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Case No: CO/2872/2016

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE PLANNING COURT

Bristol Civil and Family Justice Centre
2 Redcliff Street, Bristol
BS1 6GR

Date: 09/02/2017

Before :

THE HON. MR JUSTICE HOLGATE

Between :

THE QUEEN (on the application of LECKHAMPTON GREEN LAND ACTION GROUP LIMITED)	**Claimant**
- and -	
TEWKESBURY BOROUGH COUNCIL	**Defendant**
-and-	
(1) REDROW HOMES LIMITED	**Interested Parties**
(2) MARTIN DAWN (LECKHAMPTON) LIMITED	

David Wolfe QC and Ashley Bowes (instructed by **Leigh Day LLP**) for the **Claimant**
Jenny Wigley (instructed by **Tewkesbury Borough Council**) for the **Defendant**
Martin Kingston QC and James Corbet Burcher (instructed by **Redrow Homes Limited**) for the **1st Interested Party**

Hearing date: 29 November 2016

Approved Judgment

Mr Justice Holgate:

Introduction

1. The Claimant applies for judicial review of the decision by the Defendant, Tewkesbury Borough Council ("TBC"), to grant planning permission for the construction of 377 dwellings on land to the west of Farm Lane, Shurdington, Gloucestershire ("the Farm Lane site").

2. On 6 July 2016 Lewis J granted permission to apply for judicial review on grounds 1 to 3 of the Claimant's skeleton. He refused permission for the Claimant to argue an additional ground which alleged that the Defendant failed to take into account environmental information relating to the cumulative impacts of the proposed development together with residential development on a neighbouring site, which together made up the South Cheltenham Urban Extension in an emerging development plan. In the substantive hearing before me of grounds 1 to 3, the Claimant renewed its application for permission to raise this argument as ground 4. All parties agreed that oral submissions on this point should be heard in full and the matter dealt with in this judgment.

3. The Claimant's documentation says little about its status or composition, other than that it is said to represent about 1,100 residents living in the vicinity of the Farm Lane Site and has been actively involved in opposing development proposed on that site.

4. On 10 October 2014 Redrow Homes Limited ("RHL"), the First Interested Party, made a planning application to the local planning authority, TBC, for development on the Farm Lane site. RHL is a house builder and owns the site. The Second Interested Party, Martin Dawn (Leckhampton) Limited ("MDLL") is described as having a charge over the site. MDLL has taken no active part in these proceedings.

5. The planning application was accompanied by an Environmental Statement ("ES") dated August 2014 because the proposal amounted to an "urban development project" within paragraph 10(b) of Schedule 2 to the Town and County Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No.1824) ("the EIA Regulations 2011") and was screened as "EIA development".

6. The Farm Lane site is one of a number of sites identified for housing development in Policy HOU1 of the Tewkesbury Borough Local Plan, covering the period January 2003 to January 2011. The Farm Lane site was allocated for the development of 360 dwellings in policy SD2, a policy dedicated to that site. By a direction made by the Secretary of State for Communities and Local Government ("SSCLG"), both policy HOU1 and policy SD2 have been "saved" and so continue to remain a part of the statutory development plan.

7. At the time of the decision under challenge, TBC acknowledged that it was unable to demonstrate a 5 year supply of housing land in accordance with paragraph 47 of the National Planning Policy Framework ("NPPF") and so it accepted that, by virtue of paragraph 49, saved policies in the Tewkesbury Borough Local Plan for the supply of housing, notably policy HOU1, should be treated as "out-of-date". The effect of this was that the presumption in favour of sustainable development contained in paragraph

14 of the NPPF applied to RHL's proposal, unless disapplied by one of the two exceptions contained in that paragraph.

