview and Scrutiny Committee. Concern was raised at the meeting of the Overview and Scrutiny Committee held on 29 March 2023 about the rising costs of the Scheme, the impact of funding the Scheme on the Second Defendant’s housing revenue budget and the viability of the Carpenters Estate masterplan. The minutes record that members questioned the viability of the Scheme

given that it was to be funded from a variety of sources that were uncertain, such as future rental income. There were concerns about the broader implications of using funds from the housing revenue account when there were many existing burdens on that source of revenue. The Overview and Scrutiny Committee resolved that Cabinet's decision of 9 March 2023 should be referred back to Cabinet for reconsideration and that a number of key concerns and recommendations be submitted to Cabinet, including –

- (1) That an updated external review be carried out by a suitably qualified accountancy firm on the Carpenters regeneration programme.
- (2) That compulsory purchase arrangements be value for money tested for the public purse and the process be looked at by a suitably qualified accountancy firm.
- (3) That the viability of the Carpenters regeneration programme, excluding the Scheme, be reassessed by a suitably qualified accountancy firm using more prudent assumptions.

44. The minutes of the meeting of Cabinet held on 30 March 2023 in response to these recommendations record that they were rejected. The following points are recorded in the minutes –

“...officers gave assurances on the financial viability of the Scheme and that the Council had received independent financial advice from specialists, that the scheme viability would be kept under constant review, that there were checks and balances in place to monitor expenditure, and that an overall masterplan would be developed with flexibility to change any of its components if required.

....

The representatives of Overview and Scrutiny Committee (OSC) explained that OSC were in support of the project to regenerate the area and had called in the decision due to the increased pressures on the budget and project costs overrun. Officers explained that inflation and additional specifications caused the additional expenditure and extended time frame of the Scheme and added that all these costs were accounted for. In addition, officers stated that there would be further reflection on the costed (sic) and CPO process to apply lessons learned to future schemes.”

45. Cabinet confirmed their decision of 9 March 2023 to approve the revised budget for the Scheme and to make a compulsory purchase order under section 226(1)(a) of the 1990 Act to facilitate delivery of the Scheme.

The Claimant's case on viability and funding

46. The Claimant's written objections to confirmation of the Order were submitted by her solicitors on her behalf on 8 August 2023. They did not raise the issues of viability, lack of funding and uncertainty over delivery of the Scheme as particular points of concern at that time.

47. On 30 January 2024, shortly before the start of the public inquiry, the Claimant's solicitors wrote to the Second Defendant's solicitors summarising the Claimant's objections to confirmation of the Order. In that letter, the Claimant's solicitors stated –

“We have real concerns regarding the viability of the scheme. We have requested disclosure of the underlying viability statements, i.e. the Target Cost Plan and Updated Financial Appraisal referred to in the Acquiring Authority's report to its Cabinet meeting of 9 March 2023. However, given the history of this scheme we do not consider the authority has demonstrated that the scheme will be viable. It is apparent that the figures and viability have not been subject to independent analysis. In the case of the London Borough of Barking and Dagenham Council CPO in 2021 the order was not confirmed. The refusal by the Inspector was based on doubts about the viability of the project and the lack of updated viability appraisals. In the circumstances, we would be grateful if the above-mentioned viability statements could be sent to me as soon as possible and included in the bundle of core documents.”

48. The Claimant instructed a chartered surveyor, Adam Rhead of Gerald Eve LLP, to give evidence at the public inquiry. In his expert report dated 6 February 2024, Mr Rhead stated that he specialised in compulsory purchase and compensation matters and had advised both claimants and acquiring authorities. He said that his instructions had asked that he consider whether there was a compelling case in the public interest to confirm the Order. Section 7.5 of his report was headed “*Viability*”. He referred to the requirement stated in paragraph 13 of the CPO Guidance that acquiring authorities must show that all the necessary resources are likely be available to deliver the scheme within a reasonable timescale. He referred to the March report and stated –

“Some of the information in the Cabinet Report - the Target Cost Plan and Updated Financial Appraisal - has been withheld by the Council. It is unclear whether the Council has sufficient funds available to complete the Scheme or that these funds are ringfenced given recent press releases issued by the Council on the ‘unprecedented challenges facing the borough’ (Appendix AR8). To date the Council has not disclosed key documents necessary to demonstrate that the scheme is viable.”

49. On 15 February 2024, the Second Defendant's solicitors emailed to the Claimant's solicitors two tables containing the Updated Financial Appraisal and Target Cost Plan. The tables showed a breakdown of the total project cost of £78.1M, and funding from GLA grant (£12M) and long-term debt (£66.1M). Compulsory purchase costs were not disclosed on the basis that they were exempt information.

The parties' closing submissions

50. In his closing submissions to the public inquiry on behalf of the Claimant, Mr Gregory Jones KC submitted that the CPO Guidance placed the burden on the Second Defendant as acquiring authority to demonstrate that necessary resources were available to deliver the Scheme with a reasonable timescale. The Scheme was not said to be independently financially viable. It was therefore necessary for the inspector to test whether the sources of funding upon which the Second Defendant relied would be both available and sufficient to enable the Scheme to be delivered. Moreover, as recorded in the March report, there had been a huge increase of £24M in the projected costs of the Scheme. Critically, the information provided by the Second Defendant did not enable either the objectors or the inspector to test whether the projected costs were reliable.

51. Leading counsel submitted to the inspector that there was an obvious risk in relying on the Scheme being funded through the Second Defendant's housing revenue account, should projected costs increase further. He placed particular reliance on the absence of any evidence to show that funding would actually be forthcoming from the PWLB. The Second Defendant had not called evidence to explain how the Second Defendant would be able to build up the revenue needed to repay any loan which they might seek from the PWLB. In any event, the Second Defendant's position was "*quite hopeless*" because they had only resolved to underwrite the Scheme by a loan to the value of £78.1M. That projected cost was based upon figures which the Second Defendant had not been willing to expose to independent expert assessment or scrutiny at the public inquiry. In the absence of such assessment or scrutiny, the risk of a further significant increase in project costs could not reasonably be discounted. Mr Jones KC submitted that the Second Defendant's Overview and Scrutiny Committee had held similar concerns, but their recommendation for an external review of projected costs by a suitably qualified firm of accountants had been rejected by Cabinet on 30 March 2023. The role of Populo did not increase confidence in the Second Defendant's ability to deliver the Scheme. Populo had no track record of managing a scheme of this size. As a wholly owned company of the Second Defendant, Populo was not in a position to exercise any independent control or scrutiny of the Scheme.
52. Mr Jones KC argued for a clear similarity with the Dagenham decision in respect of the uncertainty and lack of transparency over the viability, funding and delivery of the Scheme. In both cases, there was a fundamental lack of tangible and substantive evidence to demonstrate the financial viability of the scheme for which compulsory purchase powers were sought; and of the acquiring authority's ability to deliver that scheme.
53. In his closing submissions for the Second Defendant, Mr Douglas Edwards KC said that the Second Defendant had made it clear in its evidence to the public inquiry that the Scheme was not commercially viable in the sense of generating a return on the investment. The Second Defendant did not intend that the Scheme should produce a profit. That would be unrealistic, given that the purpose of the Scheme was to deliver affordable, largely social rented housing and community floorspace. Nevertheless, on the evidence of Mr Mackin and Mr Clough, the Scheme was both fully funded and capable of being delivered within a reasonable timescale.
54. It was submitted that the Second Defendant as acquiring authority had committed to funding the Scheme as a standalone project. The Second Defendant had decided to fund the projected costs of the Scheme through their housing revenue account and via borrowing from the PWLB. The Claimant had confused the Second Defendant's revenue funding arrangements to fulfil their housing management responsibilities with the prioritisation of a standalone capital project. The PWLB routinely provided loans to fund capital projects of this kind undertaken by local authorities. PWLB funding is non-discretionary, in the sense that the board does not revisit or evaluate the merits of such schemes.
55. Mr Edwards KC submitted that there was no reasonable basis for questioning the costs budget approved by Cabinet in response to the March report. The costs had been derived from the procurement process carried out by Populo and had been reviewed by the Second Defendant's appointed quantity surveyors, Mott MacDonald. A substantial contingency of £8.66M had been included in the budget. The Second Defendant's legal,

finance and monitoring officers had assisted in preparation of the March report. The objectors had not produced any evidence to challenge the projected costs of the Scheme which had been approved by Cabinet. They had access to the March report and had been provided prior to the public inquiry with the Updated Financial Appraisal and Target Cost Plan referred to in the March report.

56. There was no requirement in the CPO Guidance for the Second Defendant to submit the cost plan and financial appraisal for the Scheme to independent assessment or scrutiny. The recommendations made by the Second Defendant's Overview and Scrutiny Committee did not affect the position. They had been considered by the Cabinet on 30 March 2023. The analogy which the Claimant sought to draw with the Dagenham decision was false: the scheme in that case was intended to be financially viable. In terms of the advice given in the CPO Guidance, the Second Defendant had given a clear indication of its funding intentions for the Scheme; and had provided substantive information about the sources of funding available to them to meet both the costs of land acquisition and delivering the Scheme. The programme for implementation was in evidence before the public inquiry.

The inspector's conclusions

57. As I have already noted, the inspector addressed these issues in DL22 to DL26, which I should set out in full.

"22. The Council's evidence (i.e. Darren Mackin) sets out in detail how the Scheme will be funded and that there is a reasonable prospect that it will be delivered. The Council considered funding of the Scheme on 9 March 2023 and its Cabinet accepted the recommendations to increase funding for the refurbishment of JRP. It also ratified that the CPO Scheme is to be funded through the Council's Housing Revenue Account and borrowing from the Public Works Loan Board (PWLb)."

23. The Council's report of 9 March 2023 also considered the recouperation of the funds required for the Scheme through the delivery of the masterplan for the Carpenters Estate. However, it is reiterated that the Scheme to refurbish JRP is nonetheless a standalone project that is not reliant on the viability or future delivery of the masterplan for the estate.

24. I have carefully considered the evidence of the Objectors, specifically in relation to the funding of the CPO Scheme. As a Scheme that will provide 96% affordable homes, it was queried whether the development would be viable. However, the Council has provided evidence that it is capable of funding the refurbishment programme itself through its public report of 9 March 2023 that it is capable of funding the refurbishment programme itself, which was prepared by its Finance Team and ultimately sanctioned by its elected Members.

25. Although the Objectors have argued that the funding agreed by the Council has not been independently scrutinised and verified, there is nothing before me to suggest that funding would not be forthcoming. Indeed, the evidence from the Acquiring Authority points out that there is no requirement for the funding to be verified, rather that there is a realistic possibility that it will come forward. Given that the totality of the Scheme is to be funded by the London Borough of Newham and it has access to funds from its Housing Revenue Account and for a non-discretionary loan from the PWLB, I am

satisfied that there is a realistic probability of the Scheme being fully funded and is therefore viable and likely to be delivered within a realistic timeframe (Nicholas Clough's evidence).

26. Therefore, based on the evidence before me I can conclude that it has been demonstrated that the Scheme is funded and viable, meaning that there is a realistic prospect that it will be delivered within a reasonable time scale”.

Submissions

58. Mr Jones KC submitted that the Second Defendant's evidence had been inadequate to show that the Scheme was funded, viable and capable of delivery within a reasonable timescale. There had been a history of abortive regeneration schemes at JRP. In that context, it had been vital for the inspector to ask himself whether he had sufficient, reliable evidence both on the costs of the Scheme and its funding to enable him to be satisfied that the Scheme was likely to be delivered.
59. It was submitted that the evidence before the public inquiry raised unresolved and real uncertainties about the costs of the Scheme and sources of funding. There had been a sudden and substantial increase in the projected costs. It was unreasonable of the inspector to have rejected the Claimant's case for independent assessment and scrutiny of the target costs budget put forward by the Second Defendant. In making that case, the Claimant was doing no more than relying on and repeating the concerns of the Second Defendant's Overview and Scrutiny Committee, which had been unreasonably rejected by Cabinet. In the absence of such independent assessment, the inspector had lacked the objective evidence which he needed in order to form a reasonable, independent judgment of the reliability of the projected costs relied upon by the Second Defendant.
60. There was no evidence before the inquiry to show that the PWLB was committed or even willing to fund the Scheme. The inspector had not heard evidence from the Second Defendant's Director of Finance as to how any loan made by the PWLB was to be serviced from the Second Defendant's own resources, which were known to be under pressure.
61. For these reasons, there were real and unresolved concerns about the viability of the Scheme. Similar concerns had caused the inspector deciding the Dagenham decision, and following the CPO Guidance, to refuse to confirm the compulsory purchase order in that case. The inspector was not able lawfully to disregard that comparable decision simply on the basis that a full copy had not been provided to him. He had been referred to the Dagenham decision. The principle of consistency required that he take it properly into consideration.
62. Mr Jones KC submitted that the inspector had misinterpreted the CPO Guidance. He had proceeded on the basis that it was sufficient to ask whether there was a reasonable possibility of the Scheme being delivered. That, however, was too narrow. Properly understood, the CPO Guidance required the inspector firstly to establish the prospects of the Scheme being delivered; and having done so, to weigh the likely prospects of delivery in the balance when determining whether the Second Defendant has compellingly justified the case for compulsory purchase. In order to do so, the inspector needed to make a properly informed assessment of the viability of the Scheme and to

take steps to avail himself of the evidence reasonably needed for that purpose. He had failed to take those steps, with the result that his conclusion in DL26 was both unlawful and inadequately explained by the reasons which he purported to give in DL22 to DL25.

Discussion

63. I begin by considering the Claimant's argument that the inspector's conclusions in DL26 were reached in breach of his *Tameside* duty. Lord Diplock stated the duty in *Tameside* at page 1065 –

“The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

64. The general principles which govern the *Tameside* duty were summarised by the Court of Appeal in R (Balajigari) v Secretary of State for the Home Department [2019] 1 WLR 4647 at [70]. The duty on the inspector was only to take such steps to inform himself as were reasonable. It was for the inspector and not the court to decide upon the manner and intensity of the inquiry to be undertaken. The court should establish what material was before the inspector and should only strike down a decision not to make further enquiries if no reasonable inspector could have been satisfied on the basis of the inquiries made that they possessed the information necessary for the decision which they were required to make.
65. This ground of challenge is concerned with the inspector's conclusion that the Scheme was funded and viable, and capable of being delivered within a reasonable timescale. Those were questions which arose from the decision making framework set as a matter of policy by the CPO Guidance. As I have set out earlier in this judgment, the CPO Guidance required the inspector to satisfy himself that the Second Defendant as acquiring authority was likely to have available to them the resources needed to deliver the Scheme within a reasonable timescale. The Second Defendant was required to provide evidence of the source of their funding both to meet the costs of compulsory purchase and of carrying out the Scheme. They were required to show that funding would be available now or early in the process of delivery. Where, as in the present case, the Scheme was not intended to be independently financially viable, the Second Defendant was required to indicate how any shortfall in funding was intended to be met.
66. In the case of a compulsory purchase order made under section 226(1)(a) of the 1990 Act, the CPO Guidance required the inspector to take the potential financial viability of the Scheme into account. In that context, a general indication of the acquiring authority's funding intentions and any commitment from third parties would usually be sufficient to give reassurance that the scheme underlying compulsory acquisition will proceed. Where financial viability is uncertain, there will need to be other compelling grounds for confirmation of the compulsory purchase order.
67. In order to judge whether the inspector was in breach of his *Tameside* duty in addressing those questions, it is necessary to identify the information which was made available to him through the public inquiry proceedings.

68. The inspector received written proofs of evidence from Mr Mackin and Mr Clough. Both witnesses gave oral evidence at the public inquiry. Their evidence was subject to cross-examination on behalf of the Claimant. Mr Mackin stated the Second Defendant's commitment to funding the Scheme as a standalone project and on the basis of the target costs budget and updated financial appraisal explained in the March report. He confirmed that the Second Defendant was no longer relying on GLA grant funding. The Scheme was to be funded through the Second Defendant's capital programme, the principal source of funds being a loan from the PWLB borrowed via the housing revenue account. Both the March report and other relevant Cabinet reports were in evidence before the inspector. Mr Mackin confirmed that the Scheme was not expected to be commercially viable, although the Second Defendant would seek to recover costs in future through the wider Carpenters Estate redevelopment programme. He identified the Second Defendant's strategic objectives in promoting the Scheme as the provision of a substantial number of affordable homes and to act as a catalyst for future investment in the masterplan for the Carpenters Estate. Mr Clough gave evidence of the progress with contractual procurement and the current programme for delivery of the Scheme to projected completion prior to the end of 2027.
69. The Claimant's witness, Mr Rhead, called into question the viability of the Scheme in his expert report. He did not, however, seek to advance a positive case that, for example, the Second Defendant's projected costs for the Scheme were significantly underestimated or unreliable; or that the Second Defendant's reliance on securing loan funding from the PWLB was misplaced. The documents to which he referred in his report, the Target Cost Plan and the Updated Financial Appraisal mentioned in the March report, were disclosed to the Claimant shortly before the start of the public inquiry and accordingly in evidence before the inspector. I understand that Mr Rhead commented on that evidence during his oral testimony at that public inquiry.
70. In the light of this evidence, there was no doubt as to the Second Defendant's funding intentions for the Scheme. The Second Defendant's approved costs budget for the Scheme was in evidence before the inspector. The principal source of funding to meet the projected capital costs of delivering the Scheme had been clearly identified. There was no issue that, as a standalone refurbishment project, the Scheme was not expected to be financially viable, in the sense of providing a positive return on investment. The Second Defendant strategic objectives for promoting the Scheme as a standalone project were clearly stated in evidence. There was no evidence before the inspector which substantiated the Claimant's main contentions that the costs budget approved by Cabinet in response to the March report was wrong or unreliable and that the requisite loan funding from PWLB was contingent upon a positive investment decision by the PWLB.
71. It is clear from the inspector's reasoning in DL22 to DL26 that he asked himself whether the information which I have just summarised was sufficient to enable him to draw his conclusions on whether the Scheme was funded, viable and likely to be delivered within a reasonable timescale. He concluded that it was sufficient for that purpose. In doing so, he considered and rejected the Claimant's argument that there was a clear need for independent assessment and scrutiny of the costs budget approved by Cabinet, that no reasonable conclusion could be drawn about the funding and delivery of the Scheme in the absence of such an independent assessment and that there was no proper basis for concluding that the requisite loan would be forthcoming from PWLB.

72. Applying the principles stated by the court in *Balajigari*, I am unable to accept that the inspector acted *Wednesbury* unreasonably in reaching those conclusions. His reasons in DL24 and DL25 for rejecting the Claimant's argument were proper and adequate. He acknowledged that the project costs and funding arrangements approved by Cabinet in response to the March report had not been independently scrutinised and verified. He was correct to say that there was no requirement for such independent scrutiny or verification. No such requirement is stated in the CPO Guidance. What is required is an indication of the acquiring authority's funding intentions and evidence of the sources of funding, particularly in a case where, as here, the acquiring authority accepts that the Scheme will not achieve a financial return on the capital investment required to deliver it.
73. Whilst there may be cases in which the information provided by the acquiring authority is shown to be so questionable that independent scrutiny is clearly called for, it is very difficult to conceive of a case in which the inspector holding the public inquiry will fail to identify that fact. The very purpose of the public inquiry procedure is to enable inspectors to consider whether the acquiring authority has addressed the matters identified in the CPO Guidance to their satisfaction. It will be a rare case indeed in which the inspector can be shown to have failed to take reasonable steps to acquaint himself with the relevant information to enable him to do so, notwithstanding the public inquiry proceedings. Here, the inspector was well aware of the concerns which had been raised by the Overview and Scrutiny Committee; and that having considered those matters with the benefit of further advice from officers, including the finance and monitoring officers, Cabinet had re-affirmed its approval of the costs budget and funding and delivery arrangements for the Scheme. In my judgment, in this case the inspector was reasonably entitled to find as he did in DL24 and DL25, that those matters had been sufficiently addressed in the Second Defendant's evidence and on the basis of the information contained in the March report.
74. The March report explained why the forecast cost of the Scheme had increased by £24M since July 2021. A substantial contingency had been priced into the target costs budget. It is relevant to note that, according to the March report, the projected construction costs had been checked by the Scheme's appointed quantity surveyors. The March report itself had been prepared with input from the Second Defendant's finance team and approved by Cabinet.
75. Mr Mackin's evidence was that loan funding for capital projects such as the Scheme was routinely available to local authorities from the PWLB. HM Treasury had set up the PWLB to provide loan facilities exclusively to local authorities to fund capital projects such as the Scheme. PWLB loan funding was provided on a "*non-discretionary*" basis, with the judgment whether the given project justified the capital investment to be funded by the loan resting with the local authority. That evidence was consistent with the PWLB's own explanation of its lending arrangements on its website, which was put into evidence during the course of the public inquiry. The PWLB stated that major local authorities such as borough councils may take out PWLB loans and, under current arrangements, are "*free to finance capital projects by borrowing, provided they can afford to service their debts out of their revenues*", such decisions being the responsibility of the elected members of the local authority who are accountable to their electorates. In closing submissions, Mr Jones KC had relied upon the PWLB's statement that a local authority's freedom to borrow was subject to their

finance director being “*satisfied that they are acting in line which statute and can afford to repay the loan*”. The inspector, however, was aware that the March report had been prepared with input from the Second Defendant’s finance team.

76. In summary, the inspector had sufficient information upon which to reach proper and reasonable conclusions, as he did in DL25, on the adequacy of funding arrangements for the Scheme. In particular, he was in a position on the basis of the evidence reasonably to decide whether the Scheme would be funded and how the required funds were to be sourced. Likewise, Mr Clough’s evidence provided the inspector with sufficient information upon which reasonably to judge whether the Scheme was likely to be delivered within a reasonable timescale.
77. In paragraphs 51 to 57 above I have rehearsed in some detail the closing submissions which were made to the inspector on behalf of the Claimant and the Second Defendant. It is clear that there was extensive disagreement between the parties as to whether the Second Defendant’s evidence justified the conclusions subsequently reached by the inspector on the funding, viability and deliverability of the Scheme. Whether the inspector was right to reach those conclusions is not a matter for me to decide on an application brought under section 23 of the 1981 Act. This is not an appeal from the inspector’s decision. By invoking the *Tameside* principle, the Claimant must establish both that the inspector lacked the information necessary reasonably to address the questions raised by the CPO Guidance and failed to take reasonable steps to address that deficiency. For these reasons I have given, the Claimant has failed to do so.
78. The next question is whether the inspector fell into error in failing to have regard to the Dagenham decision. Mr Jones KC criticised the inspector for stating in DL49 that he had not been provided with a full copy of the Dagenham decision. It was submitted that the inspector could readily have been provided with a full copy, had he but asked the Claimant to provide one to him. In any event, he would have been in a position to obtain one within the planning inspectorate.
79. In my view, that criticism misses the inspector’s point in DL49. The reason why the inspector was unable to give more than limited weight to the Dagenham decision was because the Claimant had given little if any real explanation as to why it was material to the decision whether to confirm the Order in the present case. In my judgment, the inspector was justified in taking that point. As Ms Ruchi Parekh submitted on behalf of the First Defendant, the Claimant’s reliance on the Dagenham decision in relation to the issue of viability was essentially limited to the quotation of two isolated, brief passages. Those passages appeared to reflect the judgment of the inspector in that case on the evidence, such as it may have been, which had been led by the acquiring authority on that topic.
80. It is well-established that a previous decision is capable of being a material consideration in planning appeal proceedings, for reasons of consistency: see Baroness Cumberledge of Newark v Secretary of State for Communities and Local Government [2018] PTSR 2063 at [29] and the cases there cited. However, in order to be material on that basis, it is necessary to show that the previous decision is not distinguishable on its facts from the instant case. In North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P&CR 137, 145 Mann LJ said –

“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”.

81. Although the principle has typically been applied in the context of planning appeal decisions under section 78 of the 1990 Act, I can see no good reason why it should not also apply in the context of decisions whether to confirm compulsory purchase orders made under section 226(1)(a) of the 1990 Act. In this case, however, the Claimant appears simply to have assumed that the Dagenham decision was indistinguishable in any relevant respect from the case before the inspector. No attempt was made to explain why the Dagenham decision should be taken to be a like case to the present one, insofar as the issue of viability of the scheme underlying compulsory purchase was concerned.
82. In closing submissions for the Second Defendant, Mr Edwards KC pointed out that the brief extract from the Dagenham decision relied upon by the Claimant indicated that in that earlier case, the scheme was intended to be commercially viable. That was in clear contrast to the Second Defendant’s case in support of confirmation in the present case, which acknowledged that the Scheme was not intended to produce a positive return on investment and would be fully funded by the Second Defendant via a capital loan.
83. That being the position before the inspector, he was indisputably justified in questioning how the Dagenham decision related to the Order before him for confirmation. It is entirely unsurprising, in those circumstances, that he should decide that he was able to give the Dagenham decision only limited weight.
84. The parties have since provided a full copy of the Dagenham decision to the court, which enabled me to hear argument about its potential relevance to the decision under challenge and to form my own provisional view as to whether it could reasonably be said to be indistinguishable from the decision which the inspector had to make on the question of viability. In the Dagenham case, the scheme of development underlying the compulsory purchase order was to be delivered by a single purpose private company which sought a positive return on its investment. Evidence before the public inquiry indicated that the development scheme was substantially lacking in financial viability. That evidence consisted of a financial viability appraisal and review carried out over five years prior to the public inquiry. The acquiring authority did not rely on those appraisals, but had not submitted an up-to-date assessment of the scheme’s financial viability to the inspector. The inspector found the financial viability of the scheme to be uncertain; and that the private investors who were funding the scheme via the acquiring authority’s development partner would be unlikely to continue to do so in such circumstances. It is clear that the issues on viability raised for determination in the Dagenham decision were quite different from those arising in the present case.
85. There is no substance in the Claimant’s argument that the inspector misinterpreted the CPO Guidance. The overarching policy to which the CPO Guidance is directed is that a compulsory purchase order should not be confirmed unless there has been shown to be a compelling case in the public interest for compulsory acquisition of the land included in the order. The question whether the scheme underlying compulsory acquisition is funded, viable and capable of being delivered is self-evidently material to the decision whether a compelling case for compulsory purchase has been made out. As the CPO Guidance states, if the acquiring authority cannot show that all the

necessary resources are likely to be available to deliver the scheme for which the land is said to be required, it will be difficult to establish a compelling case for its compulsory purchase in the public interest. That is why acquiring authorities are advised to provide substantive information about the sources and timing of funding for both land acquisition and implementation of the scheme. The absence of such information would raise a real doubt as to whether the expropriation of the land included in the compulsory purchase order was justified in the public interest. Essentially similar advice is given to acquiring authorities who are seeking to justify confirmation by the First Defendant of a compulsory purchase order made under section 226(1)(a) of the 1990 Act. Perhaps reflecting the fact that many such orders are made to assemble the land required to deliver development projects promoted by local planning authorities in partnership with a private developer seeking a commercial rate of return on their investment, the advice in paragraph 106 of the CPO Guidance focuses on the financial viability of such schemes. The Dagenham decision concerned such a scheme. Nevertheless, the essential guidance is that the acquiring authority should provide evidence of funding intentions, sources and timing of funding, so that the confirming minister or the appointed inspector is able to make an informed judgment on the prospects of the scheme being delivered, in the event that compulsory purchase of the requisite land is authorised.

86. Insofar as Mr Jones KC's submission was that the inspector's informed judgment on the prospects of delivery of the Scheme must also inform his overall determination of the overarching question whether confirmation of the Order was compellingly justified in the public interest, I would accept it. However, I have no doubt that the inspector was well aware of the need ultimately to address that overarching question. It is clear from DL52 that his conclusions in DL26 did inform his determination of that question. Nor, finally, is there any merit in the Claimant's complaint that the inspector failed to give proper, adequate and intelligible reasons for his conclusions in DL26. The explanation he gave in DL22 to DL25 was unarguably sufficient for that purpose.
87. For these reasons, ground 1 must be rejected.

Ground 2 – Reasonable efforts to acquire by agreement

The issue

88. The Claimant's challenge under this ground is to the validity of the inspector's conclusion that the Second Defendant as acquiring authority had taken reasonable steps to acquire all the Order land, including the Claimant's leasehold interest in the premises, by agreement. The Claimant contends that in reaching that conclusion, the inspector had misunderstood the terms of the "uplift offer" made to the Claimant in early 2023, which in fact exposed the Claimant to the risk of being left without compensation in an unrefurbished home on an upper floor of an otherwise uninhabitable tower block. Further, the inspector had failed to have proper regard to the history of interactions between the Claimant and the Second Defendant during the period of abortive attempts to bring forward the refurbishment of JRP. In order to take proper account of that history and its impact on the question whether the Second Defendant had acted reasonably in negotiations to acquire the Premises, the inspector needed to reach a judgment as to whether the Second Defendant had been in breach of its covenants as Landlord and of its duties as local housing authority. The inspector had failed to do so. Finally, the inspector had failed to give proper and adequate reasons for his conclusion.

The CPO Guidance

89. The general overview of compulsory purchase powers and procedures in Tier 1 of the CPO Guidance advises as follows –

“The confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement. Where acquiring authorities decide to/arrange to acquire land by agreement, they will pay compensation as if it had been compulsorily purchased, unless the land was already on offer on the open market.

Compulsory purchase is intended as a last resort to secure the assembly of all the land needed for the implementation of projects. However, if an acquiring authority waits for negotiations to break down before starting the compulsory purchase process, valuable time will be lost. Therefore, depending on when the land is required, it may often be sensible, given the amount of time required to complete the compulsory purchase process, for the acquiring authority to:

- *plan a compulsory purchase timetable as a contingency measure;*
- *initiate formal procedures*

This will also help to make the seriousness of the authority’s intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.”

90. Paragraph 3 of the general overview poses the question “What should acquiring authorities consider when offering financial compensation in advance of a compulsory purchase order?” and states –

“When offering financial compensation for land in advance of the making of a compulsory purchase order, public sector organisations should, as is the norm, consider value for money in terms of the Exchequer as a whole in order to avoid any repercussive cost impacts or pressures on both the scheme in question and other publicly-funded schemes.

...

In order to reach early settlements, public sector organisations should make reasonable initial offers, and be prepared to engage constructively with claimants about relocation issues and mitigation and accommodation works where relevant.”

91. Tier 1 of the CPO Guidance gives advice on preparing and making a compulsory purchase order. It includes the following –

“17 What are the benefits of undertaking negotiations in parallel with preparing and making a compulsory purchase order?”

Undertaking negotiations in parallel with preparing and making a compulsory purchase order can help to build a good working relationship with those whose interests are affected by showing that the authority is willing to be open and to treat their concerns with respect. This includes statutory undertakers and similar bodies as

well as private individuals and businesses. Such negotiations can then help to save time at the formal objection stage by minimising the fear that can arise from misunderstandings.

Talking to landowners will also assist the acquiring authority to understand more about the land it seeks to acquire and any physical or legal impediments to development that may exist. It may also help to in identifying what measures can be taken to mitigate the effects of the scheme on landowners and neighbours, thereby reducing the cost of a scheme. Acquiring authorities are expected to provide evidence that meaningful attempts at negotiation have been pursued or at least genuinely attempted, save for lands where land ownership is unknown or in question.”

The factual background

92. I base this summary of the relevant factual background on those points of chronology that have been agreed between the parties and on the contemporary documents. The parties did not agree any summary of the history of management of JRP following the beginning of the decanting process in 2005.
93. The Second Defendant initiated plans to regenerate JRP and the wider Carpenters Estate as long ago as 2003. Between 2005 and 2013, a number of different proposals were considered. During that period, the Second Defendant began the process of decanting existing tenants from flats in JRP.
94. From 2018 onwards, a change in Mayoral administration at the Second Defendant led to a renewed commitment to regenerating Carpenters Estate. At the end of that year, Cabinet decided to move away from a joint venture with private developers as the regeneration vehicle and to pursue a “resident led” redevelopment model.
95. On 17 April 2019, the Second Defendant’s agents made an offer to purchase the Claimant’s leasehold interest in the Premises. The Claimant’s son’s evidence to the public inquiry was that the Claimant did not receive that letter.
96. In early 2020 Populo was appointed by the Second Defendant as development manager. Part of Populo’s role was to produce a masterplan for the Carpenters Estate and to engage with existing residents for that purpose.
97. On 30 June 2021, the Second Defendant’s agents made a second offer to purchase the Claimant’s leasehold interest in the Premises. The Claimant’s son’s evidence to the public inquiry was again that the Claimant did not receive that letter. It appears that neither this offer nor the previous offer was followed up by the Second Defendant’s agents at that time.
98. In July 2021, Cabinet endorsed the masterplan for redevelopment of the Carpenters Estate and decided to carry out a ballot of existing residents by posing the question “*Are you in favour of the proposal for the regeneration of the Carpenters Estate?*”. Residents were invited to answer that question “Yes” or “No”. The ballot was informed by a document entitled “Your Carpenters Estate Landlord Offer” [**“the Landlord Offer”**] which was in two parts. Part one described the design proposals for regeneration of the Carpenters Estate as proposed in the masterplan. Part 2 explained the housing offer for residents living on or with the right to return to the Carpenters

Estate. Page 22 of the Landlord Offer was headed “The offer to resident homeowners living in James Riley Point and Lund Point”. Amongst other things, it was stated that resident leaseholders whose flats in JRP were due to be refurbished would have the option of selling their interest or buying an alternative home in the regeneration area. They could choose to move into a temporary home of comparable size and type near to their existing home, to allow the refurbishment works to be carried out. The Second Defendant would offer such accommodation and pay the reasonable costs of the move. Resident leaseholders of JRP would be offered a range of options to continue to own a new home on the Carpenters Estate, depending on their financial circumstances, including arrangements to enable them to bridge the gap between the value of their existing leasehold interest and the price of a flat on the redeveloped estate. The Landlord Offer concluded with the following –

“If an agreement cannot be reached, the Council may, as a last resort, apply for a compulsory purchase order to gain vacant possession to complete works to the building in which your home is located”.

99. In December 2021 the ballot resulted in 73% of existing residents answering “Yes” to the question posed in the Landlord Offer. Those in favour included the Claimant.
100. On 20 April 2022, the Second Defendant provided the Claimant and her family with a draft agreement which formed the basis for discussions and negotiations over the following months. In May 2022 all remaining leaseholders in JRP were provided with hotel accommodation following the failure of the lift at the building. The Claimant and her family moved into a hotel. By September 2022, agreement had yet to be reached with the four leaseholders, including the Claimant. It was at that point that the Second Defendant included the offer of an option uplift payment [**“the uplift offer”**] with a view to bringing negotiations to a successful conclusion. I set out the terms of the uplift offer in paragraphs 109 and 110 below.
101. The Second Defendant subsequently imposed a deadline of 12 December 2022 for acceptance of the uplift offer, which was extended to 16 December 2022. By that date, the Second Defendant had not reached agreement with any of the four remaining leaseholders.
102. Meanwhile, in December 2022 the Claimant and her family moved from hotel accommodation into temporary alternative accommodation, where they continued to live at the date of the public inquiry.
103. On 23 February 2023, the Second Defendant reinstated the uplift offer. A deadline of 24 March 2023 was given for acceptance of that offer. On 9 March 2023, the Second Defendant sent a revised draft agreement including the uplift offer to the solicitors then retained by the Claimant.

Revised draft agreement and uplift offer

104. The principal purpose of the proposed terms of the revised draft agreement was to enable the Second Defendant to undertake the refurbishment works at JRP without the need for compulsory purchase of the remaining leasehold interests. Its proposed terms provided a basis on which each of the remaining leaseholders would give vacant possession of their leasehold premises at JRP and grant a licence to the Second

Defendant to occupy those premises for the purposes of carrying out the refurbishment works comprised in the Scheme. The Second Defendant was to grant to each remaining leaseholder a tenancy of comparable alternative premises during the course of those works and until their practical completion. That tenancy was to be at no rent. The Second Defendant was also to make two payments to each remaining leaseholder – the Phase One Payment and the Phase Two Payment. The Phase One Payment was a disturbance payment in the sum of £41,100. The Phase Two Payment was to reimburse the reasonable expenses incurred by the remaining leaseholders in moving into the temporary accommodation and later returning to their leasehold premises following completion of the refurbishment works at JRP. There was to be no transfer of title. Upon practical completion, each remaining leaseholder would resume possession of their leasehold premises at JRP, taking the benefit of a newly refurbished flat and any uplift in the value of their lease resulting from the refurbishment of that flat and of JRP. The revised draft agreement proposed a long stop date of three and a half years from the date on which the Second Defendant was to take vacant possession of the remaining leasehold premises at JRP for practical completion of the Scheme.

105. Clause 9.3 of the revised draft agreement contemplated three scenarios in which the Scheme may not achieve completion. The first was that having started the refurbishment works, the Second Defendant may not have achieved practical completion by the long stop date. The second was that the Second Defendant became convinced for good reason that the works would or could not achieve practical completion by that date. The third was that following the commencement of the Scheme in accordance with clause 3 of the revised draft agreement – the “Commencement Date” – it may become clear to the Second Defendant acting reasonably, that the works could not be carried out wholly or in part for one or more specified reasons – a “Works Termination Event”. In the event of any of these three possible scenarios coming about, the Second Defendant was able under clause 9.3 to exercise the option granted by the leaseholder to the Second Defendant under clause 10 of the revised draft agreement – the “Landlord’s Option”.
106. A further possible outcome contemplated by the revised draft agreement was that the Second Defendant may decide that the refurbishment works at JRP were no longer viable prior to reaching the “Commencement Date” in accordance with clause 3. Clause 9.4 made provision for that event –

“9.4 In the event that the Commencement Date has not been reached and the Landlord deems the Works no longer viable for any reason, such that the Commencement Date cannot occur, then the Landlord shall at its absolute discretion (acting reasonably):

(a) hand back the Property to the Leaseholder and end the Temporary Accommodation Tenancy as if Practical Completion had taken place (save that the Property will be handed back in accordance with its condition at the Property Vacant Possession Date); and

(b) pay to the Leaseholder the Phase Two Payment; and

(c) this Agreement shall immediately determine (save for any payments due under this Agreement or the Lease) following the end of the Temporary Accommodation Tenancy.”

107. Clause 10.2 and 10.3 of the revised draft agreement provide the “Landlords Option” –

“10.2 From the date here of until the date of Practical Completion the Leaseholder grants to the Landlord, in consideration for the Landlord’s obligations set out in this agreement, the Landlord’s Option to purchase the Property (or accept the Leaseholder’s surrender of all interest in the Property).

10.3 The Landlord’s Option shall only be exercised in relation to the Property in the event that any one of the circumstances set out in clause 9.3 have occurred, or that the Landlord has determined that the Commencement Date cannot occur in accordance with clause 9.4”.

108. Clause 10 made contractual arrangements for agreement of the purchase price, for the resolution of a dispute as to that price and for the mechanics of exercising the option (including service of an option notice) and completing assignment of the lease. Clause 10.4(b) required the purchase price to be determined on the assumption that the refurbishment works both to the leasehold premises and to JRP as a whole had been practically completed. On completion of the assignment, clause 10.13 required the Second Defendant to pay any outstanding Phase Two Payment, the leaseholder’s professional fees reasonably incurred and a sum equivalent to the Home Loss Payment due to the leaseholder under section 29 of the Land Compensation Act 1973, had their lease been compulsorily purchased.

109. Clause 10.14 of the revised draft agreement then stated the terms of the uplift offer –

“10.14 In the event that all leaseholders in the Building have given vacant possession of their properties to the Landlord by 17th March 2023 and either:

(a) a Works Termination Event has occurred; OR

(b) Practical Completion has not been reached,

by 29th September 2026, then within 30 days of that date the Landlord shall exercise the Option and serve an Option Notice in accordance with clause 10.4, and pay to the Leaseholder the Option Uplift Payment on completion of the Transaction”.

110. The “Option Uplift Payment” was defined in clause 1 of the revised draft agreement as –

“The difference between the total of the Agreed Purchase Price together with all sums paid under clause 10.13, and the sum of £1,000,000.00 (ONE MILLION POUNDS)”.

March 2023 discussions and correspondence

111. On 16 March 2023 a without prejudice meeting round table meeting was held between the Claimant and members of her family, the Second Defendant’s Corporate Director of Inclusive Economy and Housing, Vicky Clark, and the parties’ legal representatives. Further correspondence and emails were exchanged over the course of the following days. On 20 March 2023 Ms Clark again met with the Claimant and members of her family. On 21 March 2023, the Second Defendant agreed to extend the deadline for acceptance of the offer until 29 March 2023.

112. On 27 March 2023 Ms Clark emailed the remaining leaseholders, including the Claimant, in the following terms –

“I am very pleased that we are moving towards an agreed date for Vacant Possession of 29th March. This date is important for the Council because it allows us to progress the scheme, and to safeguard £12m of Greater London Authority grant investment in the scheme.

Moreover the Council is not minded to extend deadlines again as we have already made our best and final offer to leaseholders and there is no scope to amend this further.

I would like to remind you that the offer being made to you via the contract offers exceptional value.

- You have the right to return to a fully refurbished flat worth significantly more than the property in its current state, at no net cost to you.*
- Should the scheme start but stall part way through you will have sufficient compensation to purchase something equivalent in size and quality to your refurbished flat, in a similar location.*
- You will receive a disturbance payment of £40,100 per flat within fourteen working days of the contract being signed.*

In the event that you do not accept the offer and agree the VP date, the Council will move to make a Compulsory Purchase Order.

- Under the terms of a confirmed Compulsory Purchase Order the price which the Council can offer you is your flat’s market value, plus 10%.*

I know that alongside final assurances on contracts, you have all had some practical concerns regarding arrangements for Vacant Possession, Inventory and Removal and I thought it sensible to group these in a single email to everyone - please note that this email is intended to cover all the specific issues that people have raised in discussions over the last week.

If you have raised an issue which you feel is not covered here, or if you want further clarification, then please contact me as soon as possible”.

113. The Claimant’s son, Pirakalathan Saravanamuthu, gave evidence at the public inquiry. In his proof of evidence, he states that on 17 March 2023, on receipt of the revised draft agreement the Claimant had instructed new solicitors, Irwin Mitchell LLP, to review it and advise on its terms. He states that it was on 22 March 2023 that the Second Defendant informed the Claimant that the deadline for accepting the revised draft agreement was linked to the availability of GLA grant funding. He says that the Second Defendant agreed at the Claimant’s request to extend the deadline for acceptance of the terms of the revised draft agreement to 29 March 2023. He says that the Claimant received Irwin Mitchell’s advice “around 28 March 2023”.
114. In mid-afternoon on 29 March 2023, Irwin Mitchell emailed a letter to the Second Defendant raising a number of points, including –

“We have not had enough time to review the Agreement and the supporting documentation in detail but we understand that you have told our clients that they must sign the Agreement today (29 March 2023) or you will compulsorily purchase the Property. They have also told me that the grant funding given to you by the Greater London Authority is dependent on you having acquired the keys to the four leaseholder properties in the Building by 31 March 2023.

In respect of the grant funding, I would be grateful if you could confirm that our client’s understanding is correct. Please also let us know whether it is possible to extend this deadline, how the funding is essential to delivery of the Agreement and if you lose the funding, how the Council would fund the compulsory purchase of the Property.

In respect to the Agreement, essentially our clients want to secure a position whereby, if the Council does not refurbish the Property and hands it back to them, or hands it back to them prior to the Commencement Date, they are ensured their global settlement figure of £1 million. These principles are contained in the Agreement, and our clients are not seeking to a renegotiation of the principles already agreed. However, further amendments are required to make the Council's obligations enforceable and to protect our clients. Our clients are acting reasonably in seeking to ensure that this happens.

The Agreement gives the Council a wide discretion to decide not to carry out the works to the Building and the Property and to decide to exercise the Option and purchase the Property instead. In these circumstances and in the light of past structural and repair issues with the Building, we believe that it is entirely reasonable that our clients want to secure their uplift payment and to avoid any unforeseen expenses or circumstances”.

115. At the end of the afternoon on the same day (29 March 2023), the Second Defendant’s lawyers responded to that letter –

“I write after attempting to ring you without success. We are surprised to be contacted by yourselves as we were unaware of your client’s change in solicitors acting. ...

We would like to confirm that the standing offer is for £1 MILLION as per the contract agreement your client has hopefully shown you. The uplift payment will remain open until midnight tonight if your client can give us vacant possession in that time. I'm afraid we cannot entertain any further amendments to the contract. We have been repeatedly clear on this. It is now the day of signature and three other leaseholders have now completed. We cannot realistically circulate a change at this last minute.

We note your letter states that we will compulsorily purchase the property - this is not in fact the case. The relevant deadline today is for the option uplift payment. If your clients provide us with VP after today they will not be entitled to the uplift payment under the contract, but the offer to enter into the contract remains”.

116. The Claimant’s solicitor immediately responded –

“I am sorry that you were not able to get hold of me - I'm not sure what happened. Please can you urgently consider extending the deadline to 30 March (tomorrow) so that I may have time to consider the information in your email below with my client”.

117. On the morning of 30 March 2023, the Second Defendant's lawyers emailed the Claimant's solicitors as follows –

"I write following our call a moment ago. I must be extremely clear that the uplift offer has now expired and will not be reinstated. Please brief your clients accordingly.

...

Your client is still welcome to sign the contract and hand over the keys. The uplift clauses will no longer be operable but the council's existing compensation offer is quite generous and you must be aware it is a substantial improvement on the statutory minimum. If your clients are agreeable to this route we would ask that they sign as quickly as possible, ideally today.

Secondly, we would be prepared to reinstate the original landlord's offer made to your clients late last year and purchase the flat from them outright. This would be on the basis of a new pre-sale valuation of the property in its current condition. This will offer your clients certainty. If your clients do take this route then we suggest adopting the 14th April as a possible exchange date for simplicity's sake.

Please take instructions and let us know your position, particularly if your clients wish to sign the contract".

118. On 31 March 2023, having failed to obtain vacant possession of the Premises, the Second Defendant lost the opportunity of GLA funding for the Scheme in the sum of £12M. Cabinet's approval of the budgetary and funding arrangements for the Scheme as set out in the March report and confirmed on 30 March 2023 following call-in by the Overview and Scrutiny Committee had assumed the loss of that GLA grant funding.
119. On 6 April 2023, the Second Defendant's lawyers sent a detailed response to the Claimant's solicitors' letter of 29 March 2023 –

"We appreciate at the time of your writing that you had not had sufficient time to review the Agreement. Further, that you were under the impression from your clients that if they had not signed the Agreement by 29th March 2023 an extension was required because the only alternative was for the Council to compulsory purchase the Property.

As we explained when we spoke on 29th March, however, an extension is unnecessary. The significance of the 29th March date relates only to the Option Uplift Payment of £1m under clause 10.14, applicable in the event that all leaseholders gave vacant possession of their properties to the Council by that date. The contract remains available for your clients to enter into with the Council, notwithstanding that the effect of clause 10.14 is now academic. In consequence, no extension of time was or is required by your clients. In any event, whilst the Council's Cabinet has approved the use of CPO powers, as we are sure you will have already advised your clients, negotiations can occur alongside a CPO and are not a reason to hold it up.

We note that the offer set out in clauses 10.1- 10.13 still applies and your client will still be entitled to receive the purchase price (as valued on the basis that the works were completed) plus a 10% uplift if the works are terminated.

...

We must emphasise that following the passing of the 29th March, the effect of cl. 10.14 no longer applies and therefore there is no 'global settlement figure of £1 million'. We do not follow how you maintain the assurance in your letter that the agreed principles continue to apply. We also note that you state your clients wish to receive payment upon their property being handed back to them, including where this may occur prior to the Commencement Date. Payment under clause 10 of the Agreement where the works do not complete is on an acquisition basis, not a hand back of the property. Further, prior to the Commencement Date and where the works are deemed no longer viable, the provisions of clause 9.4 apply entitling your clients to hand back of their property and the Phase 2 Payment.

In summary, the sum of £1 million in clause 10.14 (and the still active full back offer of the refurbished value plus 10% per 10.13(c)) was intended to allow your clients to purchase an equivalent property in the event works had to be halted. It was not a compensation payment for disturbance or disruption, which are covered by the Phase One and Phase Two payments”.

120. Thereafter, during the course of continuing negotiations on the revised draft agreement the Claimant sought to persuade the Second Defendant to reinstatement of the uplift offer. On 6 October 2023, the Second Defendant’s solicitors wrote to the Claimant’s solicitors as follows –

“The Council has considered carefully your various amendments to the Option Uplift Payment, which we note as proposed would operate to reinstate the Option, provide a mechanism where payment of the uplift would be made regardless of the date of entry into the agreement by your client and be index-linked.

The terms offered to all four leaseholders who retained interests in James Riley Point included at 10.14 of the draft agreement an offer (as amended) of the Option Uplift Payment in the event that a Works Termination Event occurred or Practical Completion had not been reached by 29th September 2026. The Option Uplift Payment is defined in the Agreement as the difference between the Agreed Purchase Price for the unit (together with all sums paid under cl. 10.13) and the sum of £1m. The commitment on the part of the Council to make the Option Uplift Payment in accordance with cl. 10.14 required all leaseholders to give vacant possession by 29th March 2023. In the event that vacant possession was not given by all leaseholders, the Option Uplift Payment ceased to be payable to any. Although the three other leaseholders agreed terms with the Council in accordance with the draft agreement, the Option under cl. 10.14 lapsed in all cases as a result of your client failing to agree terms and give vacant possession by the due date.