8. The Farm Lane site lies on the southern fringes of Cheltenham and in the vicinity of the village of Leckhampton. It also lies to the north-east of the village of Shurdington. The site covers an area of about 15.41 ha and comprises agricultural land subdivided into fields by hedgerows. Farm Lane marks the eastern boundary of the site and Leckhampton Lane its southern boundary. The Lanes/Brizen Lane housing estate lies immediately to the north. Open agricultural fields adjoin the site to the west. The Farm Lane site is not the subject of any statutory or non-statutory landscape designation, but the Cotswolds Area of Outstanding Natural Beauty ("AONB") lies to the south. Green Belt designation applies to the areas to the south and west of the site.

9. It has long been recognised that Gloucester and Cheltenham are unable to meet the whole of their development requirements within their respective administrative areas. Partly as a result of the introduction by the Localism Act 2011 of the duty to co-operate in section 33A of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"), Gloucester City Council, Cheltenham Borough Council and TBC have agreed to promote a joint development plan known as the Joint Core Strategy ("JCS"). The plan period runs to 2031. Roughly about one third of the new homes required is proposed to be met in the administrative area of the TBC which would include what in physical terms would amount to urban extensions of Gloucester and Cheltenham.

10. On 20 November 2014 the JCS was submitted to SSCLG for statutory examination under PCPA 2004 by an independent inspector. Policy SA1 of the submission draft of the JCS proposes strategic alterations on a number of sites, one of which would be "A6 South Cheltenham/Leckhampton." The draft plan proposes to allocate 1124 dwellings on the site as an "indicative total". The Farm Lane site forms the western part of the draft A6 allocation and represents that part which lies within the area of TBC. The remaining and larger part of the allocation, lying to the east of the Farm Lane site, falls within the administrative area of Cheltenham Borough Council.

11. The proposed development of the Farm Lane site is a matter of great local controversy. TBC received 809 representations on the planning application, of which 742 were letters of objection. Initially, Natural England raised an objection to the proposal in their letter dated 7 November 2014, because of a lack of information in the application as to its impact on the AONB. The Cotswolds Conservation Board ("CCB") (established under section 87 of the Countryside and Rights of Way Act 2000) also has statutory responsibilities in relation to the AONB. CCB responded that it had no objection to the development of the site for residential purposes, save that the proposed layout would have an unacceptable adverse impact on the AONB because of the inadequacy of the green buffer area proposed for the southern part of the site. On 7 November 2014 English Heritage (now Historic England) expressed their concern that insufficient information had been presented by the developer on the impact of the proposed development on heritage assets.

12. In order to address these objections, in May 2015 RHL submitted an amended layout and landscape strategy and a Built Heritage Assessment. The new layout proposed a significant increase in the size of the landscape buffer in the southern part of the site. TBC undertook further consultation, from which it is clear that English Heritage, Natural England and the CCB did not object to the proposal.

13. The processing of the application was handled by Joan Desmond, a Development Management Team Leader at TBC with nearly 30 years' experience of planning. She was responsible for preparing the officers' report to the meeting of TBC's Planning Committee on 29 September 2015. She explains in her witness statement that members of the Committee have not only a good deal of local knowledge but also "good planning knowledge with many of them having been members of the Committee for a numbers of years" (paragraph 17). She adds that:

> "In order to maintain their knowledge and keep it up to date, Committee members receive regular training on both legal and planning policy matters."

Consequently, it is said that Committee members are familiar with such matters as heritage issues and the application of the statutory tests for the protection of the setting of listed buildings.

14. Mr Paul Skelton has been the Development Manager at TBC since 2009. He has been employed by the authority since 1991 and is a full member of the Royal Town Planning Institute. Mr Skelton is responsible for the overall direction and coordination of (inter alia) planning applications within TBC. He has a delegated function to determine the majority of planning applications submitted to the Council. All other planning applications are allocated to the Planning Committee. He usually checks most of the reports prepared by officers for the committee and did so in the case of the report on the Farm Lane application. The members of the Committee visited the site on 25 September 2015 in advance of their meeting.