The time limitation on the offer, ending (as amended) on 29th March 2023, was included because vacant possession of all units within James Riley Point was required by 31st March 2023 in order to enable the Council secure £12m grant funding from the GLA. Your client's decision not to agree to the terms offered has meant that the grant has now been lost. More widely, the Option Uplift Payment was proposed as a time-limited offer operating, it was hoped, to incentivise leaseholders to provide early vacant possession. This would have thereby enabled the Council to avoid the costs of making a full CPO, deliver an earlier start on site with associated construction cost savings

and avoid the costs of works for compliance with building and fire safety requirements for an occupied building which will become largely redundant once refurbishment of the block commences.

As a public body, when offering financial compensation for land in advance of a compulsory purchase order, the Council must consider value for money and avoid any repercussive cost impacts or pressures on both the scheme in question and other publicly funded schemes. In the circumstances attaching to this scheme, the Council considers that it was reasonable for the offer of the Option Uplift Payment to have been time-limited and that it is also reasonable now not to reinstate that offer.

The potential and now actual loss of the GLA grant funding were and remain factors which reasonably justified the Council's decision that the offer should be time limited and is not to now be reinstated. The offer of £1m exceeded (and exceeds) the reasonable open market value of the leasehold interest in your client's flat both now and upon completion of the refurbishment works. Absent any other compelling reason, the £1m sum would also potentially give rise to repercussive effects on the acquisition of other interests within the wider Carpenters Estate. For these reasons we regret that we are unable to reinstate the Option Uplift Payment”.

The Claimant's objection

121. In her notice of objection to the Order, the Claimant said that the Second Defendant had failed to take reasonable steps to acquire the Premises from her by agreement. The Second Defendant had begun to make plans for the refurbishment of JRP from 2003 onwards, but had not attempted to enter into meaningful negotiations for the acquisition of her leasehold interest in the Premises until October 2021. The Second Defendant had later put forward a draft settlement agreement to which she and her family were able to agree, subject to resolution of two outstanding matters. Yet the Second Defendant had failed to negotiate constructively on those outstanding matters. Had they done so in a timely way, it would have been possible to reach agreement and to have avoided the stressful and protracted compulsory purchase proceedings which she and her family were now having to endure.
122. The Claimant's first concern about the draft agreement was that on a true understanding of its terms, it did not in fact oblige the Second Defendant to refurbish the Premises and return them to the Claimant; or failing that, to pay to the Claimant the enhanced compensation purportedly payable under its terms. The second point of concern related to the uplift offer proposed under the draft agreement. That proposal had been the subject of continuing discussion between the Claimant's lawyers and the Second Defendant, but in late March 2023 the Second Defendant had peremptorily withdrawn the offer to include the uplift payment in the draft agreement. That was clear evidence of the Second Defendant's failure to negotiate constructively or to make reasonable efforts to acquire by agreement the rights in the Premises which they actually required in order to carry out the refurbishment of JRP.
123. The Claimant set out a series of matters as evidence of the Second Defendant's failure to perform their repairing obligations as Landlord of JRP. They had failed to repair and maintain the drains, the water supply and heating installations. They had withdrawn security cameras and the concierge service. They had licence film companies to use JRP for filming work, which had caused serious noise and vibration to the Claimant

and her family, and resulted in the failure of the lifts serving resident occupiers. This presented severe difficulties for the Claimant and her family who live on the upper floor of the tower block. The Second Defendant had even broken into the Premises and installed a gate which prevented the Claimant and her family gaining access to the Premises.

124. The particular relevance of this history of failure was said to be that it had resulted in a depressed value for the Claimant's leasehold interest in the Premises in the "no-scheme" world, which would be the conventional basis for determining the compensation payable to her under the Land Compensation Acts. That meant that there was a particular onus on the Second Defendant to negotiate constructively with a view to avoiding the need to resort to compulsory purchase.

The Second Defendant's response

125. In responding to these objections in their statement of case, the Second Defendant contended that they had indeed made reasonable efforts to reach agreement with the Claimant either to acquire her leasehold interest in the Premises; or to secure vacant possession of the Premises for the purposes of implementing the Scheme and then restoring the refurbished flat to the Claimant and her family. The Second Defendant said that negotiations with the four remaining leaseholders at JRP, including the Claimant, had been ongoing for a number of years. The Second Defendant had offered terms of settlement to those leaseholders which included an option to return to a fully refurbished property. Three out of those four leaseholders accepted the terms offered and had since given vacant possession of their flats at JRP.
126. The Second Defendant had provided remaining leaseholders with a detailed explanation of the terms on offer. The draft form of agreement included contractual safeguards to protect the leaseholders in the very unlikely event that the Scheme failed to begin; or once begun, the works failed to complete. This included a payment to the leaseholder of the value of their lease assuming that refurbishment had been carried out. The draft agreement included a provision whereby the Council would have to pay each remaining leaseholder an enhanced payment – the uplift offer - in the event that the refurbishment works required as part of the Scheme were not completed by a specific deadline. This incentivised offer was made on the basis that the Second Defendant secured early vacant possession of JRP as a whole, thereby enabling the Second Defendant to secure GLA grant funding, and to begin and complete the works required as part of the Scheme in a timely manner, thereby providing benefits and cost savings to the Second Defendant. As agreement was not reached in time with the Claimant, the Second Defendant was no longer able to secure those benefits and costs savings. Consequently, as the Second Defendant could no longer justify the uplift offer as representing value for money, that element of the draft agreement had been withdrawn from the negotiations with the Claimant.
127. The Second Defendant, however, committed to continuing negotiations for acquisition and or vacant possession of the Claimant's leasehold interest and would attempt to negotiate with her in parallel with the compulsory purchase proceedings. The Second Defendant remained willing to agree to the Claimant having the option either to move into comparable temporary accommodation in the local area for the duration of the refurbishment works and thereafter return to the Premises; or to sell her leasehold interest to the Second Defendant by private treaty. However, the Second Defendant

would not agree to buy the Claimant's leasehold interest in the Premises at a price very substantially in excess of its open market value.

128. The Second Defendant denied that they had failed to maintain JRP. They contended that they had acted in accordance with their obligations both as Landlord and as local housing authority. They disputed the Claimant's contention that there had been a history of neglect which had resulted in diminution in the value of the Premises. The Claimant had been offered a package of measures which accord with the CPO Guidance and the compensation code; and the option to return to a fully refurbished and improved home at the Premises following completion of the Scheme.

Evidence at the public inquiry

129. Both the Claimant and her son gave written and oral evidence at the public inquiry. The Claimant gave detailed evidence of the deteriorating state of repair and maintenance of JRP during the years following 2005. She referred to problems with heating, cleaning, security, water supply, drainage, leaks and flooding. She gave impressive details of the prolonged noise, disruption and disturbance that she and her family had experienced in consequence of the Second Defendant permitting parts of JRP to be used for film making. These activities had led to physical damage to the Premises, power cuts, the lift becoming out of order and security problems. They had provoked the Claimant into threatening legal proceedings against the Second Defendant as her Landlord. On one occasion in early 2011, the Second Defendant actually broke into the Premises and installed a steel door which prevented the Claimant and her family from gaining entry. The Second Defendant later explained that this had been done in error due to their operatives mistaking the Premises for another flat at JRP. Although the Second Defendant did not accept as accurate the detailed account of these matters given by the Claimant, it is understandable that she and her family should have formed the perception that the Second Defendant was indifferent to the impact of conditions at JRP on those leaseholders who continued to live there; and even pursuing a policy of deliberate neglect.
130. The Claimant's son gave evidence of his active involvement in negotiations with the Second Defendant. He confirmed that the Claimant and her family had voted in favour of the Landlord Offer as they wished JRP to be refurbished rather than demolished. He said that negotiations between the Claimant and the Second Defendant began in earnest in April 2022. The Claimant had raised two particular issues. Firstly, the Claimant wished to be able to purchase a property in the local area. Secondly, the Claimant wished to be compensated for all that she and her family had had to endure while living at JRP during the period since 2005.
131. The Claimant's son stated his understanding of the main terms offered by the Second Defendant under the revised draft agreement as follows –

“The structure of the contract was to give the Council a licence to carry out works to the flat. When the works were carried out the Council offered to give the flat back to us. We had an option to sell the flat to the Council at the no scheme value, throughout that process. However, if the Council in its discretion decided that the works were not viable having started them they would pay us the value of the property as if it had been fully refurbished. Finally, if the Council decided that it could not commence the works then it will hand the property back to us. The contract also contained option uplift

payment which was £1 million minus the purchase price and disturbance payment. This payment was only available if all the leaseholders signed the agreement by a certain date”.

132. He set out a number of concerns with the Second Defendant’s offer which he had raised during negotiations. He found the revised draft agreement to be a complex document. He was unhappy that the Second Defendant insisted on negotiating collectively with the remaining leaseholders. He was concerned about the short deadline for acceptance of the revised draft agreement in March 2023. He was concerned about failure of the Scheme and what would happen were the refurbishment project not to succeed. In the event of failure, the Claimant’s family wished to be in a position to buy a property in the local area. They had instructed new solicitors to review the revised draft contract and to advise on its terms.
133. The Claimant’s son said that the outstanding issue for the Claimant was the Second Defendant’s refusal to reinstate the uplift offer into the draft agreement. The Second Defendant had acted unreasonably in declining Irwin Mitchell’s request for a short extension of the deadline for acceptance of the revised draft agreement at the end of March 2023. He was of the view that had the Second Defendant done so, the terms of the revised draft agreement, including the uplift offer, would have been agreed and the need for compulsory purchase avoided. He was also concerned at the Second Defendant’s refusal to pay the Claimant’s professional fees incurred since March 2023.
134. The Claimant’s son said that the family had been unable to gain ready access to the Premises due to the lifts at JRP being out of order since May 2022. They were now housed temporarily in temporary accommodation which was too small for the family’s needs. It was a furnished property which meant that the family had not been able to use their own furniture and many of their belongings whilst living there.
135. In his proof of evidence on behalf of the Second Defendant, Mr Mackin gave a detailed chronological account of the history of negotiations with remaining leaseholders at JRP, including the Claimant and her family. He offered the following explanation of the uplift offer –

“The Council’s initial attempts to encourage agreement with all four leaseholders by the end of July 2022 had been unsuccessful. To incentivise leaseholders to provide early vacant possession, from September 2022, the Council proposed a time limited offer on one aspect of the agreement which became known as the Option Uplift Payment. In essence, where the Council exercised an option to acquire because either the refurbishment works had been terminated or practical completion not achieved by an agreed longstop date, the offer operated to ensure that leaseholders would receive a minimum total payment of £1m, taking into account other payments to which they were entitled under the overall offer. The uplift payment was made conditional upon all leaseholders in concert giving vacant possession by an agreed date which had to be before 31st March 2023. In the event vacant possession was not given by all leaseholders by the agreed date, the uplift payment ceased to be payable to any. In this way, the Council sought to ensure that vacant possession could be obtained by the date stipulated by the GLA and to incentivise all the leaseholders to make the contractual commitment.

...

In early 2023, and with the GLA grant condition date of 31st March approaching, the Council made renewed efforts to achieve agreement with all four leaseholders. Various dates to conclude agreement and provide vacant possession were proposed by the Council, including 17th March and ultimately 29th March 2023 was fixed as the contractual date by which vacant possession was required to be given by all leaseholders to trigger the entitlement to the uplift payment. As such, the date of 29th March 2023 became the date by which all leaseholders were required to give vacant possession so that they might benefit from the £1m uplift figure provided by the uplift payment calculation.

On 29th March 2023, the three other leaseholders completed agreements with the Council and provided vacant possession of their flats. The Objectors did not complete their agreement with the Council as terms could not be agreed. Consequently, as vacant possession of Flat 128 was not obtained by 29th March 2023, the Option Uplift Payment lapsed for all four leaseholders because the option was conditional on all four agreeing under contract to vacate by 29th March 2023”.

136. Mr Mackin said that since April 2023, negotiation with the Claimant had been conducted through correspondence with her solicitors and exchanges of amended draft agreements. The principal matter in contention was the uplift offer. The Second Defendant had not been willing to reinstate the uplift offer for the reasons given by the Second Defendants’ solicitors in their letter of 6th October 2023.
137. Mr Mackin stated the principal terms which remained on offer by the Second Defendant to the Claimant –

“As a 12th December 2023, the core terms of the Council’s offer for the Objectors’ temporary relocation during refurbishment works are as follows:

- a disturbance payment of £40,100 to be made on vacant possession (the “Phase One payment” under the agreement);*
- the provision of alternative temporary accommodation rent-free for the duration of the refurbishment;*
- reimbursement of all reasonable costs arising in consequence of the temporary move, including costs incurred by moving into the temporary accommodation and then on return from the temporary accommodation to Flat 128 (the “Phase Two payment” under the agreement);*
- removal and where necessary storage arrangements for the objectors’ possessions with a new for old offer on items that could not be moved; and*
- no charge for the refurbishment works.*

Where the works are terminated for any reason or practical completion not achieved by an agreed longstop date, the Council’s offer includes a mechanism under which the Council may exercise an option to acquire Flat 128. That acquisition is at an enhanced value that assumes practical completion has been reached and the refurbishment achieved. Where this mechanism applies, the Objectors’ entitlement is as follows:

- *acquisition of Flat 128 at an assumed value as if fully refurbished and the works completed, where that valuation is undertaken as if Flat 128 is within a private development;*
- *payment of a further 10% of the assumed value of the property;*
- *payment of all professional fees in relation to the transaction;*
- *retention of the Phase One payment of £40,100;*
- *to the extent not already covered by any Phase Two payment, reimbursement of reasonable expenditure in respect of finding and moving into alternative permanent accommodation incurred by the leaseholder up to the maximum amount that would be payable for costs in respect of purchasing a property up to the value of the hypothetical valuation; continued occupation of the rent-free temporary accommodation until the transaction completes”.*

138. Mr Mackin said that the Second Defendant considered the compensation package on offer for the temporary relocation properly reflected the disruption that would be caused to the Claimant’s family by the temporary move and would support them during the refurbishment. On completion, those works would provide them with a newly refurbished flat within JRP at no cost to themselves. Further, where those works did not complete or did not complete on time, the compensation package proposed on acquisition of the Premises by the Second Defendant was highly favourable to the Claimant. That remained the case notwithstanding the withdrawal of the uplift offer.

Closing submissions

139. In his closing submissions on these matters, Mr Jones KC submitted that the Second Defendant had failed to make reasonable efforts to negotiate with the Claimant and her family for the land and rights needed to enable the refurbishment works to be carried out at JRP and the Scheme to be delivered. The Second Defendant’s efforts, such as they were, must be judged in the context of the prolonged and persistent mismanagement of JRP by the Second Defendant as both landlord and local housing authority, of which the Claimant had given detailed evidence. The Second Defendant’s offers to purchase the Claimant’s lease in 2019 and 2021 had not been received by her. The Second Defendant had not followed up on either offer. Negotiations did not begin until April 2022.
140. When the Second Defendant introduced the uplift offer into the draft agreement which formed the basis for negotiations with a view to avoiding the need for compulsory purchase, the Second Defendant had set deadlines for acceptance firstly in December 2022 and later in March 2023, but had not informed the Claimant or her solicitors of the reason for imposing that deadline. The Claimant, her family and her solicitors had been unaware that the uplift offer was contingent upon the Second Defendant securing the GLA grant until very shortly prior to the final imposed deadline expired on 29 March 2023. That was unreasonable. That failure was compounded by the Second Defendant’s refusal shortly to extend the final deadline at the request of Irwin Mitchell on 29 March 2023, to enable the solicitors to give proper advice to the Claimant and her family on a complex draft contract. The Claimant’s evidence was that the other remaining leaseholders had simply given in under pressure from the Second Defendant

to complete the revised draft agreement by the final imposed deadline of 29 March 2023.

141. It had been unreasonable for the Second Defendant to decline to reinstate the uplift offer in subsequent negotiations with the Claimant's solicitors. The Claimant's son had made clear that the Claimant required the security of the uplift offer so that, should the Scheme fail for any reason, she and her family would be in a position to purchase comparable alternative leasehold premises in the local area. Given the history of abortive plans to regenerate JRP since 2005, that was plainly a commitment which the Second Defendant acting reasonably ought to have accepted. Whereas clause 9.4 of the draft agreement would allow the Second Defendant to return the Premises to the Claimant in their current unrefurbished state, should the Second Defendant decide at a later date not to commence the Scheme.
142. The Second Defendant had failed to undertake meaningful efforts to negotiate an agreement with the Claimant which would avoid the need to resort to compulsory purchase powers.
143. For the Second Defendant, Mr Edwards KC submitted that the Claimant's criticisms of the Second Defendant's efforts to negotiate an agreement with the Claimant were unjustified. Offers to purchase had been made in 2019 and 2021. The Second Defendant had stated their policy of support for remaining leaseholders at JRP in the Landlord Offer, which the Claimant had supported in the residents' ballot. Negotiations between the remaining leaseholders, including the Claimant, and the Second Defendant had been in progress since April 2022.
144. The purpose of the draft agreement whose terms were in discussion between the parties was to enable the Second Defendant to secure the rights of vacant possession which they needed to deliver the Scheme, and thereby avoid the need for acquisition of the remaining leaseholders' leases, whether by agreement or by compulsion. The terms offered would enable the leaseholders and their families to move at no cost to themselves into comparable temporary accommodation for the duration of the refurbishment works at JRP; and to return, again at no cost to themselves following completion of those works. They would receive the Phase One Payment and reimbursement of costs reasonably incurred under the Phase Two Payment. They would take the benefit of a refurbished home at JRP and the enhanced value of their leases, again at no cost to themselves.
145. The purpose of inclusion of the uplift offer in clause 10.14 of the revised draft agreement had been to incentivise the remaining leaseholders to complete the agreement. Three of the four remaining leaseholders had felt able to complete the revised draft agreement by the final deadline set by the Second Defendant. The Claimant alone had not done so. It had been reasonable for the Second Defendant to impose that deadline in order to ensure that their exposure to the cost of the uplift offer was contingent on securing the GLA grant. Otherwise, the uplift offer would not represent value for money for the reasons given by Ms Clark in her letter to the Claimant's solicitors of 6 October 2023. For those same reasons, it had been reasonable for the Second Defendant to decline to reinstate the uplift offer into the draft agreement on which the parties had continued to negotiate.

146. The terms which remained on offer to the Claimant, as stated by Mr Mackin in his evidence to the public inquiry, nevertheless provide a fair and reasonable basis for the Claimant to withdraw her objection to the Order and reach agreement with the Second Defendant. As the Claimant's son had confirmed in evidence, the outstanding issue for the Claimant was the Second Defendant's refusal to reinstate the uplift offer. The Second Defendant had made clear to the Claimant why they were not willing to reinstate the uplift offer. Their reasons for refusing to do so were justified and disclosed no failure to engage in meaningful negotiations with the Claimant.
147. Mr Edwards KC said that the Second Defendant disputed the Claimant's contentions that they were guilty of mismanaging JRP and had failed in their duties as landlord and local housing authority. The Claimant had not pursued legal proceedings for breach of covenant or of statutory duty. In any event, those issues were of no assistance to the inspector in forming his judgment whether the Second Defendant had conducted meaningful negotiations and made reasonable efforts to acquire the Claimant's leasehold interest by agreement.

The inspector's decision

148. The inspector's reasoning and conclusions on those matters are stated in DL28 to DL35 of his decision.

"28. The CPO Guidance sets out that acquiring authorities are expected to provide evidence that meaningful attempts at negotiation have been pursued or at least genuinely attempted. Paragraph 19 details what acquiring authorities should consider when negotiating. The AA must demonstrate that it has taken reasonable steps to acquire all the land and rights in the Order by agreement. Compulsory purchase is intended as a last resort. Furthermore, the CPO guidance is clear that it is necessary for the acquiring authority to demonstrate that they have taken reasonable steps to acquire all the land and rights included in the Order by agreement.

29. However, it is also clear that 'if an acquiring authority waits for negotiations to break down before starting the compulsory purchase process, valuable time will be lost. Therefore, depending on when the land is required, it may often be sensible, given the amount of time required to complete the compulsory purchase process, for the acquiring authority to: plan a compulsory purchase timetable as a contingency measure; and initiate formal procedures'.

30. The Objectors argue that the intention to redevelop or refurbish JRP has been a protracted event, spanning over some 20 years. During this period, it is argued that the Council has allowed JRP to deteriorate to the point that it has made living there a challenge, especially as the Objectors live on the 21st floor and the only working lift was closed down in 2021 as a result of the Council failing to source replacement parts. The Council did enter into discussions with the Objectors and three other families that held the freehold to their properties in September 2022 and again in early 2023. At this time, the Council agreed that an uplift of £1 million would be paid, should the Scheme fail. However, the Objectors did not enter into the agreement within the timeframe insisted on by the Council as they sought legal advice over its terms and conditions. Furthermore, as the agreement was tied to a grant from the Greater London Authority, the offer of a £1 million uplift in the event of the Scheme's failure was withdrawn. The

Objectors argue that no meaningful efforts to negotiate have been made by the Council since the withdrawal of the agreement.

31. As the Objectors state, the redevelopment or refurbishment of JRP has been mooted for over 20 years. Indeed, from 2020 extensive advertising, workshops, and consultation on the proposed masterplan to regenerate Carpenters Estate was undertaken, culminating in the Council balloting occupiers through the Landlord Offer from 19 November - 14 December 2021. This essentially asked the community whether it agreed to the regeneration of Carpenters Estate, which included JRP. Moreover, the Landlord Offer made it explicit that resident homeowners in JRP would have several options open to them and should a voluntary agreement not be reached, the Council may, as a last resort, apply for a compulsory purchase order to compulsorily acquire their property. The Objectors voted in favour of the Landlord Offer.

32. The Objectors have had to vacate their home and move into temporary accommodation and have not been able to readily access the flat and their personal effects within JRP. However, the Objectors have been rehoused as a family unit, close to JRP, and the Council have adapted the property to ensure that it meets their needs. The Objectors still reside at the property, rent free and can continue to do so until the works at JRP are complete. The Objectors then have the options available to them, as set out within the Landlord Offer.

33. The evidence from the Council is comprehensive and fully demonstrates how it has attempted to negotiate with the Objectors in compliance with the CPO guidance. Therefore, based on the evidence before me I consider that the Council acting as the Acquiring Authority has adequately demonstrated that they entered into meaningful negotiation with the Objectors subject to the Order. In addition, although the Objectors stated that offer letters from Savills were never received and the offers were not followed up, it is clear from the Acquiring Authority's evidence that discussions regarding the purchase of Flat 128 JRP had been taking place between the Objectors and the Council.

34. Although I acknowledge Dr Savaranamuthu's statement that the other three freeholders "just gave up", none of the other freeholders/owners of those properties provided any evidence to support this assertion either written, or orally during the inquiry. Moreover, the Acquiring Authority has stated that once the works to JRP has been completed, the Objectors are free to move back into their newly refurbished property, and in the event that the Scheme is not completed, an enhanced payment to the value of the flat as if it were refurbished, would be made.

35. Thus, I am satisfied that the Acquiring Authority has attempted to negotiate the vacant possession of Flat 128 at JRP. In reaching this conclusion I accept that collectively the Objectors' connection with the Order Land would have made any negotiation very difficult. In this respect I can fully understand their unwillingness to sell their interest in the land or being unable to reach an agreement. However, a failure to ultimately reach an agreement does not mean that the negotiation process was flawed. Therefore, I conclude that the Acquiring Authority have taken reasonable steps to acquire all the land and rights included in the Order by agreement".

149. It is also relevant to note the following reasoning in DL38 –

“I note the current state of the building, which is uninhabitable, the protracted history of decanting, the alleged mismanagement of the building’s maintenance and the tenancy agreement, the antisocial behaviour, and disturbances caused by filming at JRP. However, these matters are not material to the issue at hand”.