15. On 29 September 2015 the Planning Committee resolved to delegate authority to Mr Skelton to permit RHL's application, subject to formal observations from the County Council as highways authority and the completion of a section 106 obligation to secure the infrastructure required for the development and to avoid prejudicing the delivery of the wider A6 strategic allocation.

16. Mr Skelton explains in his witness statement that officials of the SSCLG had been closely monitoring the Farm Lane application with a view to deciding whether it should be called in for determination by the minister. On 21 December 2015 the SSCLG issued a holding direction that TBC should not issue any grant of planning permission without his specific authorisation, so that he could consider exercising his call-in powers under section 77 of the Town and Country Planning Act 1990 ("TCPA 1990"). On 29 February 2016 the SSCLG wrote to say that he had decided not to call in the application. On 16 March 2016 it was confirmed that this had the effect of lifting the holding direction.

17. In the meantime, on 16 December 2015 the Inspector conducting the Examination of the JCS had issued her "Preliminary Findings on Green Belt Release, Spatial Strategy and Strategic Alterations" in a document referred to as EXAM 146. In paragraph 60 she stated that, for reasons relating to landscape impact, she was not minded to find that part of the A6 allocation lying within TBC's area "sound" which, if eventually confirmed in her final report, could prevent the three Councils from adopting the JCS with an allocation of the Farm Lane site (sections 20 and 23 of PCPA 2004), subject to any legal challenge. However, those were only the Inspector's preliminary and

conditional findings and not her final report to the three Councils on the statutory Examination of the JCS.

18. Both before and after SSCLG's decision not to call in the planning application, TBC received written representations asking that the application be referred back to the Planning Committee for reconsideration in the light of the Inspector's "Preliminary Findings" issued in December 2015. Once the SSCLG had decided against call-in, the matters left over by the Committee's decision on 29 September 2015 were close to be being resolved and it fell to Mr Skelton to decide whether the application should be referred back to the Committee. At paragraphs 18 to 25 of his witness statement he explains how he came to conclude that the matter should not be taken back to Committee. On 11 April 2016 he met with TBC's Corporate Leadership Team, comprising the Chief Executive, Deputy Chief Executive and Borough Solicitor, who agreed with his conclusions.

19. The section 106 obligation which TBC required the Interested Parties to enter into was executed on 26 April 2016 and TBC issued the planning permission challenged in these proceedings on the same date, under the delegated powers conferred on the Development Manager.

20. On 26 May 2016 the Inspector conducting the Examination of the JCS issued her Interim Report on the JCS. This dealt with topics such as the Objectively Assessed Housing Need ("OAHN") for the areas of the three Councils, the supply of land, spatial strategy, green belt release, need for additional allocations, local green space, and infrastructure. She remained of the view that the inclusion of the Farm Lane site as part of strategic site A6 should not be regarded as "sound", and so she recommended that it be removed from the allocation (paragraphs 112 and 115). However, it should be noted that in paragraph 3 of her report the Inspector stated that even at that stage:

> "All findings within this [Initial Report] are preliminary and will be reviewed as necessary in the light of all information before me when completing my formal, final report to the JCS authorities."

Summary of the grounds of challenge

21. The Claimant submits that:

Ground 1

TBC, as opposed to its Development Manager, failed to take into account as a material consideration the preliminary findings of the Inspector in EXAM 146 issued on 16 December 2015 on the soundness of allocating the Farm Lane site, contrary to section 70(2) of TCPA 1991;

Ground 2

TBC failed to comply with section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 as regards the effect of the proposed development on the setting of listed buildings.

Ground 3

TBC failed to take into account one of the two exceptions by which the presumption in favour of sustainable development contained in paragraph 14 of NPPF may be disapplied.

Ground 4

TBC failed to take into account all the required environmental information for the proposal, namely the cumulative adverse impacts of developing the whole of the draft A6 strategic allocation for housing.

22. The Claimant has accepted that ground 1 should be determined by reference to the examining Inspector's preliminary findings issued on 16 December 2015 and not her Interim Report issued on 26 May 2016, because the latter post-dated the grant of planning permission (see eg. paragraph 35 of the Claimant's skeleton). That is the correct approach to a judicial review of that decision.

23. It is convenient to deal first with grounds 2 and 3 which challenge the basis upon which the Committee reached its decision that planning permission be granted (subject to the conditions stated in their resolution). I will then deal with the issue raised under ground 1 as to whether the matter should have been referred back to Committee before planning permission was granted on 26 April 2016. I will lastly deal with ground 4.

General legal principles on challenges to decisions of local planning authorities

24. The principles upon which the courts may intervene in a judicial review of a local authority's decision to grant planning permission are well-established and have been summarised in R (Zurich Assurance Ltd) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at paragraphs 15-16; R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) at paragraphs 90 to 95; and in R (Plant) v Lambeth London Borough Council [2016] EWHC 3324 Admin at paragraphs 62 to 72. For present purposes I would highlight the following points drawn from the case law.

25. The principle that Inspectors' decision letters should be read and interpreted (and the adequacy of their reasoning judged) on the basis that they are addressed to a "knowledgeable readership", applies with particular force to an officer's report to a planning committee, although in a different way. The purpose of an officer's report is not to decide an issue or to determine an application, but to inform the committee of considerations relevant to the application. The report is not addressed to parties interested in the application, let alone to the world at large, but to the members of the committee, who can be expected to have substantial local knowledge and an understanding of planning principles and policies. The Court should acknowledge that the members of the Committee have been trained in planning practice and law (as confirmed for this case by Ms Desmond's witness statement) and was therefore acting within its area of specialist expertise. The Court should guard against undue intervention in policy judgments made by planning committees and respect their decisions unless it is clear that they have gone wrong in law. The Courts must not impose too demanding a standard upon officers' reports, to avoid defeating their purpose. Such a report is not normally to be criticised unless its overall affect significantly misleads the Committee about material matters which are left uncorrected

at their meeting (see eg. R v Mendip District Council Ex Parte Fabre [2000] 80 P & CR 500, 509-511 and paragraph 51 below).

Ground 2

26. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides:

> "In considering whether to grant planning permission… for development which affects a listed building or its setting, the local planning authority… 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."

The application of this provision is a well-trodden area of the law. It has been considered in, for example, East Northamptonshire District Council v SSCLG [2015] 1 WLR 45; R (Forge Field Society) v Sevenoaks District Council [2014] EWHC 1895 (Admin) and Mordue v SSCLG [2016] 1 WLR 2682.

The NPPF

27. Section 66(1) must also be considered alongside relevant policies contained in the NPPF. Paragraph 132 deals with the impact of a proposed development on the "significance" of a heritage asset and requires great weight to be given to the conservation of such assets. The more important the asset, the greater the weight. "Significance can be harmed or lost by alteration or destruction of the heritage asset or development within its setting." Any such harm or loss requires clear and convincing justification. "Substantial" harm to or loss of a grade II listed building should be "exceptional". "Substantial" harm to or loss of "designated heritage assets of the highest significance" (eg. grade I or grade II* listed buildings) should be "wholly exceptional". Paragraph 133 states that where a proposed development would cause "substantial" harm to or total loss of a designated heritage asset, planning authorities should refuse consent unless it can be demonstrated that that "harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss" (or four criteria are all met).

28. In the present case the officers' report advised that the harm to designated heritage assets would be "less than substantial" and so it is common ground that paragraph 134 of the NPPF was relevant:

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

Case Law

29. In the East Northants case the Inspector decided that harm caused by a wind farm development to the setting of grade I listed buildings would be "less than substantial" and outweighed by the significant benefits arising from the production of renewable energy. The Court of Appeal upheld the judgment of Lang J quashing the decision.