Submissions

150. Mr Jones KC submitted that the inspector had made a legal error in failing to take into account and attribute weight to the history of abortive plans for regeneration of JRP, which had resulted in the decanting of the block since 2005 and the subsequent history of neglect and mismanagement by the Second Defendant. Those matters formed an important context to the negotiations between the parties. They explained why the Claimant and her family had real and legitimate fears for the risk and the consequences of failure of the Scheme. The Second Defendant had acted unreasonably in failing to acknowledge those concerns in negotiations. The Inspector had acted unlawfully in failing to take proper account of that important context and those concerns in his decision.
151. In particular, those matters served to explain why the Claimant had needed time in March 2023 to take legal advice on the true meaning and effect of the uplift offer before making her decision whether to accept the terms offered by the Second Defendant in the revised draft agreement. Those terms were complex and the drafting was in parts obscure. The inspector had failed to give proper consideration to those vital points, because he had misunderstood the true extent of the terms offered in the revised draft agreement in March 2023. In particular, he had misunderstood the effect of clause 9.4 of the revised draft agreement, which would have enabled the Second Defendant to decide at a later date not to proceed with the Scheme but to hand back the Premises to the Claimant unrefurbished and in an uninhabitable tower block.
152. Had the inspector properly understood that the uplift offer was so limited, he would have accepted that the Second Defendant had acted unreasonably in refusing to allow the short extension to the Claimant to receive her solicitors’ advice before making her final choice whether to accept the terms offered by the Second Defendant in late March 2023. His error was compounded by his failure to acknowledge that it had been unreasonable for the Second Defendant not to have divulged that the deadline for acceptance of the uplift offer was driven by the terms which governed the Second Defendant’s eligibility to attract the GLA grant.
153. The reality was that, in the absence of considered advice from her solicitors and given the uncertainty created by clause 9.4 of the revised draft agreement, in late March 2023 the Claimant and her family had been placed by the Second Defendant in an impossible position, in which they could only prudently decline to accept the terms then offered within the tight deadline imposed by the Second Defendant. The inspector’s misunderstanding of the effect of clause 9.4 had led him to fail to grasp that essential point, which rendered the Second Defendant’s negotiating position unreasonable. That position had not improved subsequently, since the Second Defendant had consistently refused to entertain further negotiation on the Claimant’s principal point of concern, which was to secure the fall back to an uplift payment of £1m on sale of her lease, in the event of failure of the Scheme.

154. The inspector had failed to address these matters adequately in his reasons, which were legally deficient to explain why he had concluded in DL35 that the Second Defendant had taken reasonable steps to acquire the land and rights required to deliver the Scheme by agreement.

Discussion

155. In DL29, the inspector referred to the CPO Guidance that acquiring authorities are expected to provide evidence of genuine and meaningful attempts at negotiation with those whose land or rights are subject to proposed compulsory purchase. There should be evidence of reasonable steps being taken with a view to acquiring the land required for the scheme underlying compulsory purchase by agreement. Nevertheless, in order to maintain the momentum of the scheme, it may be appropriate to take steps to secure compulsory purchase powers whilst also pursuing negotiations to acquire the land and rights needed for the scheme by agreement.
156. It is important to have well in mind why these considerations are relevant to the decision whether to confirm a compulsory purchase order. The acquiring authority is expected to advance a compelling case in the public interest for confirmation of the order. Compulsory purchase is intended as a last resort. Unless the acquiring authority has engaged in meaningful negotiations with land owners and rights owners whose property is needed to achieve the purposes for which the order is made, it will not be possible (at least in the majority of cases) for the confirming authority to determine whether resort to compulsory acquisition might have been avoided. In the absence of evidence of reasonable efforts to acquire the requisite land and rights by agreement, it is unlikely to be open to the confirming authority safely to conclude that a compelling case for compulsory acquisition has been established.
157. However, what is required in order to demonstrate that the acquiring authority has at least attempted to engage in and take forward such meaningful negotiations, and has made reasonable efforts to acquire the land and rights required for the scheme by agreement, will vary from case to case. Moreover, the judgment whether the action taken by the acquiring authority fulfils those policy requirements is primarily for the confirming authority, in this case the inspector, subject only to statutory review by this court on *Wednesbury* principles.
158. It is vital also to have well in mind that the policy of the CPO Guidance is to require the acquiring authority to attempt and take forward meaningful negotiations and make reasonable efforts to acquire by agreement. It is not to insist on those negotiations and efforts achieve a successful outcome. *Ex hypothesi*, there will be cases in which the acquiring authority will need to resort to compulsory purchase because the parties have failed to reach an agreement for sale or possession of the requisite land or rights which is mutually acceptable, despite the meaningful and reasonable efforts of the acquiring authority to secure such an agreement.
159. Essentially, that was the inspector's conclusion in DL36, having considered the history of negotiations between the Second Defendant and the remaining leaseholders, including the Claimant, which was before him in evidence in the present case. I have set out that evidence and the respective contentions advanced by the Claimant and the Second Defendant in some detail. I am unable to accept that the inspector's

consideration of that evidence and those contentions in DL28 to 35 and DL38 of his decision reveals or substantiates the legal errors contended for by Mr Jones KC.

160. In the light of the inspector's reasons in DL28 and DL29, it is beyond argument that the inspector directed himself properly by reference to the relevant policy and advice given in the CPO Guidance.
161. It is incorrect to say that the inspector failed to take account of the prolonged period of uncertainty over plans for regeneration of JRP. He refers to that history in DL31. His task was not to review the reasons why matters had taken so long. The relevant question for him was to consider whether the Second Defendant had made appropriate arrangements to accommodate the impact of the current refurbishment proposals under the Scheme on remaining leaseholders at JRP, including the Claimant and her family. It was of significance that the Claimant and her family favoured refurbishment over demolition, and had voted in favour of the Landlord Offer on that basis. In making that choice, the Claimant and her family inevitably accepted that they would at least need to move out of the Premises to alternative residential accommodation during the course of the refurbishment works. On the evidence before him, the inspector was entitled to making the findings that he sets out in DL32.
162. The inspector referred specifically to the options available to the Claimant and her family under the Landlord Offer. I have mentioned those options in paragraph 98 of this judgment. Of particular note is that under the Landlord Offer, following completion of the Scheme the Claimant and her family will be able to resume possession of the Premises and take the benefit not only of their refurbishment but also the resulting uplift in value of her lease in the refurbished JRP. As the inspector noted in DL34, Mr Mackin had confirmed the options which remained available to the Claimant at the public inquiry.
163. In the light of those matters, the inspector cannot be said to have failed to have taken proper account of the period of uncertainty which preceded the Second Defendant's decision to take forward refurbishment of JRP and promote the Landlord Offer.
164. I do not accept that the inspector fell into legal error, in finding that the issues over mismanagement of JRP and the alleged failure of the Second Defendant to fulfil their duties as landlord and housing authority were not material to his decision whether to confirm the Order. His statutory function was to make that decision. He chose to do so by applying the framework set by the CPO Guidance. The overarching question for him to decide was whether the Second Defendant had established a compelling case in the public interest for confirmation.
165. Approaching matters in that way, it was open to him reasonably to take the view that allegations of historic property management failures and breaches of covenant made against the Second Defendant, which were disputed, were not for him to resolve. It is obvious from both DL30 and DL38 that he had those matters well in mind. The logic of the Claimant's argument on this point is that all other factors pointing clearly in favour of a compelling case in the public interest for confirmation of the Order, the Claimant's objection should nonetheless prevail on the basis of the alleged history of failures on the part of the Second Defendant to fulfil their responsibilities as landlord and housing authority. As the inspector points out, however, the Claimant and her family had voted in favour of refurbishment of JRP. That was also, as the inspector

found, what the public interest demanded, largely because of the need to bring JRP back into use and meet the local need for affordable housing. The inspector was reasonably entitled to judge that past failings that were themselves disputed were not a matter that bore materially on the decision which he was called upon to make.

166. It is pertinent to recall that the reason why the Claimant contended that those matters were relevant in her written objection was that, as she saw it, the Second Defendant's failings as landlord and housing authority had resulted in the diminution in value of her lease in the no scheme world. However, the terms of the revised draft agreement offered by the Second Defendant addressed her concern: they provided for the Claimant's leasehold interest to be valued on the assumption that the refurbishment works had reached practical completion. Mr Mackin confirmed that in his proof of evidence, in outlining the principal terms which remained on offer to the Claimant.
167. In his oral submissions, Mr Jones KC placed particular emphasis on his argument on the meaning and effect of clause 9.4 of the draft agreement. He submitted that the inspector's reasoning in DL30 revealed the inspector's misunderstanding of the true extent of the uplift offer included in the draft revised agreement and which lapsed at the end of March 2023.
168. Mr Edwards KC submitted that the Claimant had not raised the effect of clause 9.4 of the draft agreement as a core concern at the public inquiry. Neither Mr Rhead nor the Claimant's son had raised that clause as a matter of concern. It had been mentioned only fleetingly in the Claimant's closing submissions. There is force in those submissions. It is also correct to say that the draft revised agreement was in evidence before the inspector. There was no dispute as to the meaning and effect of clause 9.4. It is easy to understand that the Second Defendant as acquiring authority would not wish to be under an obligation to purchase remaining leases at JRP in circumstances in which the Scheme was abandoned before it had even begun to be implemented. It does not appear that either the Claimant's son or Mr Rhead expressed any specific concern about that proposed term.
169. These points serve to make Mr Jones KC's submission an unpromising one. But in any event, in my view, this part of the Claimant's case is founded upon a misreading of the inspector's reasoning in DL30.
170. In DL30, the inspector's focus was on the question whether the Second Defendant had acted reasonably in setting the final deadline of 29 March 2023 for acceptance of the revised draft agreement containing the uplift offer; and in declining either to extend that deadline at the request of the Claimant's solicitors or to reinstate the uplift offer during subsequent negotiations. Those were the core complaints made by the Claimant's son in his evidence and by Mr Jones KC in his closing submissions.
171. As was in fact common ground between the Claimant's son and Mr Mackin, the main outstanding issue in negotiations had been the Second Defendant's refusal to reinstate the uplift offer. Both parties had clearly stated to the inspector the reasons for their respective positions in relation to that unresolved issue. It was for him to decide whether the parties' failure to reach agreement on that matter resulted from a lack of meaningful and reasonable effort to negotiate on the part of the Second Defendant as acquiring authority. The Second Defendant's solicitors had stated the Second Defendant's reasons for their negotiating position in their letter of 6 October 2023.

172. As is obvious from DL33 to DL35, the inspector had considered the evidence in relation to those negotiations. He concluded that failure of effort or lack of reasonable engagement on the part of the Second Defendant was not the reason why the parties had been unable to resolve that issue between them. That was a judgment he was reasonably entitled to make, based on the information before him. DL30 does not reveal any misunderstanding either of the terms of the Second Defendant's offer, including clause 9.4, or of the factual position more generally. The observation that in September 2022 and again in early 2023 the Second Defendant agreed that an uplift of £1 million would be paid, should the scheme fail, is no more than shorthand for the uplift offer that was included in clause 10.14 of the revised draft agreement for acceptance finally by 29 March 2023. The focus of debate before the inspector was whether the deadline for acceptance of that enhanced offer, the refusal to extend it and the refusal to reinstate it were unexplained and unreasonable. The parties are left in no genuine doubt as to the inspector's conclusion on those matters and that he accepted the Second Defendant's evidence that they had good reason for acting as they did.

Conclusion

173. For these reasons, ground 2 must be rejected.

Ground 3 – excessive use of compulsory purchase powers

The issue

174. The issue under this ground is whether the inspector failed to understand and thereby misdirected himself as to the Claimant's argument that compulsory purchase of the Premises was an excessive use of the Second Defendant's power under section 226(1)(a) of the 1990 Act. It is also in issue whether the inspector gave proper, adequate and intelligible reasons for rejecting that argument.

CPO Guidance

175. It is well established as a matter of policy that compulsory purchase powers should be deployed as a last resort. In the context of section 226(1)(a) of the 1990 Act, the CPO Guidance advises that the confirming authority will consider whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by means other than compulsory acquisition. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired.

The parties' contentions

176. The Second Defendant's case for confirmation of the Order was that in order to facilitate the construction and delivery of the Scheme, they required full vacant possession of JRP, including the Premises. In the absence of an agreement with the Claimant for vacant possession or acquisition of the Premises, the Scheme could not be achieved without the use of compulsory purchase powers. The powers to take temporary possession of land for public works enacted under Part 2 of the Neighbourhood Planning Act 2017 were not yet in force. In the absence of either agreement with the Claimant for vacant possession of the Premises or the power to take

temporary possession of the Premises, the Council had as a last resort exercised its powers of compulsory acquisition under section 226(1)(a) of the 1990 Act in order to facilitate the delivery of the Scheme.

177. The Claimant's case was that the Premises were already vacant and she and her family living in temporary alternative accommodation. She remained willing to offer the Second Defendant a licence or other legal arrangement to allow access to the Premises for the purpose of undertaking the refurbishment works. There was no practical or commercial need for the Second Defendant to acquire her leasehold interest in order to deliver the Scheme.

The inspector's decision

178. The inspector addressed the question whether the proposed use of compulsory purchase powers was excessive in DL36 to DL38 –

“36. One of the factors in considering whether to confirm a CPO is if the purpose for which the AA is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals/locations put forward by others.

37. The Objectors argue that the Acquiring Authority's requirement to acquire all of their legal interest in the property is disproportionate as the flat is already vacant. Moreover, the Objectors are willing to stay in their emergency accommodation for a further three years, until the works are completed. A licence or arrangement to allow temporary access into the flat is also agreeable to allow the refurbishment works to be undertaken.

38. I note the current state of the building, which is uninhabitable, the protracted history of decanting, the alleged mismanagement of the building's maintenance and the tenancy agreement, the antisocial behaviour, and disturbances caused by filming at JRP. However, these matters are not material to the issue at hand. In order to achieve the policy objectives, set out above, the development has to take place on the Order Land and its surroundings. Despite the purported offers from the Objectors, no alternative Scheme or agreement has been put forward which would meet the policy objectives and the comprehensive regeneration of the Order Land which is clearly essential to enable the provision of affordable housing that is needed in the area. It is therefore clear that the purpose for which the Council is proposing to acquire the land cannot be achieved by any other means and the use of the CPO as a last resort is proportionate to achieve the aims set out above”.

Submissions

179. Mr Jones KC submitted that the inspector's reasoning was confusing and appeared to rely on the Claimant's complaints about the history of the Second Defendant's mismanagement of JRP since 2005, rather than engaging with the question whether the use of compulsory purchase powers exceeded what was necessary or justified for the purpose of delivering the Scheme. The history of mismanagement of JRP was irrelevant to that question. On the Claimant's own case, it was a factor relied upon to demonstrate the Second Defendant's failure to negotiate with the Claimant, rather than the question now under consideration.

180. It was submitted that the inspector had not grappled with the Claimant's offer to grant the Second Defendant the requisite licence to take possession of the Premises for a temporary period for the purposes of carrying out the refurbishment works. He had not given any explanation why acceptance of that offer would be insufficient to enable the Second Defendant to deliver the Scheme. As a result, the Claimant was substantially prejudiced, since she simply could not know why this ground of objection to the Order had been rejected.

Discussion

181. There is an obvious air of unreality about the Claimant's case on this ground. I have rehearsed the history of negotiations between the Second Defendant and the Claimant in considerable detail earlier in this judgment. A principal purpose of those negotiations had been to try to arrive at mutually acceptable terms upon which both parties could agree that the Second Defendant should be given vacant possession to carry out the refurbishment works required to deliver the Scheme, following which possession of the refurbished Premises would be returned to the Claimant. Those negotiations were founded on the objective of avoiding the need for the Second Defendant to purchase the Claimant's leasehold interest in the Premises, whether by agreement or under compulsion.
182. In DL35, the inspector concluded that although the parties had not been able to reach agreement, that was not the result of any failure on the part of the Second Defendant to take reasonable steps in the negotiations. I have rejected the Claimant's contentions under ground 2 that the inspector's conclusions on that issue are legally flawed.
183. The inescapable fact was that on the evidence before the inspector, those negotiations had not resulted in terms on which both parties could agree. The principal source of disagreement was the uplift offer. The Claimant's son had made it clear that the Claimant insisted on reinstatement of the uplift offer, since she required the "*insurance policy*" of the sum of £1m payable under the uplift offer to enable her to purchase a comparable property in the local area should the Scheme fail. The Second Defendant had made it clear that, following the loss of opportunity to secure GLA grant funding at the end of March 2023, they could not justify reinstating the uplift offer. To do so would be commit to paying the Claimant a sum of money which, on the advice of their valuers, would be very substantially in excess of the compensation that was likely to be payable to the Claimant under the land compensation acts in the event of compulsory purchase of her lease of the Premises. The uplift offer could no longer be said to represent value for money to the public purse.
184. In his expert report, Mr Rhead sought to support the Claimant's argument that the use of compulsory purchase powers in this case was excessive –

"... the [Claimant's] Family are prepared to enter into a licence subject to agreement being reached on the protections contained within the Draft Agreement in such circumstances where the Council decides not to proceed with the Scheme. Since March 2023, the Objectors have been advised by [Irwin Mitchell] and its specialist planning team. They are instructed to agree the terms of the Draft Agreement and an accompanying licence which would allow the Council to take possession of the Property".

185. That was, in substance, no more than a statement that the Claimant and her family remained willing to continue to negotiate with the Second Defendant. Mr Rhead did not suggest that the Claimant was willing to drop her insistence on the reinstatement of the uplift offer. As the Claimant's son had made clear in his evidence to the public inquiry, and as Mr Jones KC reminded the inspector in his closing submissions, it remained the Claimant's position that reinstatement of the uplift offer was needed to provide her with financial security in the event that the Scheme did not proceed to completion.
186. On the evidence before the inspector, there was no realistic prospect that the parties would reach agreement on the terms of a licence to allow the Second Defendant to take vacant possession of the Premises for the purposes of carrying out the refurbishment works. As the inspector said in DL38, despite the Claimant's offers, no alternative Scheme or agreement had been put forward which would meet the policy objectives and the comprehensive regeneration of the Order land which was essential to enable provision of much needed affordable housing. It was clear that the purpose for which the Second Defendant was proposing to acquire the land could not be achieved by means other than compulsory purchase of the Claimant's leasehold interest in the Premises.
187. In the light of this analysis, I am unable to accept that the inspector failed properly to address the Claimant's argument that the use of compulsory purchase powers to acquire her leasehold interest in the Premises was excessive. Nor is his reasoning inadequate to explain why he rejected that argument, in the light of the evidence before him. I can see some force in Mr Jones KC's submission that the Claimant's contentions about the history of mismanagement of JRP had little if anything to do with that issue. The inspector's reasoning in the first sentence of DL38 would perhaps have been better placed earlier in his overall decision, where he addressed the issue of negotiations. Nevertheless, in the second sentence of DL38, he said that the historic matters of which the Claimant complained were not material to the issue at hand. As I understood it, that was Mr Jones KC's submission. There is, in my judgment, no genuine as opposed to forensic doubt as to the inspector's reasons for concluding that the use of compulsory purchase powers under section 226(1)(a) of the 1990 Act for the purpose of delivering the Scheme, was as a last resort and proportionate in this case.

Conclusion

188. Ground 3 is rejected.

Disposal

189. I am very grateful to all Counsel for their very helpful written and oral submissions. In the light of my conclusions on the three grounds of challenge advanced by the Claimant, this claim must be dismissed.

APPENDIX 9 – 16

A

Supreme Court

**CG Fry and Son Ltd v Secretary of State for Housing,
Communities and Local Government and another**

B

[On appeal from CG Fry and Son Ltd v Secretary of
State for Levelling Up, Housing and Communities]

[2025] UKSC 35

2025 Feb 17, 18;
Oct 22

Lord Reed PSC, Lord Sales, Lord Hamblen,
Lord Stephens, Lady Simler JJSC

C

Planning — Planning permission — Conditions — Claimant granted outline planning permission for development and reserved matters approval for phase of development on land near Ramsar site — Subsequent scientific advice that development risking adverse environmental effect on site — Local planning authority refusing to discharge conditions attached to reserved matters approval for lack of “appropriate assessment” — Whether national planning policy legally relevant when considering application for discharge of conditions — Whether appropriate assessment required for approval of reserved matters or discharge of condition attached to such approval — Conservation of Habitats and Species Regulations 2017 (SI 2017/1012), reg 63 — National Planning Policy Framework (2021), para 181

D

E

The claimant property developer proposed to carry out a major residential development on land near the “Somerset Levels”, which was designated as a “protected site” of environmental significance under the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (1971) (“Ramsar site”). Under paragraph 181 of the National Planning Policy Framework 2021¹ (“NPPF”), Ramsar sites were to be afforded the same protection as if they were protected sites designated under the Conservation of Habitats and Species

F

Regulations 2017², although that policy was not implemented into law. A planning authority had to carry out an “appropriate assessment” pursuant to regulation 63(1) of the 2017 Regulations before deciding to give any consent, permission or “other authorisation” for a development plan or project which was likely to have a significant effect on a protected site within those Regulations. In 2015 the local planning authority granted the claimant outline planning permission for the development, which was to take place in eight phases, subject to conditions requiring “reserved matters approval” of certain aspects of the development at the later stages.

G

The claimant was granted reserved matters approval in June 2020 for phase 3 of the development which comprised 190 dwellings. That approval was itself subject to further conditions (“the sub-conditions”) requiring approval of further matters that had nothing to do with protection of the nearby Somerset Levels Ramsar site. At that stage no threat to the environment had been identified, but later in 2020 Natural

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England published new scientific advice which identified that the Ramsar site was at risk from the accumulation of excessive nutrients in water as a result of enrichment by phosphates linked to the development. Subsequently, the claimant applied to the

¹ National Planning Policy Framework, para 181: see post, para 3.

² Conservation of Habitats and Species Regulations 2017, reg 63: see post, para 37.

planning authority to approve the matters covered by, and consequently to discharge, the sub-conditions. The planning authority withheld approval on the basis that an appropriate assessment under the 2017 Regulations was required before it could be granted, relying on the Natural England advice and paragraph 181 of the NPPF. The claimant's appeal against the authority's decision was dismissed by a planning inspector appointed by the Secretary of State and the claimant's application for statutory review of the inspector's decision was dismissed by the judge. The claimant's appeal to the Court of Appeal was dismissed, the court holding, *inter alia*, that: (i) the policy in paragraph 181 of the NPPF was a material consideration at the stage of discharging conditions on a reserved matters approval; and (ii) regulation 63 of the 2017 Regulations required an appropriate assessment to be undertaken at the stage of considering whether to discharge conditions attached to a reserved matters approval.

On the appeal—

Held, allowing the appeal in part, (1) that national planning policy, such as paragraph 181 of the National Planning Policy Framework (“NPPF”) covering the environmental impact of a development on a Ramsar site, could be a material consideration in relation to granting planning permission, including outline planning permission subject to conditions, at the start of the planning process; that, however, once planning permission was granted there was a fundamental change in the legal position in that the developer acquired rights under the planning legislation to develop land in accordance with the permission; that in the case of an outline planning permission, the meaning of any conditions imposed, and the extent of the developer's rights, were determined at the time of grant of the outline permission and thus any further sub-conditions that were imposed at the stage of reserved matters approval had to fall within the scope of the main conditions; that in deciding whether to give an approval required under such conditions, the local authority was confined to a consideration of matters fairly related to their subject matter and did not have a general power to refuse approval in order to further some other purpose or policy objective; that the local planning authority could not revisit matters which had already been approved in principle at the outline stage and, if the claimant had satisfied the conditions and sub-conditions as properly interpreted, it had the right under the planning legislation to proceed henceforth with the development for which permission had been granted; that those rights given by the planning legislation could not be overridden or diluted by general policies laid down by central government, whether in the form of the NPPF or otherwise, and thus the planning authority could not rely on a statement of national planning policy such as paragraph 181 of the NPPF to introduce a new risk factor which was not referred to in the conditions; that, while a rule introduced in later legislation such as the Conservation of Habitats and Species Regulations 2017 could affect the developer's rights in that way, those Regulations did not apply to a Ramsar site; that, accordingly, since the conditions attached to the outline planning permission made no reference to the need to protect the Somerset Levels Ramsar site, the authority had not been entitled to introduce that as a new variable or risk factor late in the development process in the way it had and could not refuse to discharge the sub-conditions on the basis that additional measures were required to protect the Ramsar site; and that the courts below had erred in treating a statement of policy, namely paragraph 181 of the NPPF, as if it were binding legislation, overlooking the critical differences between the two and the nature of the claimant's rights conferred by the grant of outline planning permission (post, paras 43, 60–65, 66–67, 69–70, 73).

Kingsway Investments (Kent) Ltd v Kent County Council [1971] AC 72, HL(E) and *Paul Newman New Homes Ltd v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1054, CA considered.

- A (2) That, having regard to the purpose of the 2017 Regulations to provide protection for the environment, together with the deliberately broad language used in regulation 63, that provision was not limited in its application to the grant of planning permission but, rather, in the context of a multi-stage planning regime, the words “or other authorisation” covered a decision to give approval for reserved matters, or to discharge conditions attached to a reserved matters approval, where that had the effect of authorising the developer to proceed with the development; and
- B that, accordingly, in a case involving a potential impact on a European site where the Habitats Regulations had effect, regulation 63 might require an “appropriate assessment” to be carried out before a decision was made to give reserved matters approval or to discharge conditions attached to such an approval, if the planning authority had for any reason (such as oversight, misinterpretation of the law, being ignorant of relevant science or misunderstanding that science) failed to carry one out at the stage of assessing whether to grant outline planning permission (post, paras
- C 44, 53–56, 60, 73).

No Adastral New Town Ltd v Suffolk Coastal District Council [2015] Env LR 28, CA, *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin) and *R (Swire) v Canterbury City Council* [2022] JPL 1026 considered.

Decision of the Court of Appeal [2024] EWCA Civ 730; [2024] PTSR 2000, CA reversed in part.

D

The following cases are referred to in the judgment of Lord Sales JSC:

Camden London Borough Council v Secretary of State for the Environment [1993] JPL 466

Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-508/03) EU:C:2006:287; [2006] QB 764; [2006] 3 WLR 492; [2006] ECR I-3969; [2007] Env LR 1, ECJ

- E *Cooper v Attorney General* [2010] EWCA Civ 464; [2011] PTSR 1; [2011] QB 976; [2011] 2 WLR 448; [2011] Env LR 4, CA

Coöperatie Mobilisation for the Environment UA v College van gedeputeerde staten van Limburg (Joined Cases C-293/17 and C-294/17) EU:C:2018:882; [2019] Env LR 27, ECJ

DB Symmetry Ltd v Swindon Borough Council [2022] UKSC 33; [2023] PTSR 160; [2023] 1 WLR 198; [2023] 2 All ER 621; [2023] RTR 12, SC(E)

- F *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66; [2017] PTSR 1413, SC(Sc)

European Commission v Federal Republic of Germany (Case C-142/16) EU:C:2017:301, ECJ

Friends of the Irish Environment Ltd v An Bord Pleanála (Case C-254/19) EU:C:2020:680; [2021] Env LR 16, ECJ

- G *Holohan v An Bord Pleanála* (Case C-461/17) EU:C:2018:883; [2019] PTSR 1054; [2019] Env LR 16, ECJ

Inter-Environnement Wallonie ASBL v Conseil des Ministres (Case C-411/17) EU:C:2019:622; [2020] Env LR 9, ECJ (GC)

Kingsway Investments (Kent) Ltd v Kent County Council [1971] AC 72; [1970] 2 WLR 397; [1970] 3 WLR 897; [1970] 1 All ER 70; 68 LGR 301, HL(E)

No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88; [2015] Env LR 28, CA

- H *Paul Newman New Homes Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 15; [2021] PTSR 1054, CA

Preston New Road Action Group v Secretary of State for Communities and Local Government [2018] EWCA Civ 9; [2018] Env LR 18, CA

Proberun Ltd v Secretary of State for the Environment (1990) 61 P & CR 77, CA

R v Newbury District Council, Ex p Chieveley Parish Council [1999] PLCR 51, CA

- R (Barker) v Bromley London Borough Council* (Case C-290/03) EU:C:2006:286; [2006] QB 764; [2006] 3 WLR 492; [2006] ECR I-3949, ECJ A
- R (Barker) v Bromley London Borough Council* [2006] UKHL 52; [2007] 1 AC 470; [2006] 3 WLR 1209; [2007] 1 All ER 1183; [2007] Env LR 20, HL(E)
- R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594; [2023] 4 All ER 675, SC(E)
- R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687; [2003] 2 WLR 692; [2003] 2 All ER 113, HL(E) B
- R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin); [2022] JPL 1026
- R (Whiteside) v Croydon London Borough Council* [2023] EWHC 3289 (Admin)
- R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin); [2021] EWCA Civ 1588; [2021] 1 WLR 2863, CA
- R (Wright) v Forest of Dean District Council* [2019] UKSC 53; [2019] 1 WLR 6562; [2020] 2 All ER 1, SC(E)
- R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983; [2023] PTSR 1952; [2023] Env LR 14, CA C
- Redrow Homes Ltd v First Secretary of State* [2004] EWCA Civ 1375; [2005] JPL 502, CA
- Shemara Ltd v Luton Corpn* (1967) 18 P & CR 520
- Thirkwell, Lewis v Secretary of State for the Environment* [1978] JPL 844
- UBS AG v Revenue and Customs Comrs* [2016] UKSC 13; [2016] 1 WLR 1005; [2016] 3 All ER 1, SC(E) D
- Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657; [2021] 4 All ER 209, SC(E)
- The following additional cases were cited in argument:
- Dansk Industri (DI) v Rasmussen's Estate* (Case C-441/14) EU:C:2016:278; [2016] 3 CMLR 27, ECJ (GC)
- Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E) E
- Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908; [2011] 3 EGLR 93, CA
- Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) EU:C:1990:395; [1990] ECR I-4135, ECJ
- Mercer v Alternative Future Group Ltd* [2024] UKSC 12; [2024] ICR 814; [2024] 4 All ER 1, SC(E)
- R v Newbury District Council, Ex p Stevens* (1992) 65 P & CR 438 F
- R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037; [1995] 3 All ER 20, CA
- R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] PTSR 182; [2014] 1 WLR 324; [2014] 2 All ER 109, SC(E)
- R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710; [2015] 4 All ER 169; [2015] LGR 593, SC(E)
- R (Fulford Parish Council) v City of York Council* [2019] EWCA Civ 1359; [2020] PTSR 152, CA G
- R (Noble Organisation Ltd) v Thanet District Council* [2005] EWCA Civ 782; [2006] Env LR 8, CA
- R (Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) EU:C:2004:12; [2005] All ER (EC) 323; [2004] ECR I-723; [2004] Env LR 27, ECJ
- Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; [2022] AC 690; [2021] 2 WLR 1125; [2022] 2 All ER 113, SC(E) H
- Shahid v Scottish Ministers* [2015] UKSC 58; [2016] AC 429; [2015] 3 WLR 1003; [2016] 4 All ER 363, SC(Sc)
- Sweetman v An Bord Pleanála* (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092; [2015] Env LR 18, ECJ

- A *Von Colson v Land Nordrhein-Westfalen* (Case 14/83) EU:C:1984:153; [1984] ECR 1891, ECJ
 Whitley (FG) & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296, CA

APPEAL from the Court of Appeal

- B By a CPR Pt 8 claim form the claimant, CG Fry and Son Ltd, applied
 for statutory review pursuant to section 288 of the Town and Country
 Planning Act 1990 seeking to quash the decision of an inspector appointed
 by the first defendant, the Secretary of State for Levelling Up, Housing
 and Communities (now the Secretary of State for Housing, Communities
 and Local Government), dated 24 November 2022 dismissing its appeal
 C Council, to give notice within the prescribed period on an application to
 discharge conditions on the grant of a reserved matters approval related
 to land at Jurston Farm, Near Wellington, Somerset for the third phase
 of a planning permission for a mixed use development which was to
 take place over eight phases. The grounds of challenge were that: (i) the
 D inspector had erred in applying the assessment provisions of regulation
 63 of the Conservation of Habitats and Species Regulations 2017 to the
 discharge of conditions on a planning permission; (ii) the inspector had
 erred in considering that paragraph 181 of the National Planning Policy
 Framework (“NPPF”) had the effect of making the 2017 Regulations a
 relevant consideration; and (iii) if regulation 63 of the 2017 Regulations
 did apply to the discharge of conditions, it ought to be interpreted as
 E limiting the scope of the appropriate assessment to reflect the scope of the
 conditions being considered. By a decision dated 30 June 2023, and by
 order dated 20 July 2023, Sir Ross Cranston sitting as a judge of the King’s
 Bench Division [2023] EWHC 1622 (Admin); [2024] PTSR 184 rejected the
 claimant’s challenge to the inspector’s decision on all grounds.

- F By an appellant’s notice, and with permission granted by the judge, the
 claimant appealed. By a judgment dated 28 June 2024 the Court of Appeal
 (Sir Keith Lindblom SPT, Singh and Arnold LJ) [2024] EWCA Civ 730;
 [2024] PTSR 2000 dismissed the appeal.

- G The claimant appealed with permission of the Supreme Court (Lord
 Lloyd-Jones, Lord Leggatt and Lord Richards JJSC) granted on 1 November
 2024. By orders dated 29 January 2025, the Supreme Court (Lord Reed PSC,
 Lord Sales, Lord Hamblen, Lord Stephens and Lady Simler JJSC) granted
 the Home Builders Federation and the Land, Planning and Development
 H Federation, the Office for Environmental Protection and the Wildlife and
 Countryside Link permission to intervene. The issues for the Supreme Court,
 as stated in the agreed statement of facts and issues, were: (i) whether the
 environmental impact of the development on the nearby Ramsar site was
 legally irrelevant to the discharge of the conditions in issue; and (ii) whether
 the Court of Appeal had been correct to identify that regulations 63 and 70
 of the 2017 Regulations, read together, required an appropriate assessment
 of the approval of reserved matters and the discharge of conditions, and,
 if not, whether the Court of Appeal’s alternative analysis justified the same
 outcome.

The facts are stated in the judgment of Lord Sales JSC, post, paras 4–13,
 16, 19.

Lord Banner KC, Ashley Bowes and Matthew Henderson (instructed by *Clarke Willmott LLP, Taunton*) for the claimant. A

Sir James Eadie KC, Richard Moules KC and Nick Grant (instructed by *Treasury Solicitor*) for the Secretary of State.

Luke Wilcox (instructed by *Somerset Council Legal Department, Taunton*) for the local planning authority.

Zack Simons KC and Matthew Henderson (instructed by *Shoosmiths LLP*) for the first intervener, by written submissions only. B

Stephen Tromans KC and Ruth Keating (instructed by *Office for Environmental Protection*) for the second intervener, by written submissions only.

Estelle Dehon KC, Nina Pindham and Hannah Taylor (instructed by *Leigh Day*) for the third intervener, by written submissions only. C

The court took time for consideration.

22 October 2025. LORD SALES JSC (with whom LORD REED PSC, LORD HAMBLÉN, LORD STEPHENS and LADY SIMLER JJSC agreed) handed down the following judgment.

1 This appeal is concerned with two issues of planning law in relation to environmental protection and large-scale development of land for residential dwellings. The environmental concern relates to the introduction of phosphates arising from the development into the water systems feeding the Somerset Levels and the effect that may have on the Somerset Levels and Moors Ramsar Site (“the Ramsar site”). The first issue of planning law relates to the interpretation of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”) and the question whether an “appropriate assessment” is required before a local planning authority decides to discharge conditions requiring the approval of reserved matters in a grant of outline planning permission for that development (“Issue 1”). The second issue relates to the effect of a grant of outline planning permission and the impact on that of a policy adopted by the Government, which is the method by which Ramsar sites are protected in the United Kingdom, and a change of scientific advice bearing on the application of that policy (“Issue 2”). D E F

2 The Habitats Regulations, in their original 1994 form and as amended, were promulgated to implement Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna (“the Habitats Directive”) in domestic law. This background is relevant to the question of interpretation which arises under Issue 1. The Habitats Regulations remain in effect despite the withdrawal of the United Kingdom from the European Union. They constituted retained EU law under the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”), now called assimilated law by virtue of section 5 of the Retained EU Law (Revocation and Reform) Act 2023. G H

Ramsar sites

3 Ramsar sites are designated sites requiring environmental protection. They are designated under paragraph 1 of article 2 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat of

- A 2 February 1971 (“the Ramsar Convention”) and, in England, under section 37A of the Wildlife and Countryside Act 1981. They are not protected by the Habitats Regulations. However, it is a matter of national planning policy that they should be protected, as explained in paragraph 181 of the National Planning Policy Framework (“the NPPF”): “The following should be given the same protection as habitats sites ... (b) listed or proposed Ramsar sites ...” “Habitats sites” are defined in Annex 2 of the NPPF as:

- B “Any site which would be included within the definition at regulation 8 of [the Habitats Regulations] for the purposes of those Regulations, including candidate Special Areas of Conservation, Sites of Community Importance, Special Areas of Conservation, Special Protection Areas and any relevant Marine Sites.”
- C Para 181 of the NPPF in place at the material time, issued in July 2021, has become paragraph 194 in the latest version of the NPPF issued in December 2024.

Factual background

- D 4 The appellant developer wishes to build a mixed use development including 650 dwellings and commercial and community uses, a primary school and associated infrastructure on land at Jurston Farm, near Wellington, Somerset. The development site is in the catchment area of the River Tone, which feeds into the Somerset Levels.

- E 5 There is a risk that the development will generate phosphates in waste water and surface water entering the river, with consequent detrimental effects on the Ramsar site. The introduction of excessive phosphates into water habitats causes eutrophication and undue growth of oxygen-depleting micro-organisms which harm the ecology of those habitats.

- F 6 On 22 December 2015 the local planning authority, Somerset West and Taunton Council, now Somerset Council (“the Council”), granted outline planning permission for the proposed development subject to 19 conditions. Condition 4 required that, before any reserved matters approval was given, the Council had to agree details of a site-wide surface water strategy. That condition was discharged on 5 December 2016. It was proposed that the development would come forward in eight phases.

- G 7 In June 2020 the Council granted reserved matters approval for Phase 3, comprising 190 dwellings. Ten conditions were imposed on that approval. Those which are relevant to this appeal are: the conditions relating to the need for the Council to approve measures in respect of tree protection (condition 3); “details of the surface water drainage scheme based on sustainable drainage principles” (condition 4); a construction environment management plan (condition 5); infrastructure details (condition 6); a cycleway and footpath network (condition 7); and details of the material to be used at damp-proof course level (condition 10). Conditions 3, 4 and 5 were pre-commencement conditions.

- H 8 On 17 August 2020 Natural England published an advice note in respect of development with possible effects on protected or vulnerable sites such as the Ramsar site (“the Natural England advice”). This constituted new scientific advice in relation to the protection of the Ramsar site. It stated that in the light of the judgment of the Court of Justice of the European Union (“the CJEU”) in *Coöperatie Mobilisation for the Environment UA v*

College van gedeputeerde staten van Limburg (Joined Cases C-293/17 and C-294/17) [2019] Env LR 27 (“*Dutch Nitrogen*”), greater scrutiny should be given to plans and projects resulting in increased nutrient loads that might have an effect on Special Areas of Conservation, Special Protection Areas designated under the Habitats Regulations and sites designated under the Ramsar Convention. Natural England noted that the Ramsar site was at risk from eutrophication caused by phosphates arising from the development of new housing and other forms of development. It therefore advised that “before determining a planning application that may give rise to additional phosphates within the catchment [for the Ramsar site], competent authorities should undertake a Habitats Regulations assessment” (p 3). Planning permission should only be granted if the assessment enabled the planning authority to conclude that the development “will not have an adverse effect on the integrity of the site” (p 2). A “nutrient neutrality” approach (meaning that by the taking of mitigation measures there should be no net addition of phosphates or nitrates to the protected site) was likely to be a “lawfully robust solution” (p 3).

9 The Home Builders Federation, which has intervened in these proceedings, says that there is only very limited scope for mitigation measures to be taken in the vicinity of the Ramsar site, with the result that following the approach proposed by Natural England would be liable to block development near it.

10 On 9 June 2021 the appellant applied to the Council for the discharge of (which is to say, approval in respect of the matters covered by) conditions 3, 4, 5, 6, 7 and 10 of the reserved matters approval. The Council withheld its approval, relying on paragraph 181 of the NPPF. It maintained that an appropriate assessment under the Habitats Regulations (if they had been applicable) would have been required before such a decision could be made. The validity of this contention is the subject of Issue 1.

11 On 5 April 2022 the appellant appealed pursuant to section 78 of the Town and Country Planning Act 1990 (“the TCPA 1990”) to the Secretary of State, the first respondent to this appeal, against the Council’s failure to give notice of its decision within the prescribed period. The Council resisted that appeal, relying on paragraph 181 of the NPPF and the Natural England advice. The Council published its own provisional (or, as it was called, “shadow”) appropriate assessment of Phase 3 of the proposed development which stated that it would increase phosphate loading within the hydrological catchment of the Ramsar site through the production of waste water and by increased surface flows over urban land. The assessment continued: “It cannot be concluded that the project will not adversely affect the integrity of the [Ramsar site], either alone or in combination with other plans or projects.” The Council calculated that the phosphorus loading of the proposed project was 41.19 kilograms/year and stated that no mitigation had been provided to offset that impact.

12 The inspector appointed by the Secretary of State to determine the appeal held an inquiry. On 24 November 2022 he issued his decision letter. He considered that, on its proper interpretation, the policy in paragraph 181 of the NPPF applies at the discharge of conditions stage. The Ramsar site was therefore to be accorded the same protection as a site covered by the Habitats Regulations (like the inspector, I will refer to this as “a European site”). He concluded that, in respect of such a site, regulation 63 of the

A Habitats Regulations would have required an appropriate assessment before the conditions attached to the reserved matters approval could be discharged. Despite the United Kingdom's departure from the European Union, the Habitats Regulations were, by virtue of provisions of the Withdrawal Act, still to be interpreted in the light of the Habitats Directive which they were promulgated to implement, and the case law of the CJEU interpreting that Directive, including in particular in light of the precautionary principle as a principle of EU law. The inspector dismissed an argument by the appellant that, by reason of the grant of outline planning permission and reserved matters approval for the development, it was not permissible to introduce at this stage, by the application of national policy, a requirement for an appropriate assessment before the conditions were discharged. He therefore dismissed the appeal.

C 13 The appellant brought a claim for statutory review in the High Court to challenge the inspector's decision under section 288 of the TCPA 1990. By a judgment dated 30 June 2023 Sir Ross Cranston, sitting as a judge of the High Court, dismissed that challenge: [2024] PTSR 184.

D 14 So far as is relevant to Issue 1, before the judge the appellant argued that in relation to a development like that in the present case, if it affected a European site, the Habitats Regulations only required (by virtue of regulation 70) an appropriate assessment to be carried out when outline planning permission was granted and had no application at the stage of consideration of discharge of reserved matters, since regulation 63, relied on by the inspector, did not cover that case. Under the Withdrawal Act the Habitats Regulations constituted retained EU law derived from the Habitats Directive, and the appellant accepted that the Regulations should be construed in light of the Directive and that principles of EU law governing the interpretation of EU legislative instruments, such as the Directive (in particular, the principle that a purposive interpretation and the precautionary principle in relation to environmental protections should be applied) were also applicable when interpreting the Habitats Regulations. But the appellant maintained that the wording of regulations 63 and 70 of the Habitats Regulations was clearly to the effect that it was only at the stage of the grant of outline planning permission (and not at the stage of consideration of reserved matters approval), that the Habitats Directive permitted such an approach to be adopted by member states, and that application of a purposive approach and the precautionary principle did not permit or require any modification of the natural textual meaning of that wording. The judge did not accept that argument. He held that the Habitats Directive and a purposive approach to the interpretation of the Habitats Regulations require the application of the assessment provisions to the discharge of conditions attached to reserved matters approval and that the precautionary principle would be undermined if the application of the assessment provisions was limited to the stage of the grant of outline planning permission: para 64.

H 15 So far as is relevant to Issue 2 the appellant argued: that, even if it was wrong in its submission about the meaning of the Habitats Regulations, since the Ramsar site is not a European site and those Regulations do not apply to it there is no requirement in law that an appropriate assessment be carried out at the stage of consideration of reserved matters approval or the discharge of conditions attached to such approval; that phosphate generation is outside the scope of the conditions attached to the grant of

reserved matters approval in this case and is, therefore, not a matter which is a material planning consideration when deciding whether those conditions should be discharged, but rather is legally irrelevant to such a decision; and that paragraph 181 of the NPPF did not make an irrelevant consideration into a relevant consideration so as to enable the Council or the inspector to take phosphate generation and the Natural England advice into account when deciding whether the conditions attached to the reserved matters approval should be discharged. The judge rejected this submission as well, holding that if the conditions were discharged the consequence would be that a development with a potential detrimental impact on a Ramsar site protected by national policy would be authorised by the planning system, and “that creates the nexus to NPPF’s policy on the protection of Ramsar sites. It is open to the Secretary of State to introduce such a consideration as a matter of national planning policy”: [2024] PTSR 184, para 67.

16 The appellant appealed to the Court of Appeal. By a judgment of the court (the Senior President of Tribunals (Sir Keith Lindblom) and Singh and Arnold LJJ) the appeal was dismissed ([2024] PTSR 2000).

17 As regards Issue 1, the court treated the Habitats Regulations and the principles of EU law governing the interpretation of the Habitats Directive and those Regulations as retained EU law within the meaning of the Withdrawal Act. They reviewed those principles of EU law and the case law of the CJEU which elucidated their application in relation to the Habitats Directive. In agreement with the judge they held that, properly interpreted, regulation 63 of the Habitats Regulations applied at the stage of consideration whether conditions attached to reserved matters approval should be discharged and that it required an appropriate assessment to be carried out before such discharge. The court held that ordinary principles of statutory interpretation in domestic law, which involve a purposive approach to construction of legislation (as stated in recent authorities including *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005, para 62; *Uber BV v Aslam* [2021] ICR 657, para 70 and *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594, paras 40–41), led to this conclusion. Giving the words of regulation 63 their natural and ordinary meaning in the context of this legislation, they were capable of covering that stage in the planning process “on a straightforward reading of the language used, having regard to that legislative purpose [of the assessment provisions]”, which is to avoid any risk of harm to the integrity of a protected site, “and to the underlying precautionary principle”; and “any other interpretation would ... be incompatible with the words of the provision, inconsistent with the legislative purpose and inimical to the precautionary principle”: para 75.

18 As regards Issue 2, the court held that the judge had been correct in his analysis. The policy in paragraph 181 of the NPPF was engaged because of the connection between the consequence of discharging the conditions, namely to authorise Phase 3 of the development, and the object of the policy, namely to prevent harm to relevant protected sites: para 106. In the court’s view, in promulgating the policy in paragraph 181, the Government had not usurped the role of the legislature by seeking to lay down new legal conditions; it had exercised its own proper role to lay down national planning policy, “which may then be a material consideration in decision-making”; and “this was not to displace or override the provisions of the habitats legislation, which NPPF policy could not lawfully have done, but simply to

A establish as a matter of national planning policy that Ramsar sites were to have the same practical level of protection in planning decision-making as [European sites]”: para 108.

19 The appellant now appeals to this court.

The Town and Country Planning Act 1990

B 20 Section 70 of the TCPA 1990 governs the grant of planning permission by a local planning authority. Planning permission may be granted unconditionally or subject to conditions. Section 70(1) and (2) (as amended) provides in material part as follows:

“*Determination of applications: general considerations.*

C “(1) Where an application is made to a local planning authority for planning permission— (a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission. ...

D “(2) In dealing with an application for planning permission ... the authority shall have regard to— (a) the provisions of the development plan, so far as material to the application, (aza) a post-examination draft neighbourhood development plan, so far as material to the application, (aa) any considerations relating to the use of the Welsh language, so far as material to the application; (b) any local finance considerations, so far as material to the application, and (c) any other material considerations.”

E (In parallel with section 70(2), section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) provides that where a planning authority is required to have regard 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”).

F 21 Section 78(1) provides that where a local planning authority “refuse an application for planning permission or grant it subject to conditions” (paragraph (a)) or “refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions” (paragraph (b)) the applicant may appeal to the Secretary of State. Section 78(2) also provides for a right of appeal where a local planning authority fail to determine the application within a specified period. On an appeal, the Secretary of State may, among other things, deal with the application as if it had been made to him in the first instance: section 79.

G 22 Section 91 provides that, subject to certain exceptions, every planning permission which is granted is subject to the condition that the development to which it relates must be begun “not later than the expiration of ... the applicable period, beginning with the date on which the permission is granted” (subsection (1)(a)). In England, the applicable period is three years: section 91(5). That time limit does not apply to any outline planning permission: section 91(4)(g).

H 23 Outline planning permission is governed by section 92. So far as relevant, “Outline planning permission” means “planning permission

granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority ... of matters not particularised in the application ('reserved matters')": section 92(1). Section 92(2) stipulates that where outline planning permission is granted for development consisting in or including the carrying out of building or other operations, it shall be granted subject to certain timing conditions, including that application for approval of any reserved matter must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission (paragraph (a)) and, in relation to land in England, that the development to which the permission relates must be begun not later than the expiration of two years from the final approval of the reserved matters (paragraph (b)). Subsections (4) and (5) confer powers on the planning authority to vary those periods, and subsection (6) provides that in considering whether to exercise those powers "the authority shall have regard to the provisions of the development plan and to any other material considerations".

24 Section 336(1) defines various terms used in the TCPA 1990. So far as is relevant, "planning permission" is defined to mean "permission under Part [3] ... but does not include permission in principle". Part 3 is headed "Control over development". It includes the provisions set out above. Sections 70(1), 92(1) and 336(1) make it clear that outline planning permission is itself a form of planning permission governed by section 70(1).

The Habitats Directive and European case law

25 Article 6 of the Habitats Directive states:

"2. Member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

"3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

26 It is recognised in the case law of the CJEU and in domestic law that article 6(3) requires a strict "precautionary approach". The case law was reviewed by the Senior President of Tribunals in *R (Wyatt) v Fareham Borough Council* [2023] PTSR 1952, at para 9. The following points are relevant:

"(6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the 'precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of

A the plans or projects being considered’ (see the judgment of the CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353 (‘Waddenzee’), at para 58). The ‘precautionary principle’ requires a high standard of investigation (see the judgment in *Waddenzee*, at paras 44, 58, 59 and 61).