They decided that considerable weight must be given to the objective of section 66(1) and hence to a finding of harm to the setting of a listed building (paragraphs 19 to 24). That principle applies also where the decision-maker finds that there would be harm to the setting of a listed building, albeit that that harm would be less than substantial (paragraph 28). The Inspector's reasoning failed to comply with that principle. He had wrongly equated the "less than substantial harm" that would be caused to the setting of the buildings with a "less than substantial objection" to the grant of planning permission.

30. In the Forge Field case Lindblom J (as he then was) discussed the effect of the East Northants decision (see paragraphs 48 to 51). The desirability of preserving the setting of a listed building is not a mere "material consideration" under section 70(2) of TCPA 1990. Where such a setting would be harmed, that is a matter to which considerable weight should be given; section 66(1) gives rise to a strong presumption against the grant of planning permission. However, that presumption is rebuttable and it is for the planning authority to decide how much weight should be given to the harm it identifies. The judge decided that the district council's decision to grant planning permission should be quashed because the officer's report had merely carried out a simple balancing exercise between harm to heritage assets and countervailing planning benefits, and had effectively equated "limited" or "less than substantial" harm to the heritage asset with a limited or less than substantial objection to the grant of planning permission (paragraphs 41-42 and 55).

31. In Mordue v SSCLG the Court of Appeal explained that there is a danger of reading too much into the East Northants decision. It does not require a decision-maker to *positively* demonstrate that he had given considerable weight to the objective in section 66(1). East Northants was a case when the Inspector had *positively* given the impression that he had *not* done so (see paragraphs 24 and 26). The Court of Appeal also explained the decision in the Forge Field case on the same basis (paragraph 27). Thus, where the reasons for a decision contain a positive indication that the decision-maker has failed to comply with section 66(1), that indication would need to be dispelled by a countervailing positive reference to that duty in order to avoid the conclusion that an error of law had occurred by applying the wrong test (paragraph 27). Paragraph 134 of the NPPF forms part of a fasciculus of policies (paragraphs 131 to 134) which lay down an approach giving effect to the duty in section 66(1). Accordingly, a decision-maker who works through those paragraphs will generally have complied with that duty. Likewise, where a decision-maker has referred to one paragraph within that fasciculus, such as paragraph 134, the appropriate inference is that he has properly taken into account all those paragraphs, and therefore complied with section 66(1), in the absence of some *positive* indication *to the contrary* evidenced in his reasoning (paragraph 28).

32. I also note that in paragraph 27 of Mordue the Court of Appeal deprecated the practice of arguing or determining a point of this nature by referring to other decisions which simply apply well-established legal principles to the circumstances of a particular case. It is only necessary to apply those principles to the facts of the instant case.

Facts

33. The officers' report must be considered in the context of the material before the Council. It is common ground that in the present case none of the 809 representations received by TBC on the application raised any objection or concern relating to the

impact of the proposal on any heritage assets (paragraph 26 of the witness statement of Ms. Desmond).

34. On 11 November 2014 English Heritage raised a concern that the developer had failed to submit sufficient evidence to enable the effects of the proposal on a number of listed buildings to be assessed. They advised TBC to require that issue to be addressed. English Heritage indicated that TBC could then determine the application by reference to its own specialist advice and that they did not need to be consulted again. In May 2015 RHL provided a Built Heritage Assessment. TBC did in fact consult English Heritage again. On 16 September 2015 English Heritage wrote to say that the information supplied in the assessment satisfied the requirements of the NPPF and that they agreed with the conclusions of the consultants (see schedule of additional representations attached to the agenda for the Committee meeting on 29 September 2015). Those conclusions were that the harm to the settings of listed buildings would either be a "minor detrimental impact… equating to a low level of less than substantial harm" or in other instances "no harm or negligible harm".