B “(7) ... the competent authority [responsible for considering whether to allow a development to proceed] must be ‘satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the protected site concerned’ (paras 44, 58, 59 and 61 of the CJEU’s judgment in ... *Waddenzee* ...).”

C “(10) ... If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it ‘cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned’ (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092, at para 44, and its judgment in *People Over Wind v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at para 38).”

D 27 In *Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054, at para 33, the CJEU emphasised the rigour required in applying the “appropriate assessment” provision:

E “Under article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects ...”

28 The precautionary principle was explained further by the CJEU in its judgment in *Dutch Nitrogen* [2019] Env LR 27:

G “99. ... [The] second stage of the assessment procedure, which is envisaged in the second sentence of article 6(3) of the Habitats Directive and occurs following the appropriate assessment of the implications of the plan or project for the site concerned, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned ...

H “100. Article 6(3) of the Habitats Directive thus integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects envisaged. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision ...”

29 The meaning of the expression “agree to” in the second sentence of article 6(3) was considered by the CJEU in its judgment in *Inter-*

Environnement Wallonie ASBL v Conseil des Ministres (Case C-411/17) A
[2020] Env LR 9:

“140. The second sentence of article 6(3) of the Habitats Directive specifies that following an appropriate assessment, the competent national authorities are to ‘agree’ to the project only after having ascertained that it will not adversely affect the integrity of the site concerned ...” B

“141. It follows that the assessment must be conducted before agreement is given.

“142. Furthermore, while the Habitats Directive does not define the conditions governing how the authorities ‘agree’ to a given project under article 6(3) of that Directive, the definition of ‘development consent’ in article 1(2)(c) of the EIA Directive [the Environmental Impact Directive, Council Directive 85/337/EEC] is relevant in defining that term.” C

“143. Accordingly, by analogy with the court’s findings on the EIA Directive, if national law provides for a number of steps in the consent procedure, the assessment under article 6(3) of the Habitats Directive should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable.” D

30 In *Friends of the Irish Environment Ltd v An Bord Pleanála* (Case C-254/19) [2021] Env LR 16, at paras 42 and 43, the CJEU repeated what it had said in *Inter-Environnement Wallonie*, para 142, about the relevance of the term “development consent” as defined in article 1(2)(c) of the EIA Directive as follows: “the decision of the competent authority or authorities which entitles the developer to proceed with the project”.” E

31 Under article 2(1) of the EIA Directive an environmental impact assessment is required before development consent is given. In *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-508/03) [2006] QB 764 and in *R (Barker) v Bromley London Borough Council* (Case C-290/03) [2006] QB 764, at paras 47–48, the CJEU held that where consent for a development is given in stages, by way of a principal decision (to grant outline planning permission) followed by a subsidiary decision (approval of reserved matters), an environmental impact assessment is required to be undertaken at the first stage when the environmental impact is capable of being assessed at that point, but if it was not undertaken then such an assessment will be required at the reserved matters stage where it appears the project will have an environmental impact. F G

The Habitats Regulations and domestic case law

32 The Habitats Directive was transposed into domestic law by the Habitats Regulations. The Habitats Regulations were amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019. The Explanatory Memorandum to those Regulations made it clear that they were not intended to introduce any change in policy (para 2.4). H

33 Regulation 3A of the Habitats Regulations (as amended) states that where the Habitats Directive is referred to it should be construed as if the United Kingdom were still a member state of the European Union.

A 34 Regulation 9(1) requires “the appropriate authority” to “exercise [its] functions which are relevant to nature conservation ... so as to secure compliance with the requirements of” certain specified Directives, which include the Habitats Directive. Regulation 9(3) requires a “competent authority, in exercising any of its functions” to “have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions”.

B 35 Part 6 of the Habitats Regulations contains provisions for the “Assessment of plans and projects”. Regulations 61 to 64 are in Chapter 1 of Part 6. Regulations 63 and 64 are defined in regulation 61 as “the assessment provisions”.

36 Regulation 62(1) states:

C “(1) The requirements of the assessment provisions ... apply—
(a) subject to and in accordance with the provisions of Chapters 2 to 7, in relation to the matters specified in those provisions ...”

D 37 Regulation 63, entitled “Assessment of implications for European Sites and European offshore marine sites”, appears in the section of Part 6 headed “General provisions” and (together with regulation 64) in the subsection headed “General provisions for protection of European sites and European offshore marine sites”. Regulation 63 provides:

E “(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which— (a) is likely to have a significant effect on a European site ... (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site’s conservation objectives ...”

F “(5) In the light of the conclusions of the assessment, and subject to regulation 64 [which provides for ‘Considerations of overriding public interest’], the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site ...”

G “(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.”

38 Regulation 70, entitled “Grant of planning permission”, is in Chapter 2 of Part 6. It appears in a section headed “Planning” and a subsection headed “Planning permission”. Regulation 70 provides:

H “(1) The assessment provisions apply in relation to— (a) granting planning permission on an application under Part 3 of the TCPA 1990 (control over development) ... (c) granting planning permission, or upholding a decision of the local planning authority to grant planning permission (whether or not subject to the same conditions and limitations as those imposed by the local planning authority), on determining an appeal under section 78 of that Act ... in respect of such an application ...”

“(3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site ... could be carried out under the permission, whether before or after obtaining approval of any reserved matters.”

39 In paragraph (3), “outline planning permission” and “reserved matters” have the same meanings as in section 92 of the TCPA 1990 (outline planning permission). Whether, in the absence of an appropriate assessment at the outline planning permission stage, such an assessment can properly be carried out at a later stage was considered by Lang J in *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin) and by Holgate J in *R (Swire) v Canterbury City Council* [2022] JPL 1026. Both judges referred to the speech of Lord Hope of Craighead in *R (Barker) v Bromley London Borough Council* [2007] 1 AC 470, concerning the requirement for an environmental impact assessment under the EIA Directive, where he acknowledged (para 5) that it was “possible to conceive of cases where [the likely significant effects on the environment] only become apparent when consideration is being given to the reserved matters or where further consideration is necessary due to a material change in circumstances”. He went on to say (para 24):

“As the [CJEU] ... said in para 48 of its judgment [in the *Barker* case], however, the competent authority may be obliged in some circumstances to carry out an [environmental impact assessment] even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an [environmental impact assessment] was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier.”

At para 29 he said:

“If it is likely that there will be significant effects on the environment which have not previously been identified, an [environmental impact assessment] must be carried out at the reserved matters stage before consent is given for the development.”

40 In the light of these observations, in *Wingfield* [2019] EWHC 1974 (Admin) at [69] Lang J rejected the suggestion that the only situation in which an environmental impact assessment might be required at the reserved matters stage was if the environmental effects of the development had not been identifiable at the outline permission stage and held that such an assessment “may also be required at reserved matters stage where the need

- A for [it] was overlooked at the outline stage” (also citing *Cooper v Attorney General* [2011] PTSR 1; [2011] QB 976, paras 20–21 and 92, in support of this). She concluded (para 70) that in the case before her the need for an appropriate assessment under the Habitats Directive was overlooked at the outline permission stage; the Habitats Directive did not require that the assessment be carried out at the earliest possible stage (unlike the EIA Directive, as to which see *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env LR 18, para 58), but was focused instead on the end result of ensuring the avoidance of harm to the integrity of protected sites (para 72), meaning that the grant of outline planning permission in the absence of an appropriate assessment was not itself unlawful; and in the circumstances the local planning authority could conduct an appropriate assessment under the Habitats Directive at the stage of considering approval of reserved matters (para 71).

- C 41 Lang J referred (para 73) to the decision of the Court of Appeal in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] Env LR 28 (“*No Adastral New Town*”), in which it was held that, unlike the EIA Directive, the Habitats Directive did not require an appropriate assessment to be carried out at an early stage, because article 6 of the Habitats Directive focuses on the end result of avoiding damage to a protected site and that objective could be achieved if such an assessment was conducted at the end of a multi-stage planning process before the project was implemented (see paras 61–69 per Richards LJ). Lang J concluded (para 74) that the date when a national competent authority “agrees” to the plan or project for the purposes of article 6(3) of the Habitats Directive is “the date of adoption of the decision authorising implementation of the project” (*European Commission v Federal Republic of Germany* (Case C-142/16) EU:C:2017:301, at para 42), observing that:

- F “In a ‘multi-stage consent’ there is no ‘agreement to the ... project’ until reserved matters consent has been granted; indeed the CJEU described the reserved matters approval as ‘the implementing decision’ in *Wells [R (Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-723] at para 52 and *Commission v United Kingdom* [2006] QB 764 at paras 101, 104. By regulations 63(1) and 63(5) [of the Habitats Regulations], reserved matters consent cannot be granted unless it has been established that the integrity of the European site will not be adversely affected. So an [appropriate assessment] was required.”

- G (The Court of Appeal refused permission to appeal, including upon a reconsideration, but it relied primarily on Lang J’s further reasoning that even if an appropriate assessment had been conducted before the grant of outline planning permission it would have made no difference: [2021] 1 WLR 2863).

- H 42 In *Swire* [2022] EWHC 390 (Admin) the claimant in judicial review proceedings challenged, among other things, a local planning authority’s decision in 2021 to give reserved matters approval, under an outline planning permission granted in 2018, for the masterplan for a development near protected European sites. This was on the basis that, although an appropriate assessment under the Habitats Regulations had been carried out prior to the grant of the outline planning permission, no further appropriate assessment had been carried out under the Habitats Regulations subsequent to the

issuing of the Natural England advice about the potential effects of waste water discharges on such sites. That advice represented a change of stance by Natural England which was materially relevant to the integrity of the sites, raising an issue which had not been adequately addressed by the previous appropriate assessment. However, the local planning authority was going to conduct a further appropriate assessment in relation to applications for approval of other reserved matters which would address that issue. At paras 94 and 95 Holgate J interpreted the Habitats Regulations in the same way as in *Wingfield* and *No Adastral New Town*: the later proposed consideration whether to give reserved matters approval would be the relevant implementing decision which allowed the development to proceed and there would be compliance with the Regulations if an appropriate assessment addressing the waste water issue was conducted prior to the giving of such approval, there being no requirement that the appropriate assessment be carried out at the earliest possible stage.

Issue 1: Interpretation of regulation 63 of the Habitats Regulations

43 The Habitats Regulations are, of course, binding law in relation to planning for development which may affect a European site to which they apply. As explained above, they do not apply to the Ramsar site in this case. However, paragraph 181 of the NPPF depends upon the interpretation of the Habitats Regulations. The interpretation of the Habitats Regulations was thus a critical point in the reasoning of the judge and the Court of Appeal and they gave very full judgments on the issue. As appears from my discussion of Issue 2 below, this is not a critical point in my reasoning. However, we heard full argument on the point and if we considered that the judgments below were in error on it, it would be desirable that we should correct them since the Habitats Regulations apply in many situations. I therefore consider that it is appropriate that this court should deal with this issue.

44 In my view, the Court of Appeal interpreted regulation 63 of the Habitat Regulations correctly. They were right to conclude that this interpretation was required by application of ordinary domestic principles of statutory interpretation.

45 In relation to those principles, the Court of Appeal cited a range of relevant authority (see para 17 above) which emphasises that a purposive approach should be adopted. This is encapsulated in the oft-cited statement of Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, at para 8:

“The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

This is as relevant to the interpretation of subordinate legislation such as the Habitats Regulations as to the interpretation of primary legislation. In the former case it is the purpose of the relevant legislator—typically a Secretary of State acting under a power conferred by Parliament—which matters.

46 In this case the Court of Appeal correctly observed ([2024] PTSR 2000, para 68) that there is no dichotomy between looking at the natural and ordinary meaning of legislation and a purposive approach to construction.

A The authorities make it clear that the correct approach is that legislation must be construed having regard to its context and in the light of its purpose. “The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it”: *PACCAR* [2023] 1 WLR 2594, para 41.

B 47 The historical context which led to the enactment of the Habitats Regulations was the intention to give effect in domestic law to the regime set out in the Habitats Directive. The object of that Directive was to ensure a high degree of protection for vulnerable habitats and sites of various kinds as identified for the purposes of the Directive, and to ensure careful scrutiny of development proposals likely to have an impact on such habitats and sites with a view to minimising or avoiding such impact. This is made clear by the recitals to the Directive and by its operative terms.

C 48 The recitals to the Habitats Directive state:

“the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community ...”

D “it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued ...”

“an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future ...”

E 49 Article 2(1) states that the Directive’s aim is “to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora” and article 2(2) states that measures taken pursuant to the Directive “shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora”. Article 6(2) requires member states to take appropriate steps to avoid the deterioration of protected habitats; and article 6(3) (see para 25 above) makes it clear that the point of an appropriate assessment is to equip the relevant authority with information to enable it to comply with its obligation to “agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned”.

G 50 Further, it is well established in the European case law reviewed above that the Habitats Directive has to be interpreted in light of the precautionary principle, which again aims to ensure that vulnerable sites are accorded a high degree of protection. In substance, the precautionary principle reflects and gives expression to the purpose of the Directive.

H 51 The purpose of the Habitats Regulations is to implement and follow the Habitats Directive in pursuing the same objective. Brexit has made no difference to this. There is nothing in the Withdrawal Act which affects the application of ordinary domestic law principles of interpretation so far as the Habitats Regulations are concerned. Although the Court of Appeal referred to provisions of the Withdrawal Act it is not necessary to examine them in this judgment since it is not suggested that the outcome of the appeal depends upon them.

52 Lord Banner KC, for the appellant, did not dispute in this court that we should interpret the Habitats Regulations purposively, having regard to

these objectives, and having regard to the precautionary principle. Nor did he dispute these points in the courts below. His submission is that even applying the purposive approach and the precautionary principle, the wording of regulation 70 is clearly to the effect that an appropriate assessment is only to be carried out at the stage when planning permission is granted (including when outline planning permission is granted) and that the Court of Appeal erred in construing regulation 63 as conferring a power or imposing a duty for a planning authority to carry out an appropriate assessment at a later stage of the planning process, such as when considering whether to give reserved matters approval or to discharge conditions attached to a reserved matters approval. He places emphasis on the statement in regulation 62 that “the assessment provisions” (that is, as defined in regulations 61, 63 and 64) apply “subject to and in accordance with the provisions of” Chapter 2, which includes regulation 70.

53 In my judgment this submission is unsustainable. Regulation 70(1) states positively, in the section of the Regulations dealing with planning permission, that the assessment provisions apply in relation to the grant of planning permission. But it does not say, in negative terms, that they do not apply in relation to any other stage of the planning process where it may be appropriate for them to operate in order to fulfil the purposes of the Habitats Regulations and to respect the precautionary principle.

54 Regulations 63 and 64 are grouped together under the heading “General provisions for protection of European sites and European offshore marine sites” and they are expressed in clear, self-contained terms setting out relevant powers and obligations which arise under them. That heading indicates that they are to have general effect in relation to the relevant sites. In line with that indication, regulation 63(1) uses entirely general language to indicate when the obligation to make an appropriate assessment which it sets out applies, that is to say “before deciding to undertake, or give any consent, permission or other authorisation for” a relevant plan or project. That is not language capable of being limited to the grant of planning permission. On the contrary, as the Court of Appeal rightly observed, the language is deliberately broad in its effect and, having regard to the way in which the planning system works in the context of the multi-stage planning regime of the kind operated in the present case, the words “or other authorisation” naturally cover a decision to give approval for reserved matters or to discharge conditions attached to a reserved matters approval which would have the effect of authorising the developer to proceed with the development.

55 Regulation 62(1) (see para 36 above) does not support Lord Banner’s submission. In my opinion this provision undermines the submission. The opening words of the provision indicate and acknowledge that the assessment provisions set out “requirements”, so it is natural that the content of those requirements should be determined by reading regulations 63 and 64 according to their own terms. Regulation 62(1)(a) and (b) stipulates specific qualifications on the application of the assessment provisions: in the case of paragraph (a), that they should apply “subject to and in accordance with the provisions of Chapters 2 to 7”, but only “in relation to the matters specified in those provisions”. The operation of the later stages of a multi-stage planning process, after the grant of outline planning permission, is not a matter specified in those provisions. Therefore the wording of regulation 62(1) indicates that a deliberate choice has been made that the assessment

A provisions should have general application in relation to matters not so specified. Regulation 62(1) does not say that the assessment provisions apply only in relation to the matters so specified, which is in effect the meaning which Lord Banner sought to extract from it.

B 56 It is clear that the protective purpose of the Habitats Regulations and the precautionary principle would be defeated, rather than promoted and respected, if the Regulations are read as precluding any opportunity for an appropriate assessment to be carried out at a later stage in a multi-stage planning process, such as that in issue in the present proceedings, where the planning authority has for any reason (eg by oversight, misinterpretation of the law or being ignorant of relevant science or misunderstanding that science) failed to carry one out at the stage of assessing whether to grant outline planning permission. Therefore, in a case involving a potential
C impact on a European site where the Habitats Regulations have effect, application of a normal purposive approach to their interpretation and having regard to the precautionary principle leads to the conclusion that regulation 63 would apply to a decision to give reserved matters approval or to discharge conditions attached to such an approval where that would result in authorisation for the project to proceed. Giving the words of regulation
D 63 their ordinary and natural meaning in the context in which they appear leads to this result.

57 This conclusion on the interpretation of the Habitats Regulations accords with the reasoning in *No Adastral New Town, Wingfield and Swire* [2015] Env LR 28, which on this point I would endorse, in agreement with the Court of Appeal ([2024] PTSR 2000, para 78). I leave aside the distinct question raised in those cases whether there is an obligation to conduct
E an appropriate assessment under the Habitats Regulations at the earliest opportunity. That question does not arise in this appeal and we did not hear submissions on it, since the Natural England advice constituted new scientific information which was not available to be taken into account when outline planning permission was granted in 2015. The Council and the inspector took that advice into account at the first opportunity in the multi-stage
F planning process followed in this case.

58 Lord Banner sought to draw support for his submission under Issue 1 from aids to interpretation which might have been relevant if the Habitats Regulations were ambiguous in some relevant respect. It is not necessary to go into this because the Regulations are not ambiguous. They are clear in their effect.

G 59 The Court of Appeal rightly reached their conclusion on Issue 1 by following normal domestic principles of interpretation: [2024] PTSR 2000, paras 66–97. As they observed (para 97) it was unnecessary for the judge to refer to the principles of interpretation in EU law because the Habitats Regulations are to be construed as having the meaning he gave them simply by applying the conventional approach to statutory interpretation in domestic law, which includes the purposive approach. Despite this, the Court
H of Appeal discussed the effect of the Withdrawal Act in obiter dicta in some detail (paras 37–53). It is not necessary for this court to deal with this part of their judgment; nor did we receive submissions which would assist us to do so. The points made in the judgments of the CJEU and the domestic courts referred to above are relevant because they serve to emphasise the purposes

promoted by the Habitats Directive and the Habitats Regulations, which are already clear from the terms and context of those instruments. A

Issue 2: Outline planning permission, reserved matters approval, discharge of conditions and national policy

60 Although I would dismiss the appeal in relation to Issue 1, I would allow it in relation to Issue 2. In my view the judge and the Court of Appeal erred in giving a statement of policy (in paragraph 181 of the NPPF) the same status and force as a legal rule set out in legislation (in regulation 63 of the Habitats Regulations) in respect of the decision in this case whether to discharge the conditions attached to the reserved matters approval in relation to an outline planning permission. They failed to take into account the nature of the rights conferred on the appellant by the grant of such permission. B C

61 National planning policy bearing on a relevant factor in respect of a proposed development is plainly a “material consideration” within the meaning of section 70(2)(c) of the TCPA 1990 (see para 20 above) and section 38(6) of the 2004 Act in relation to a decision whether to grant planning permission (including outline planning permission) at the start of the planning process: *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] PTSR 1413, para 53. At that stage a developer is asking the planning authority to exercise its discretion to grant permission to proceed with a development and has acquired no right to do so. Therefore, having regard to the national policy in paragraph 181 of the NPPF, Mr Richard Moules KC, who presented the submissions of the respondent Secretary of State on Issue 2, correctly submits that the impact on a Ramsar site can be a material consideration when deciding whether to grant planning permission. Similarly, national planning policy is a “material consideration” within the meaning of section 92(6) of the TCPA 1990 to which regard should be had when a planning authority considers whether to exercise its powers under section 92(4) or (5) to adjust the conditions attached to an outline planning permission setting the timeframe within which certain steps should be taken to operate the multi-stage planning process under that permission. D E F

62 However, when planning permission is granted there is a fundamental change in the legal position, in that it creates rights under the planning legislation for the developer to develop land in accordance with the permission. Those rights are not made defeasible depending on government policy. That is true both in respect of a grant of full planning permission and in respect of a grant of outline planning permission (which, as observed above, is itself a grant of planning permission, albeit one subject to conditions). Rights given by the planning legislation cannot be overridden or diluted by general policies laid down by central government, whether in the form of the NPPF or otherwise: *R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562, para 42. G

63 The Court of Appeal, [2024] PTSR 2000, para 108, correctly noted as a point of principle that government policy could not alter the application of legislation, referring to the habitats legislation. However, the importance of this principle in the present case is in relation to the operation of the planning legislation, which the Court of Appeal did not consider in this part of their judgment. H

A 64 Where an application for full planning permission is approved by a local planning authority they “grant planning permission” (section 70(1)(a)), which means that they give legal permission for the development referred to in the application to proceed. This has the effect of conferring a right on the developer, for the purposes of the planning legislation, to develop its land in accordance with the permission which has been given. Assuming that this permission is not set aside in legal proceedings brought to challenge it on the grounds of some legal flaw, that right is not defeasible. The developer may proceed with the development within the time allowed under section 91 of the TCPA 1990 without fear of enforcement action being taken against it. If the planning authority has a change of mind and wishes to revoke or modify the permission, it has to pay compensation: section 107 of the TCPA 1990.

B 65 This scheme reflects the basic nature of the planning regime, which combines action by private landowners in developing their land with public regulation through the planning system to encourage them to do that in particular ways in the public interest and provides for enforcement controls if they proceed with development without permission. If landowners are to be incentivised to proceed with developments which are encouraged by the planning regime through development plans and local and central government policies, they need assurance that the costs they incur in carrying out a development will not be lost. The grant of planning permission gives them that assurance. Once granted, a developer knows where it stands and that it can incur costs to proceed with the development within the timetable set by the legislation without fear that they may be lost by reason of a change of position by the regulating authority. So, for example, if planning permission has been granted after completion of all relevant checking processes it would not then be open to the planning authority to revoke the permission (without payment of compensation) because of a change in government policy or a change in scientific advice, such as that set out in the Natural England advice. The grant of planning permission locks in the right of the developer to proceed with the development for which permission has been given.

F 66 Turning to a grant of outline planning permission, which is a form of planning permission, the analysis is the same, with due allowance for the fact that the permission granted is conditional in various ways. The conditions specify in binding legal form the particular areas where the developer will need to satisfy the planning authority of certain matters before the development can proceed, and in this way they allow the developer to know where it stands in calculating whether it can safely incur costs in carrying the project forward. The stipulated conditions delimit the extent of the risk the developer takes in doing so. The extent of the conditionality of the permission which has been granted is determined by a fair and objective reading of the conditions imposed, by asking what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and the planning consent as a whole: *DB Symmetry Ltd v Swindon Borough Council* [2023] PTSR 160, para 66. Except to the extent that the permission is made conditional according to the terms on which it is granted under section 70(1) of the TCPA 1990, it is a grant of full permission to proceed with the development. The imposition of a condition that, say, the planning authority has to agree a scheme for tree protection (condition 3 in the outline planning permission in the present case)

is confined to consideration of matters fairly related to that subject matter; it does not import a general power for the planning authority to refuse to give approval for a perfectly acceptable tree protection scheme in order to further some other purpose or policy objective. And where approval for reserved matters in an outline planning permission is given subject to further conditions (which I will call sub-conditions), those sub-conditions have to fall within the ambit of the reserved matters as defined by the conditions set out in the outline permission. The planning Acts contain no general power to revoke or modify the conditions set out in the outline permission, unless compensation is paid pursuant to section 107 of the TCPA 1990.

67 Lord Morris of Borth-y-Gest referred to these points in *Kingsway Investments (Kent) Ltd v Kent County Council* [1971] AC 72, 96, where he explained that if outline planning permission is granted subject to approval of reserved matters “the applicant clearly knows that that permission is conditional and that it will be of no use to him until he is able to submit details” in respect of those matters which are acceptable to the planning authority, and said “it must, of course, be assumed that the authority will act in good faith. They must not misuse their functions so as indirectly and without paying compensation to achieve what would amount to a revocation or modification of a permission already given”. This is simply another way of saying that once outline planning permission is granted subject to defined conditions, the planning authority is bound by those conditions and has to act properly in accordance with them when deciding whether to give approval as required under them. As Lionel Read QC, sitting as a High Court judge, stated in *Camden London Borough Council v Secretary of State for the Environment* [1993] JPL 466, 470, the power of a planning authority under a planning condition to refuse approval in respect of a project for which outline planning permission has been given is limited by the terms of that condition, and the planning authority has to determine an application for approval of a reserved matter “within the terms of the condition”.