35. TBC's conservation officer gave his opinion in a memorandum dated 14 September 2015. He too was satisfied with the level of information supplied and found it difficult to disagree with the conclusions of the consultants. The geographical separation and lack of intervisibility with the proposal meant that its impact on setting was likely to be minimal. The listed buildings in closer proximity, that is Leckhampton Farmhouse and its associated barn (both Grade II):

> "…had been subsumed with the Leckhampton Farm Court development and their immediate setting is dominated by this introverted residential cluster."

Thus, the effect of the proposal was likely to be "less than substantial". He considered that much the same applied to Brizen Farmhouse. Its relationship to the application site was "fairly tenuous and any intervisibility had been severed by the intervening salient of modern housing along Brizen Lane." He arrived at the conclusion that any harm would be less than substantial and raised no objection to the proposal.

36. The officers' report gave a fair summary of the views of English Heritage and the conservation officer, and of RHL's Built Heritage Assessment (paragraphs 16.3 to 16.5).

Discussion

37. Mr. Wolfe QC, who together with Mr Bowes appeared on behalf of the Claimant, submitted that the officers' report did no more than carry out a simple balancing exercise which merely treated the "less than substantial harm" to the settings of the listed buildings as a "less than substantial planning objection" to the proposal and therefore failed to comply with section 66(1).

38. Mr. Wolfe's criticism began with paragraph 16.1 of the officers' report, but that simply summarised the balancing exercise required by paragraph 135 of the NPPF as regards the impact of the proposals upon *non-designated* heritage assets, of which there were some. It is therefore now accepted on behalf of the Claimant that paragraph 16.1 of the officers' report does not lend any support to ground 2.

39. The Claimant's complaint under this ground therefore relies upon paragraph 16.3 of the officers' report, in order to demonstrate that the impact upon designated heritage assets was dealt with as a simple balancing exercise which disregarded the requirements of section 66(1). I completely reject this submission.

40. The officers' report stated that Leckhampton Farmhouse and Barn would experience "*temporary moderate* and *permanent moderate/minor* adverse effects arising out of impacts to their wider setting" and would therefore require "*moderate* scheme benefits" to balance the harm. The listed building at Brizen Farm would experience *temporary moderate/minor* adverse impacts during the construction phase but "no residual effect from the development (ie. *no permanent effect*). The report went on to require that *moderate* scheme benefits to balance the *moderate/minor* adverse impacts upon "Important Hedgerows". The overall thrust of this section was to advise the Committee that they should be satisfied that the benefits of the proposal should be greater than the identified impacts. The use of the word "balance" did not detract from that incontrovertible point, because of the different weightings applied by the officers to "harm" and "benefit". Read properly in context, the report did not suggest that the Committee should merely carry out a simple unweighted balancing exercise. The fact that officers stated that the benefits of the proposal should be found to the greater than the adverse heritage effects makes that plain. It also demonstrates that the officers gave advice which complied with paragraph 134 and section 66(1), as explained in East Northants and Mordue. The *additional* extent to which the report stated that the benefits of the proposal should *outweigh* limited harm to heritage assets shows that officers advised the committee on how much additional weight to give the presumption or "tilt" in section 66(1) in favour of preserving the setting of listed buildings in the particular circumstances of this case.

41. Accordingly, the advice given to members does not suffer from any of the flaws identified in, for example, East Northants and Forge Field. It is unimpeachable. The Claimant cannot point to any positive indication to the contrary. I am further reinforced in these conclusions by the training and experience of the members of the Committee in dealing with the setting of listed buildings, heritage issues and the relevant policy and statutory tests (see paragraph 17 of the witness statement of Ms. Desmond) and the approach taken by the courts to criticisms of officers' reports (see paragraphs 24-25 above).