68 In line with this approach, Mummery LJ’s analysis in *Redrow Homes Ltd v First Secretary of State* [2005] JPL 502, paras 22–30, on the question whether approval for reserved matters should be given was rightly directed to the construction of the condition included in the outline planning permission, unaffected by planning considerations of a general nature applicable at the time when such approval was sought. As he pointed out (para 27), if there has been a substantial change in relation to the general planning context by the time such approval is sought, that may “afford grounds for invoking appropriate procedures for the revocation or modification of [the outline planning permission]”, which might lead to a right of compensation for the developer; but that does not affect the construction of the condition set out in the planning permission nor the obligation of the planning authority to honour that condition according to its terms.

69 Where an outline planning permission has been granted it is not open to a planning authority to revisit matters which have been approved in principle at the outline stage; and some element of development must be acceptable on the site within the ambit of the outline permission: see *Paul Newman New Homes Ltd v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1054, para 17 and *Swire* [2022] JPL 1026, para 11. Where an outline permission reserves matters for the

- A subsequent approval of a local planning authority, the extent to which the authority can withhold approval is restricted to what has been expressed to be so reserved and it is not permitted to go back on points of principle which it has accepted by granting permission: see *Shemara Ltd v Luton Corpn* (1967) 18 P & CR 520, 524, per Diplock LJ (sitting as a judge of the High Court); *Lewis Thirkwell v Secretary of State for the Environment* (1978) JPL 844, 847; *Proberun Ltd v Secretary of State for the Environment* (1990) 61 P & CR 77, 85 (per Glidewell LJ); *R v Newbury District Council, Ex p Chieveley Parish Council* [1999] PLCR 51, 64 (per Pill LJ); and *Redrow Homes* [2005] JPL 502, paras 22–30. In the present case, however, the Council and the inspector relied on the policy in paragraph 181 of the NPPF and the new scientific advice given by Natural England to revisit matters which had been approved at the outline stage and did so in a way which could potentially eliminate the possibility of any development taking place within the ambit of the outline permission which had been granted, if approval were withheld because of a negative view formed in the course of carrying out the appropriate assessment.

- 70 Therefore, it was not open to the Council or the inspector in the present case to use the fact that the outline planning permission was granted subject to conditions requiring approval to be given by the planning authority for certain matters, and that such approval had not been given outright but subject to sub-conditions within the ambit of the main conditions set out in the outline permission, as a basis to say that, before those sub-conditions were discharged so that the development could proceed, some additional measures to promote a different objective (ie the protection of the Ramsar site) should be taken. The planning legislation gave them no power to do that, unlike the position in relation to a European site, where the Habitats Regulations apply. National policy and new scientific advice of the kind in issue in this case do not confer such a power, because the operation of the conditions set out in the outline planning permission (and hence of the sub-conditions set out in the reserved matters approval) is determined by the interpretation of the conditions set out in the outline permission; and they allow no reference to such an objective. (By contrast, a planning authority would be entitled, and may be required, to have regard to a national or local policy directed to the substance of the condition in question, eg, taking the example of condition 3, a policy on the best way to ensure that trees are protected.)

- 71 Mr Moules relied on the judgment of Timothy Corner KC (sitting as a Deputy High Court Judge) in *R (Whiteside) v Croydon London Borough Council* [2023] EWHC 3289 (Admin) in support of his submission that it is permissible for a planning authority considering whether to grant approval for reserved matters under a condition in a planning permission to have regard to a wider range of considerations than is indicated by construction of the condition itself. However, that case was concerned with a distinct issue, very different from that which arises in this appeal.

- 72 So far as is relevant, the planning permission which was granted for residential development in that case included two conditions (condition 14, requiring the residential units to be accessible to a particular standard, and condition 18, requiring approval of a plan for finished land levels). Such a plan was submitted by the developer and approved by the planning authority, which discharged condition 18. But the plan was not consistent

with ensuring that the accessibility requirement in condition 14 was fully met. The judge held that this feature of the case was a relevant matter which should have been taken into account when considering the discharge of condition 18 according to the test of whether the application to discharge was “satisfactory”: paras 50 and 55–56 (in the event, the judicial review to challenge the discharge failed because, if this had been taken into account, the result would have been the same). The judge distinguished, and did not question, authority which held that a condition reserving a particular matter could not be used to refuse a scheme for reasons which had nothing to do with that matter (which is to say, the present case), and emphasised that the planning authority was “dealing with the planning permission as a whole”, meaning that it was a relevant consideration that the whole permission should be operated in a coherent way which gave due effect to each part of it. The planning authority could not undermine a condition on which the permission it had granted was predicated by ignoring it. That approach is unsurprising but has no relevance to the determination of this appeal. The case cannot bear the weight which Mr Moules sought to place on it.

Conclusion

73 For the reasons given above I consider that the Court of Appeal was correct in its interpretation of the Habitats Regulations and that the appeal in relation to Issue 1 should be dismissed. However, I would allow the appeal in relation to Issue 2.

Appeal allowed in part.

SUSANNE ROOK, Barrister

APPENDIX 9 – 17

Shorter Oxford English Dictionary

ON HISTORICAL PRINCIPLES

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► **II** Other uses.

6 Custom, practice; mode, manner, fashion. ME–15.

7 Site; situation. LME–15.

8 Measurement, dimensions, size; measure, extent. LME–M17.

► **1B** verb trans. 1 Decree, ordain. LME–15.

2 Decide, judge; try. LME–17.

3 Assess. LME–E17.

4 Regulate (weights, measures, prices, etc.) according to an ordinance or standard. M16–M19.

■ **assizer** noun = ASSIZER (b) u6. **assizor** noun (a) each of those who constituted an assize or inquest; (b) Scot. a member of a jury: ME.**associable** /ə'səʊjəb(ə)l/, -sɪ-/ adjective. M16.[ORIGIN French, from *associer* from Latin *associare*: see ASSOCIATE verb, -ABLE.]

1 Companionable. rare. M16–17.

2 That may be associated (with) or joined in association. E19.

associate /ə'səʊʃiəl/, -sɪ-/ adjective & noun. LME.[ORIGIN Latin *associatus* pa. ppl. formed as ASSOCIATE verb: see -ATE², -ATE³.]► **A** adjective. 1 joined in companionship, function, or dignity; allied; concomitant. LME.

C. MARLOWE With him is Edmund gone associate? R. KNOWLES Christ our Saviour, equal and associate to his Father. POPE Amphinomis survey'd th' associate band. S. JOHNSON They want some associate sounds to make them harmonious.

2 Sharing in responsibility, function, membership, etc., but with a secondary or subordinate status. E19.

H. F. PRINGLE The Outlook office where the ex-President was an associate editor.

associate professor in N. American universities, (a person of) the academic rank immediately below (full) professor.► **B** noun. 1 A partner, a comrade; a companion; an ally, a confederate; a colleague. M16.

P. SIDNEY They persuade the king ... to make Plangus his associate in government. LO MACAULAY These men, more wretched than their associates who suffered death. W. IRVING His associates soon turned the tide of the battle. D. W. HARDING To her the first necessity was to keep on reasonably good terms with the associates of her everyday life.

2 A thing placed or found in conjunction with another. M17.

PAIRED associates.

3 A person who belongs to an association or institution in a secondary or subordinate degree of membership. E19.

■ **associateship** noun the position or status of an associate E19.**associate** /ə'səʊʃiət/, -sɪ-/ verb. LME.[ORIGIN Latin *associat-* pa. ppl. stem of *associare*, from *ad* AS-¹ + *socius* sharing, allied: see -ATE².]1 verb trans. Join, unite, ally, (persons: oneself or another with, (arch.) to another or others, in, (to) a common purpose, action, or condition; declare (oneself) in agreement with. LME. ► **b** Elect as an associate member. E19.

SWIFT None but papists are associated against him. D. HUME The troops ... associating to them all the disorderly people.

E. A. FREEMAN Arnulf associated his son with him in his government. GLADSTONE It is for me ... to associate myself with the answer previously given by the Under-Secretary. b SOUTHEY He was associated to the royal Academy there.

2 verb trans. Join oneself to (a person); accompany; keep company with. M16–M17.

J. MARBECK Therefore shall man leave father and mother and associate his wife. SHAKES. *Rom. & Jul.* A barefoot brother ... to associate me, Here in this city visiting the sick.3 verb trans. a gen. Join, combine, (things together; one thing with, to another or others). Chiefly refl. or in pass. arch. u16. ► **b** spec. Connect as an idea (with, (to)). M18.

A. BAIN The muscles ... act in groups, being associated together by the organization of the nervous centres. T. H. HUXLEY This vapour is intimately associated with the other constituents of the atmosphere. b A. S. NEILL The children will leave electric lights on because they do not associate light with electricity bills. JENNIE MELVILLE She associated love and pain.

4 verb trans. Of things: accompany, join. u16–17.

T. HEYWOOD Those torturing pangs That should associate death.

5 verb intrans. Combine for a common purpose; keep company, have frequent dealings, with. M17.

BURKE When bad men combine, good men must associate. D. RUMFORD As a rule I do not care to associate with coppers, because it arouses criticism from other citizens.

■ **associater** noun (rare) = ASSOCIATOR E17. **associator** noun a person who or thing which associates; an associate; a confederate; u17. **associatory** adjective having the quality of associating u19.**association** /ə'səʊʃi(ə)n/, -ʃi-/ noun. M16.[ORIGIN French, or medieval Latin *associatio*(n-), formed as ASSOCIATE verb: see -ATION.]

1 The action of joining or uniting for a common purpose; the state of being so joined. M16.

R. COKE A solemn oath of association for the restoring of it. CONAN DOYLE The good Watson had at that time deserted me for a wife, the only selfish action which I can recall in our association.

articles of association, deed of association a document giving the regulations of a limited liability company. **memorandum of association** a document giving the name, status, purposes, and capital of a limited liability company.

2 A body of people organized for a common purpose; a society. u16.

F. O'BRIEN The people who attended the College had banded themselves into many private associations.

3 A document setting out the common purpose of a number of people and signed by them. u16–M19.

LO MACAULAY Dropping the Association into a flowerpot.

4 Fellowship, companionship; social intercourse (esp. in prison). M17.

SMOLLETT The nobility would be profaned by my association. H. ALLEN To have so pleasant and bright a companion as young Anthony sitting before the fire sped their association mightily.

5 The joining or uniting of things or persons with another or others; the state of being so conjoined, conjunction. M17.

J. REYNOLDS The spark that without the association of more fuel would have died. T. CAPOTE A tendency not to experience anger or rage in association with violent aggressive action.

6 Mental connection between related ideas; an idea, recollection, or feeling mentally connected with another. u17.

J. LOCKE On the Association of Ideas. W. HAMILTON Our Cognitions, Feelings, and Desires are connected together by what are called the *Laws of Association*. B. RUBEN The theatre, the picnics, the concerts, separately and by association, they triggered off total recall. A. STORR The dreamer's associations to all the images in the dream. B. BETTELHEIM The replacement of a word that has deep emotional associations with one that evokes hardly any.**free association:** see FREE adjective, PAIRED association.7 **ECOLOGY.** A group of dominant plant species occurring together; a plant community characterized by such a group. E20.— **COMB.** **association book, association copy** a volume showing some mark of personal connection with the author or a notable former owner. **Association football** football played according to the rules of the Football Association, with a round ball which may not be handled during play except by a goalkeeper; soccer.■ **associational** adjective of or pertaining to (an) association E19. **associationism** noun (a) rare union in an association; (b) a theory accounting for mental phenomena by association of ideas: M19. **associationist** noun & adjective (a) noun a member of an association; an adherent of associationism; (b) adjective = ASSOCIATIONISTIC: M19. **associatio nistic** adjective of or pertaining to associationism or associationists E20.**associative** /ə'səʊʃiəti/, -sɪ-/ adjective. E19.

[ORIGIN from ASSOCIATE verb + -IVE.]

1 Of, pertaining to, or characterized by association (esp. of ideas). E19.

2 **MATH.** Governed by or stating the condition that where three or more quantities in a given order are connected together by operators, the result is independent of any grouping of the quantities, e.g. that $(a \times b) \times c = a \times (b \times c)$. M19.

B. RUSSELL The associative, commutative and distributive laws.

■ **associatively** adverb u19. **associativeness** noun (rare) u19. **associativity** noun (esp. **MATH.**) M20.**assail** /ə'saɪl/ verb trans. arch. exc. **SCOTS LAW** (see sense 4b). Also(Scot.) **assolzie** /-j(ɪ)l/. ME.[ORIGIN Anglo-Norman *as(s)ail(e)r*, from Old French *assail-* tonic stem of *absoldre* (mod. *absoudre*) from Latin *absolvere* ABSOLVE; the Scot. form derives from Middle English *-ly-*.]► **I** With a person as obj.

1 Grant absolution to; absolve of, from a sin. ME.

► **b** Release from purgatory. LME.

2 Release from excommunication or other ecclesiastical sentence. LME–17.

3 Release from, of obligations or liabilities. LME–M17.

4 Acquit of a criminal charge. (Foll. by of, from.) LME.

► **b** **SCOTS LAW** (as **assolzie**). Hold not liable, in a civil action, by decision of court. E17.

5 gen. Release, set free, discharge, (of, from). LME.

► **II** With a thing as obj.

1 Clear up, solve, resolve. LME–17.

2 Refute (an objection or argument). LME–E18.

3 Expiate, atone for. u16.

4 Get rid of, dispel. rare (Spenser). Only in u16.

■ **assolment** noun absolution from sin, guilt, censure, accusation, etc. E17.† **assoin** noun, verb see ESSOIN noun, verb.**assonance** /'as(ə)nəns/, noun. E18.[ORIGIN French, from Latin *assonare* respond to, from *ad* AS-¹ + *sonare*, from *sonus* sound: see -ANCE.]

1 Resemblance or correspondence of sound between two syllables. E18.

2 The rhyming of one word with another in accented vowel and those that follow, but not in consonants, or (less usually) in consonants but not in vowels. E19.

3 **transf.** Correspondence more or less incomplete. M19.■ **assonant** adjective & noun (a) adjective exhibiting assonance; (b) noun in pl., words exhibiting assonance: E18. **assonantal** /-nənt(ə)l/ adjective of or pertaining to assonance, exhibiting assonance M19.**assonate** /'as(ə)neɪt/ verb intrans. E17.[ORIGIN Latin *assonat-* pa. ppl. stem of *assonare*: see ASSONANCE, -ATE².]

1 Sound like a bell. rare. Only in E17.

2 Correspond in sound; spec. exhibit assonance. M17.

assort /ə'sɔ:t/ verb. u15.[ORIGIN Old French *assortier* (mod. *-ir*), from *à* AS-⁵ (assim. to *as* AS-¹) + *sorte* SORT noun².]

1 verb trans. Distribute into groups; arrange in sorts. u15.

► **b** Classify, place in a group, with. M19.

Tail's Edinburgh Magazine Merchants ... employ wool-sorters of their own to assort and repack it. b DICKENS He would ... assort it with the fabulous dogs ... as a monstrous invention.

2 verb trans. Provide with an assortment. arch. M18.

OED We have sent orders for some white goods to assort our store.

3 verb intrans. Fall into a class with; correspond or suit (well, ill, etc.) with. E19.

W. HAMILTON Finding that it is harmonious, — that it dovetails and naturally assort with other parts. E. LINCOLN Her cold hard voice that assorted so badly with his memory of her.

4 verb intrans. Keep company, associate, with. arch. E19.

C. LAMB I could abide to assort with fisher-swains.

■ **assorted** adjective (a) matched to; (ill, well, etc.) suited to one another; (b) of various sorts put together: u18.**assortative** /ə'sɔ:təti/, adjective. u19.

[ORIGIN from ASSORT + -ATIVE.]

BIOLOGY. Designating mating which is not random, but correlated with the possession by the partners of certain similar (or dissimilar) characteristics.**assortment** /ə'sɔ:t(ə)m(ə)nt/ noun. E17.[ORIGIN from ASSORT verb + -MENT, after French *assortiment*.]

1 The action of assorting; the state of being assorted. arch. E17.

OED She was engaged in the assortment of her crewels.

2 A set of various sorts put together. M18.

J. BRAINE A confusion of voices and an assortment of minor noises — glasses clinking, matches being struck, the central heating rumbling.

3 A group of things of the same sort. rare. M18.

ADAM SMITH Those classes and assortments, which ... are called genera and species.

assot /ə'sɔ:t/ verb. Long arch. rare. Infl. -tt-. ME.[ORIGIN Old French & mod. French *assoter*, formed as AS-⁵ + *sot* from medieval Latin *sottus*: see SOT noun.]

1 verb intrans. Behave foolishly; become infatuated. Only in ME.

2 verb trans. Make a fool of; infatuate. Chiefly as **assotted** ppl adjective. LME.**ASSR** abbreviation.

hist. Autonomous Soviet Socialist Republic.

Asst abbreviation.

Assistant.

assuage /ə'sweɪdʒ/ verb. ME.[ORIGIN Old French *as(s)ouager* from Proto-Romance, from Latin *ad* AS-¹ + *suavis* sweet.]► **I** verb trans. 1 Mitigate, appease, allay, alleviate, relieve, (feelings, pain, appetite, desire, etc.). ME.

BACON They need medicine ... to assuage the disease. J. LONDON He had once gone three days without water ... in order to experience the exquisite delight of such a thirst assuaged. N. ALGREN Assuaging her fears by day and her lusts by night.

2 Relax, moderate, (a harsh law etc.). ME–15.

3 Pacify, soothe, (a person). LME.

ADDISON Kindling pity, kindling rage At once provoke me, and assuage.

4 gen. Abate, lessen, diminish. arch. LME.

W. OWEN Of a truth All death will he annul, all tears assuage?

W. S. CHURCHILL But in the name of reason irrational forces had been let loose. These were not easily to be assuaged.

► **II** verb intrans. 15 Of passion, pain, appetite, etc.: become less violent, abate. ME–E18.

DEFOE The plague being come to a crisis, its fury began to assuage.

6 gen. Diminish, fall off, abate, subside. Long arch. LME.

AV GEN. 8:1 And the waters assuaged.

■ **assuagement** noun (a) the action of assuaging; the condition of being assuaged; (b) (now rare) an assuaging medicine or application: M16. **assuager** noun M16.

a cat, ɑ: arm, e bed, ɔ: her, i sit, i cosy, i: see, ɒ hot, ɔ: saw, ʌ run, ʊ put, u: too, ɔ: ago, ʌ my, ɔ: how, eɪ day, əʊ no, e: hair, ɪə near, ɔɪ boy, ʊə poor, ʌɪə tire, ɔ:ə sour

conchology | concomitance

■ **conchoidally** *adverb* in a conchoidal form U9.

conchology /kən'kɒlədʒi/ *noun*, U18.

[ORIGIN from Greek *kokkhō*, *kokkhē* shell + *-logy*.]

The branch of zoology that deals with shells and shellfish.

■ **concho'logical** *adjective* E19. **concho'logically** *adverb* M19. **conchologist** *noun* U18.

conchy *noun* var. of CONCHIE.

†**conchyliology** *noun*, U18–U19.

[ORIGIN from Latin *conchylium* shellfish from Greek *kokkhulion* dim. of *kokkhē* = *kokkhē* CONCH: see -ology.] = CONCHOLOGY.

concierge /kɒnsiːʒ/ *foreign kɒnsjɜːʒ* (pl. same) *noun*, M16.

[ORIGIN French from Old French *conserger* etc. = medieval Latin *consergius*, prob. ult. from Latin *conseruus* fellow slave.]

1 The warden of a house, castle, or prison; [the title of] a high official in France and other European states, having custody of a royal palace etc. *obsolete* exc. *hist.* M16.

2 In France etc.: a doorkeeper, porter, etc., for a building, esp. a block of flats. U7.

†**concile** *verb trans.* LME–M18.

[ORIGIN Latin *conciliare*: see CONCILIATE.]

Reconcile; conciliate.

†**conciliable** *noun* see CONCILIABULE.

conciliable /kən'sɪliəb(ə)/ *adjective*, rare, M17.

[ORIGIN formed as CONCILE + *-ABLE*.]

Able to be conciliated; reconcilable.

conciliabule /kən'sɪliəbjʊl/ *noun*. Also (earlier) †**-able**, E16.

[ORIGIN Latin *conciliabulum* place of assembly, from *conciliare* assembly.]

A small or secret assembly; a conventicle.

conciliar /kən'sɪliə/ *adjective*, U7.

[ORIGIN medieval Latin *conciliaris* counsellor: see -AR².]

Of or pertaining to (esp. ecclesiastical) councils.

■ **conciliarism** *noun* a theory of ecclesiastical government embodying the principle that Church councils constitute the highest authority M20. **conciliarist** *noun* a supporter of conciliarism M20. **conciliarly** *adverb* by a council M17.

conciliate /kən'sɪliet/ *verb*, M16.

[ORIGIN Latin *conciliat*- *pa.* ppl stem of *conciliare* combine, unite physically, procure, win, from *conciliū* COUNCIL: see -ATE³.]

†1 *verb trans.* Procure, get as an addition. M16–U18.

2 *verb trans.* Gain (goodwill, esteem, etc.) by soothing or pacifying acts. M16.

LD MACAULAY The arts which conciliate popularity.

3 *verb trans.* Reconcile, make accordant or compatible. U16.

4 *verb intrans.* Effect a reconciliation, arbitrate, mediate, (between). L20.

GIBBON Conciliating the qualities of a soldier with those of a philosopher.

4 *verb intrans.* Make friends (with). rare, M18.

5 *verb trans.* Overcome the distrust or hostility of; placate, pacify. U18.

A. FRASER The acute financial demands of his foreign policy left him no choice but to conciliate Parliament.

■ **conciliative** *adjective* = CONCILIATORY E19. **conciliator** *noun* a person who or thing which conciliates U16.

conciliation /kɒnsɪlɪ'eɪʃ(ə)n/ *noun*, M16.

[ORIGIN Latin *conciliatio*(n)-, formed as CONCILIATE; see -ION.]

1 The action of conciliating; reconciliation; the use of conciliating measures. M16.

2 *spec.* The process of seeking agreement between the parties in an industrial dispute, without recourse to arbitration. U19.

conciliatory /kən'sɪliət(ə)rɪ/ *adjective*, U16.

[ORIGIN formed as CONCILIATE + *-ORY*².]

Tending or calculated to conciliate; showing a spirit of conciliation.

■ **conciliatorily** *adverb* E20. **conciliatoriness** *noun* M19.

concinmate /kən'sɪnət/ *adjective*, rare, M16.

[ORIGIN Latin *concinatus* *pa.* ppl. formed as CONCINNITY: see -ATE².]

Concinnated.

concinmate /kən'sɪnet/ *verb trans.* Now rare, E17.

[ORIGIN Latin *concinat*- *pa.* ppl stem of *concinare* formed as CONCINNITY: see -ATE².]

Put together fitly; arrange skilfully or neatly; set right.

concinuity /kən'sɪnɪtɪ/ *noun*, M16.

[ORIGIN Latin *concinuitas*, from *concinuus* skilfully put together: see -ITY.]

1 Skilful fitting together; (a) harmonious arrangement. M16.

2 (An instance of) studied elegance of style. U16.

■ **concinuous** *adjective* †(a) music harmonious; (b) of elegant style: M17.

†**concional** *adjective*, M17–E18.

[ORIGIN Latin *concionalis*, conc-, from *conciō*(n-) (later conc-) contr. of *conventiō*(n-) CONVENTION: see -AL¹.]

Of or pertaining to a public assembly or public speaking.

■ **concionary** *adjective* = CONCIONAL M17–E18. †**concionator** *noun* [Latin *concionator*] a person who makes speeches, a preacher E17–M19.

concient /kən'sɪpiənt/ *adjective*, rare, E19.

[ORIGIN Latin *concient*-pres. ppl stem of *conciere* CONCEIVE.]

That conceives, conceiving.

concise /kən'saɪs/ *adjective*, U16.

[ORIGIN French *concise*] or Latin *concisus* divided, broken up, brief, *pa.* ppl. of *concidere*, formed as CON- + *caedere* to cut.]

Of speech, writing, a person, style, etc.: brief but comprehensive in expression.

■ **concisely** *adverb* U17. **conciseness** *noun* M17.

concision /kən'sɪʒ(ə)n/ *noun*, LME.

[ORIGIN Latin *concisiō*(n)-, from *concisus*: see CONCISE, -ION.]

1 A cutting to pieces, a cutting up; *spec.* (in biblical translations and allusions) circumcision. LME. †b A schism. M16–E18.

2 The quality or state of being concise; conciseness, U18.

concitation /kɒnsɪ'teɪʃ(ə)n/ *noun*, Long rare, M16.

[ORIGIN Latin *concitatio*(n)-, from *concitā*- *pa.* ppl stem of *concitare* stir up, excite, formed as CON- + *cite*: see -ATION.]

Stirring up, agitation.

conclamation /kɒŋklem'eɪʃ(ə)n/ *noun*, E17.

[ORIGIN Latin *conclamatio*(n)-, from *conclā*- *pa.* ppl stem of *conclāmare*, formed as CON- + *clāmare* shout: see -ATION.]

A loud calling out of many together, esp. in lamentation for the dead.

conclave /'kɒŋkleɪv/ *noun*, LME.

[ORIGIN French from Latin *conclave*, formed as CON- + *clavis* key.]

†1 A gen. A private room, an inner chamber. LME–M18.

†b *spec.* The meeting place of the cardinals of the Roman Catholic Church for the election of a pope. LME.

2 A private meeting or close assembly. M16. †b *spec.* An assembly of cardinals for the election of a pope; loosely the body of cardinals. E17.

in **conclave** (of cardinals or gen.) meeting privately or behind closed doors.

■ **conclavist** *noun* †(a) any of the cardinals in conclave; (b) a person attendant upon a cardinal in conclave: E17.

conclude /kən'kluːd/ *verb*, ME.

[ORIGIN Latin *concludere*, formed as CON- + *claudere* close, shut.]

†1 †1 *verb trans.* Overcome in argument, convince. ME–E18.

2 *verb trans.* Shut up, enclose; include, comprise. *arch.* LME.

†b Restrict, confine. M16–U17.

TENNYSON I dreamt Of some vast charm concluded in that star.

3 *verb trans.* †a Debar, restrain (from). LME–E18. †b Bind, oblige. *obsolete* exc. *law.* LME.

b J. LOCKE The consent of the majority shall . . . conclude every individual.

†II 4 *verb trans.* Bring to a close or end; wind up; finish; say or write in conclusion. LME.

SHAKES. Rom. & Jul. His fault concludes . . . The life of Tybalt. DAY Lewis Invariably concluding my discourse with 'In the name of the Father [etc.]'. J. CONRAD 'Aren't you astonished?' concluded the gaunt student.

5 *verb intrans.* Of a thing: come to a close or end; terminate. LME.

SHAKES. Ven. & Ad. Her heavy anthem still concludes in woe.

6 *verb intrans.* Make an end of an action; finish, close. *Freq. foll. by by, with.* E16.

T. HOOD My paper being filled . . . I must conclude with kind regards to Emily.

†III 7 *verb trans.* Arrive at as a judgement or opinion by reasoning; infer, deduce. *Foll. by simple obj., the obj. to be something, that.* LME.

H. POWER We cannot but conclude such Prognostics to be within the circle of possibilities. BURKE The greatest part of the governments . . . must be concluded tyrannies. E. M. FORSTER Am I to conclude . . . that he is a Socialist?

†8 *verb trans.* Of a person, argument, etc.: demonstrate, prove. With constructions as sense 7. LME–U18.

†9 *verb intrans.* Be conclusive. E16–E18.

10 *verb intrans.* Form a conclusion (from, to, (up)on). E16.

M. NOVAK So one must conclude from the eagerness with which Americans purchase 'how to' books.

†IV 11 *verb trans.* Bring (a matter) to a decision; settle, arrange finally. LME.

H. MACMILLAN He wished to conclude a German peace treaty.

12 *verb trans.* & †intrans. Come to a decision, determine, resolve. *Foll. by that, to do, to f., to (up)on.* LME. †b *verb intrans.* Agree, make terms (with). LME–U17.

SHAKES. Lucr. They did conclude to bear dead Lucrece thence. S. PEPYS We judged a third man is necessary, and concluded on . . . Warren. C. M. YONGE She . . . concluded that she would wait.

■ **concludent** *adjective* (now rare or obsolete) [Latin *concludent*:- see -ENT] conclusive, decisive U16. **concluder** *noun* E17.

concludible /kən'kluːzɪb(ə)/ *adjective*, rare, M17.

[ORIGIN from Latin *conclud*:- (see CONCLUSION) + *-IBLE*.]

Able to be concluded.

conclusion /kən'kluːʒ(ə)n/ *noun*, LME.

[ORIGIN Old French & mod. French, or Latin *conclusio*(n)-, from *conclud*:- *pa.* ppl stem of *concludere*: see CONCLUDE, -ION.]

1 The end, finish, or termination of a speech, writing, etc.; esp. a final section summarizing the main points. LME.

2 The issue, the final result, the outcome. LME.

I. MURDOCH One who has brought a difficult piece of navigation to a successful conclusion.

3 The result of a discussion or examination of an issue; final resolution, decision, agreement. LME.

W. RALEIGH Their standing out, hindered not the rest from proceeding to conclusion.

4 A judgement or statement arrived at by reasoning; an inference, a deduction. LME. †b *logic.* A proposition derived from two previous propositions (the premisses) in a syllogism; a deduction from premisses. U15. †c The action of concluding or inferring. rare, M16–M17.

J. TYNDALL The sober conclusions of science. G. BROWN People soon came to the conclusion that the letter must have been written by me.

†5 A proposition, a dictum, a dogma; a problem, a riddle; an experiment. LME–U17.

6 The settling or final arranging (of a treaty etc.). M16.

E. HEATH The conclusion of the Test Ban Treaty was a diplomatic triumph.

7 *law.* An act by which a person debars himself or herself, an estoppel. M16. †b *scots law.* The clause of a summons which states the remedy sought. E19.

— PHRASES: **foregone conclusion**: see FOREGONE ppl *adjective*. In conclusion in the end, finally, to conclude. **jump to conclusions**: see JUMP *verb*. **try conclusions with** engage in a trial of skill etc. with.

conclusive /kən'kluːsɪv/ *adjective*, U16.

[ORIGIN Late Latin *conclusivus*, formed as CONCLUSION: see -IVE.]

†1 Summing up. Only in U16.

2 Concluding; occurring at or forming the end; final. Now rare, E17.

3 Ending all argument; decisive, convincing. M17.

R. GRAVES They should have provided more conclusive evidence of poisoning. P. H. JOHNSON The brisk and conclusive tone of a dentist who has completed a patient's fillings.

■ **conclusively** *adverb* M16. **conclusiveness** *noun* U17. **conclusory** *adjective* relating or tending to a conclusion M19.

concoct /kən'kɒkt/ *verb*, *pa.* ppl. **concocted**, †**concoct**.

M16.

[ORIGIN Latin *concoct*- *pa.* ppl stem of *concoquere* lit. 'cook together', formed as CON- + *coquere* cook.]

†1 *verb trans.* Digest (food): see CONCOCTION *noun*. M16–E19.

†2 a *verb trans.* Refine, purify (metals, minerals, etc.) by the action of heat. M16–M19. †b *verb trans.* & *intrans.* Cook, bake, boil; undergo cooking. U16–M19.

†3 *verb trans.* & *intrans.* Ripen, bring or come to maturity. U16–E19. †b *verb trans.* Produce naturally, secrete. E17–M18.

4 *verb trans.* Prepare (esp. a soup, a drink) from a variety of ingredients. U17.

M. MITCHELL Eating . . . the dessert concocted by Mammy from corn meal and dried huckleberries. J. B. MORTON An Indian concocted the foulest smell on earth to drive the snake out.

5 *verb trans.* Devise or make up (a story, scheme, etc.) by elaborate or concerted planning; fabricate. U18.

C. THIRLWALL The whole project, concocted with such elaborate preparations. T. DRESSER He would have to concoct some excuse.

■ **concocter**, -or *noun* M17. **concoctive** *adjective* †(a) digestive; (b) pertaining to the concoction of a mixture, a story, etc.: U16.

concoction /kən'kɒkʃ(ə)n/ *noun*, M16.

[ORIGIN Latin *concoctio*(n)-, formed as CONCOCT: see -ION.]

†1 Digestion (of food). M16–E19.

first **concoction**, second **concoction**, third **concoction**: the three stages of digestion formerly recognized (a fault in the first concoction, an error in the first concoction (fig.), a fault etc. in the initial stage).

†2 Ripening, maturation. M16–M19.

3 The elaborate composition of a story, scheme, etc. to suit a purpose; a fabricated story etc. E19.

4 The preparation of a dish, potion, etc., from a variety of ingredients; a thing so concocted. M19.

Guardian Solomongundy . . . is an amazing concoction of ingredients picked up at the market.

concolorous /kən'kɒlərəs/ *adjective*, M19.

[ORIGIN from Latin *concolor*, formed as CON- + *color* COLOUR *noun*: see -OUS.]

BOTANY & ZOOLOGY. Of a uniform colour; of an identical colour with.

concomitance /kən'kɒmɪt(ə)ns/ *noun*, M16.

[ORIGIN medieval Latin *concomitantia*: see CONCOMITANT, -ANCE.]

1 The fact of being concomitant; subsistence together; an instance of this. M16.

2 THEOLOGY. (The doctrine of) the coexistence of the body and blood of Christ in each Eucharistic element singly (esp. the bread). M16.

■ Also **concomitancy** *noun* M17.

b but, d dog, f few, g get, h he, j yes, k cat, l leg, m man, n no, p pen, r red, s sit, t top, v van, w we, z zoo, f she, 3 vision, 0 thin, 0 this, 9 ring, 15 chip, d3 jar

concomitant /kən'kɒmɪt(ə)n(ə)l/ *adjective & noun*. E17.

[ORIGIN Late Latin *concomitant*-pres. ppl stem of *concomitari* accompany; see -ANT.]

► **A adjective.** Of a quality, circumstance, etc.: occurring along with something else, accompanying. (Foll. by with, (now rare) of, †to.) E17.

M. L. KING A numerical growth in church membership does not necessarily reflect a concomitant increase in ethical commitment.

► **B noun.** 1 An attendant quality, state, circumstance, etc.; an accompaniment. (Foll. by of) E17.

E. FROMM Joy is the concomitant of productive activity.

†2 A person who accompanies another; a companion. M17–U18.

■ **concomitantly** *adverb* M17.

concord /'kɒŋkɔ:d/ *noun*¹. ME.

[ORIGIN Old French & mod. French *concorde* from Latin *concordia*, from *concor*, *concord*- of one mind, formed as *con-* + *cor*, *cord*-heart.]

1 Agreement or harmonious relations between persons, nations, etc. ME. ►b A treaty establishing harmony between nations. LME.

MILTON Love-quarrels oft in pleasing concord end.

b W. H. PRESCOTT Abiding by the concord of Salamanca.

2 Agreement or harmony between things, esp. musical notes sounded together. ME. ►b *MUSIC*. A chord which is in itself satisfying to the ear and does not require resolution. Cf. *DISCORD* *noun* 3. U16.

SHAKES. Merch. V. The man that . . . is not mov'd with concord of sweet sounds.

3 *LAW*. A collusive court procedure for ensuring that a transfer of land was effective. *obsolete exc. hist.* U5.

4 *GRAMMAR*. Agreement between words in gender, number, case, person, etc. M16.

false concord: see *FALSE* *adjective*.

Concord /'kɒŋkɔ:d/ *noun*². M19.

[ORIGIN US place name.]

1 In full *Concord coach*, *Concord wagon*. A type of stage-coach orig. made at Concord, New Hampshire. M19.

2 In full *Concord grape*. A variety of dessert grape developed at Concord, Massachusetts. M19.

concord /kən'kɔ:d/ *verb*. LME.

[ORIGIN Old French & mod. French *concorde* from Latin *concordare*, from *concord*-: see *CONCORD* *noun*¹. Sense 3 is back-form. from *CONCORDANCE*.]

1 *verb intrans.* Be in or come into agreement or harmony. LME.

2 *verb trans.* Bring into harmony, reconcile. Now rare. LME.

►b Agree upon, decide by agreement. LME–M17.

3 *verb trans.* Make a concordance to (a text); arrange in a concordance. M20.

■ **concordable** *adjective* (now rare or obsolete) in full accord LME.

concordance /kən'kɔ:d(ə)ns/ *noun & verb*. LME.

[ORIGIN Old French & mod. French from medieval Latin *concordantia*, from *concordant*-: see *CONCORDANT*, -ANCE.]

► **A noun.** 1 Agreement, concord; an instance of this. LME.

►b Harmony of sounds. U15–U17.

†2 **a** A parallel passage in a book, esp. the Bible; a citation of such passages. LME–E18. ►b An alphabetical arrangement of the principal words in a book (orig. the Bible) or author, with a list (and usu. citations) of the passages in which each occurs. Orig. in *pl.* LME.

► **B verb trans.** Make a concordance to (a book etc.). U19.

■ **concordancer** *noun* a compiler of a concordance U9.

concordancy /kən'kɔ:d(ə)ns/ *noun*. Now rare. U16.

[ORIGIN formed as *CONCORDANCE*: see -ANCY.] Agreement, concord.

concordant /kən'kɔ:d(ə)n(ə)l/ *adjective*. U15.

[ORIGIN Old French & mod. French from Latin *concordant*-pres. ppl stem of *concordare*, from *concord*-: see *CONCORD* *noun*¹, -ANT¹.]

1 Agreeing; harmonious; unanimous; consistent. U15.

SHELLEY Then dulcet music swelled Concordant with the life-strings of the soul. J. TYNDAL These different methods have given concordant results. W. STUBBS The common concordant and unanimous consent of all and singular.

2 *GEOMETRY*. Corresponding in direction with the planes of adjacent or underlying strata. E20.

■ **concordantly** *adverb* LME.

concordantial /kɒŋkɔ:'dʌnʃ(ə)l/ *adjective*. M17.

[ORIGIN from medieval Latin *concordantia*: see *CONCORDANCE*, -AL¹.] Pertaining to a literary concordance.

concordat /kən'kɔ:daɪ/ *noun*. E17.

[ORIGIN French, or Latin *concordatum* use as noun of neut. pa. pple of *concordare* agree on: see *CONCORDATUM*, -AT¹.]

An agreement, a compact; now esp. one between the Vatican and a secular government relating to matters of mutual interest.

■ **concordatory** /-daɪ-/ *adjective* U19.

concordatum /kɒŋkɔ:'dʌtəm/ *noun*. E17.

[ORIGIN Latin = 'a thing agreed upon': see *CONCORDAT*.] *hist.* An Order in Council relating to the disposal of a special fund (the *concordatum-fund*) for extraordinary

expenses in Ireland voted annually by the British Parliament; a payment made under such an order.

concorporate /kən'kɔ:p(ə)rət/ *adjective*. LME.

[ORIGIN Latin *concorporatus* pa. pple of *concorporare* incorporate, formed as *con-* + *corpus*, *corpor*-body: see -ATE¹.] United in one body.

concorporate /kən'kɔ:p(ə)rət/ *verb*. arch. M16.

[ORIGIN Latin *concorporat*-pa. ppl stem of *concorporare*: see *CONCORPORATE* *adjective*, -ATE¹.]

1 *verb trans.* Form into one body. M16.

†2 *verb intrans.* Coalesce into one body. E17–E18.

■ **concorporate** *noun* E17.

concours d'élégance /kæ'kʊr de'leɪʒɑːs/ *noun* *phr.* Pl. same. M20.

[ORIGIN French = contest of elegance.]

A parade of motor vehicles in which prizes are awarded for the most elegant-looking.

concourse /'kɒŋkɔ:s/ *noun*. LME.

[ORIGIN Old French & mod. French *conours* from Latin *concursum*, from *concur*-pa. ppl stem of *concurrere* CONCUR.]

1 A flocking or meeting together; a running or flowing together; confluence. LME. ►b A concurrence of times or circumstances; process (of time, events). Also, a conjunction of planets etc. LME–U18.

M. HALE The product of chance, or fortuitous concourse of particles of matter. DRYDEN Hears . . . The noise and busy concourse of the mart.

2 An assemblage of persons or things; a crowd, throng. LME.

MILTON Under some concourse of shades. M. HOLROYD A great concourse of people gathered at the grave.

†3 The (place of) meeting of lines, surfaces, etc. LME–E19.

†4 Concurrence in action or causation, cooperation. LME–M19.

5 An open central area in a large public building, railway station, etc. Orig. US. M19.

M. BRADBURY He crosses the main concourse of the university . . . where paths cross, crowds gather.

concreate /kɒŋkri:'eɪt/ *verb trans.* Now rare or obsolete. E17.

[ORIGIN ecclesiastical Latin *concreat*-pa. ppl stem of *concreare*: see *CON-*, *CREATE* *verb*.]

Create together. Chiefly as *concreated* *ppl adjective*.

■ **concreative** *adjective* created or creating together M17.

†**concredit** *verb trans.* U16–E19.

[ORIGIN Latin *concredit*-pa. ppl stem of *concredere*: see *CON-*, *CREDIT* *noun*.]

Commit, entrust.

cremation /kɒŋkri:'meɪʃ(ə)n/ *noun*, rare. M18.

[ORIGIN from *CON-* + *CREMATION*.]

1 Cremation together. M18.

2 Burning to ashes. M19.

cremement /'kɒŋkri:m(ə)n(ə)l/ *noun*, rare. M17.

[ORIGIN from *CON-* + *CREMENT*, after *increment* etc.]

A growing together; a concretion.

conrescence /kən'kres(ə)ns/ *noun*. E17.

[ORIGIN from *CON-* + *-rescence*, after *exrescence* etc.]

†1 Growth by assimilation. Only in E17.

2 A concretion. Now rare or obsolete. E17.

3 *BIOLOGY*. The coalescence or growing together of parts originally separate; spec. that of the lips of the blastopore to form the body of an embryo. U19.

■ **conrescent** *adjective* growing together E20.

concrete /'kɒŋkri:t/ *adjective & noun*. LME.

[ORIGIN French *concret* or Latin *concretus* pa. pple of *concretere* grow together, formed as *con-* + *cretere* grow.]

► **A adjective.** 1 Formed by cohesion of parts into a mass, solidified, solid; grown together. Also, compounded of various ingredients, composite. Now rare or obsolete. LME.

2 *GRAMMAR & LOGIC*. Of a term or noun: denoting a substance or thing as distinct from a quality, state, or action (opp. *abstract*). Formerly also, designating a quality regarded as adherent to a substance, or a term expressing such a quality, i.e. the adjective, e.g. *white* (paper etc.), as distinct from the quality abstracted from the substance and expressed by an abstract noun, e.g. *whiteness*. LME.

3 Embodied in material form or existing as an actual example; real, tangible: opp. *abstract*. Of an idea, proposal, etc.: relating to realities or actual instances; specific, definite. M17.

R. FRY Metaphysical ideas so vague as to be inapplicable to concrete cases. Y. WINTERS The concept is rendered concrete by the image of Cupid. H. MACMILLAN I was to announce the Bond as a concrete proposal. R. MACDONALD My witnesses aren't entirely dependable. We need concrete evidence.

concrete music = *MUSIQUE CONCRÈTE*. **concrete operations**: see *OPERATION* 6b. **concrete poetry**, **concrete verse**: in which the meaning is conveyed visually, by means of patterns of words or letters and other typographical devices. **concrete universal** (*philosophy* etc.) (something expressing) a universal in which the general and the particular or individual are combined; an organized unity. **concrete verse**: see *concrete poetry* above.

4 [the noun used attrib.] Made or consisting of concrete. U19.

D. MORRIS The city is not a concrete jungle, it is a human zoo.

► **B noun** 1 A concrete noun or term. *rare*. LME.

2 A concreted mass; a concretion. Now *rare* or *obsolete exc.* as below. M17.

3 A heavy-duty building material made from a mixture of broken stone or gravel, sand, cement, and water, which forms a stonelike mass on hardening; paving etc. made of this. M19.

E. FERBER Tramping of restless feet on the concrete.

reinforced concrete: see *REINFORCE* *verb*.

► **II 4** *absol.* That which is concrete. Esp. in *the concrete*, in the sphere of concrete reality, concretely. M16.

— **COMB.** **concrete mixer** = *CEMENT MIXER* *s.v.* **CEMENT *noun*.**

■ **concretely** *adverb* in a concrete form, manner, or sense M17. **concreteness** *noun* M18. **concretize** *verb trans.* render concrete, esp. opp. *abstract* U19. **concretization** *noun* the action of concretizing; the state of being concretized: M20.

concrete /kən'kri:t/ in sense 3 'kɒŋkri:t/ *verb*. U16.

[ORIGIN from *CONCRETE* *adjective & noun*.]

1 *verb trans.* (freq. in *pass.*) & *intrans.* Unite into a mass by cohesion or coalescence of particles; make or become solid. U16. ►b *verb trans.* Unite, combine (sensations, ideas, etc.). E18–E19.

C. LYELL Ochreous sand, concreted . . . into a kind of stone.

2 *verb trans.* Give concrete expression to (an abstract thing). M17.

J. CONRAD Precious dreams that concrete the most cherished . . . of his illusions.

3 *verb trans.* Cover or pave with concrete; embed or set in concrete. U19.

■ **'concreter** *noun* a builder or worker with concrete U19.

concretion /kən'kri:tʃ(ə)n/ *noun*. M16.

[ORIGIN French *concretion* or Latin *concretio*-(n)-, from *concret*-pa. ppl stem of *concretere*: see *CONCRETE* *adjective & noun*.]

1 The action or process of growing together or uniting in one mass; coalescence. M16. ►b Congelation or coagulation of a liquid. E17.

†2 Union with a material thing. E17–M18.

3 A concreted mass (of); a lump, a nodule. E17. ►b *spec. MEDICINE*. A calculus or hardened deposit in the body. M17.

►c *GEOLGY*. A nodule of distinct mineral composition occurring (usu. around a nucleus) in sedimentary rock. M19.

4 The action of expressing (an idea etc.) in concrete form; an embodiment in concrete form. M17.

■ **concretionary** *adjective* (esp. *GEOLGY*) formed by concretion; marked by or consisting of concretions: M19.

†**concrew** *verb intrans.* *rare* (Spenser). Only in U16.

[ORIGIN from *ACCURE* by substitution of *CON-*, perh. after Old French *concreu*.]

Grow into a mass.

concubinage /kən'kju:bɪnɪdʒ/ *noun*. LME.

[ORIGIN French, formed as *CONCUBINE*: see -AGE.]

The cohabiting of a man and a woman who are not legally married; the practice of keeping, or the state of being, a concubine.

concubinary /kən'kju:bɪnəri/ *adjective & noun*. E16.

[ORIGIN medieval Latin *concubinarius*, from Latin *concubina*: see *CONCUBINE*, -ARY¹.]

► **A adjective.** Relating to concubinage. Of a person: living or born in concubinage. E16.

► **B noun.** A person who lives in concubinage. U16.

concubine /'kɒŋkju:bɪn/ *noun & verb*. ME.

[ORIGIN Latin *concupiscat*-pa. ppl stem of *concupiscere*, formed as *con-* + *cupere* to lie.]

► **A noun.** 1 A woman who cohabits with a man without being his wife, a kept mistress; (in polygamous societies) a secondary wife. ME.

†2 A woman's lover. LME–M16.

► **B verb trans.** †1 Take as a concubine. Only in U16.

†2 Provide with a concubine or concubines. *rare*. E19.

■ **'concupinal** *adjective* (rare) M17.

†**conculcate** *verb trans.* M16–E18.

[ORIGIN Latin *conculcat*-pa. ppl stem of *conculcare*, formed as *con-* + *calcare* tread: see *INCULCATE*.]

Trample under foot.

■ **'conculcation** *noun* LME–E19.

concupiscence /kən'kju:psɪs(ə)ns/ *noun*. ME.

[ORIGIN Old French & mod. French from late Latin *concupiscencia*, from *concupiscere*-pres. ppl stem of *concupiscere* inceptive of *cupere*, formed as *con-* + *cupere* desire.]

Eager or inordinate desire; immoderate sexual desire, lust; *THEOLOGY* desire for worldly things.

C. CHAPLIN There's a dame that arouses my concupiscence. But she looks very expensive.

■ **concupiscent** *adjective* eagerly desirous, lustful M18.

■ **concupiscently** *adverb* LME.

concupiscible /kən'kju:psɪs(ə)l/ *adjective*. LME.

[ORIGIN Late Latin *concupiscibilis*, from *concupiscere*: see *CONCUPISCENCE*, -IBILE.]

1 Of the nature of concupiscence; vehemently desirous, lustful. LME.

a cat, ɑː arm, ɛ bed, ɜː her, ɪ sit, ɪ cosy, ɪ see, ɔː hot, ɔː saw, ʌ run, ʊ put, ʊ too, ʊ ago, ʌ my, ʌu how, ɛɪ day, ɔʊ no, ɛː hair, ɪə near, ɔɪ boy, ʊə poor, ʌɪə tire, ʌʊə sour