42. For the above reasons, I reject ground 2.

Ground 3

43. Paragraph 14 of the NPPF contains the presumption in favour of sustainable development. It provides in so far as is relevant:

> "For decision-taking this means [unless material considerations indicate otherwise – see footnote 10]:
>
> - Approving development proposals that accord with the development plan without delay; and
>
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> – specific policies in this Framework indicate development should be restricted.[9]"

As explained already, because of its inability to demonstrate a 5 year supply of housing land, TBC accepted that its housing supply policies should be deemed to be "out of date" (paragraph 49 of the NPPF) so as to engage the presumption in paragraph 14 of the NPPF in favour of sustainable development, unless it was disapplied by one of the two stated exceptions. Footnote 9 identifies some policies which "indicate development should be restricted." The list includes "designated heritage assets" and so, in the present case, paragraph 134 of the NPPF was a "specific policy" for the purposes of the second exception to the presumption in favour of sustainable development contained in the second bullet point quoted above. Thus far, there is no dispute between the parties in this case.

44. The Claimant's complaint under ground 3 is that the officers' report, and thus the Committee, simply struck the overall, tilted balance contained in the first indent, namely whether the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole. Mr. Wolfe QC submits that TBC failed to consider the application of the second exception to the presumption in favour of sustainable development, by considering whether the application of paragraph 134 of the NPPF by itself would indicate that the development should be restricted (ie refused permission). He complains that instead TBC wrongly applied paragraph 134 solely as part of an overall balancing exercise under paragraph 14 of the NPPF. He points out that if paragraph 134 had been applied separately, and the outcome had told against the proposal (ie. its benefits did not more than outweigh the less than substantial harm to the settings of listed buildings), that would have been sufficient to disapply the presumption in favour of sustainable development. In other words, it would have been an incorrect application of paragraph 14 of the NPPF for TBC to apply the tilted balance in favour of granting planning permission simply because of an inability to demonstrate a 5 year supply of housing land.

45. I note that the submission of Mr. Wolfe QC proceeded on the basis that it is insufficient to bring the present case within the second indent (or the second exception to the presumption in favour of sustainable development) simply to identify paragraph 134 as a national policy falling within footnote 9 and relevant to the instant case. On his argument it is also necessary to *apply* the relevant "footnote 9 policy" to see whether it would support the refusal of planning permission. Thus, in the case of paragraph 134 of the NPPF, he submitted that this required the policy to be applied by striking a balance to see whether the less than substantial harm to heritage assets outweighed the planning benefits of the proposal so as to disapply the presumption in favour of sustainable development via the second indent or exception.

46. Mr. Wolfe QC submits that the officers' report in the present case contained the same flaw as Coulson J identified in Forest of Dean District Council v SSCLG [2016] PTSR 1031 at paragraphs 39 to 40, namely that considerable weight was given to the harm to

designated heritage assets, but only in the context of an overall balancing exercise applying the presumption in paragraph 14 of the NPPF in favour of sustainable development, and not the separate balancing exercise required by paragraph 134 in order to see whether that presumption should be disapplied.

Discussion

47. I consider that the approach of Mr. Wolfe QC set out in paragraph 45 above correctly interprets the way in which the second exception to the presumption operates. I respectfully agree with Coulson J in the Forest of Dean case that the two indents, or exceptions to the presumption in favour of sustainable development, are alternatives. In other words, the satisfaction of either one is sufficient to disapply the presumption. I also agree with him that if the decision-maker considers that the application of paragraph 134 does not tell against the proposed development, then the developer is entitled to the benefit of the tilted balance contained in the first indent when the overall balance weighing all factors comes to be struck (paragraphs 18, 36, 37, 44 and 48).

48. During the hearing it appeared to be suggested that there are passages in the judgment of Coulson J which might be taken to suggest that the balancing exercise required by paragraph 134 of the NPPF is "an ordinary unweighted balance" (see eg. paragraphs 34 to 37). The headnote has certainly taken that view ([2016] PTSR 1032 C–D). But that would be to take this part of his judgment out of context. The headnote is inaccurate in this respect. Coulson J was simply responding to, and rejecting, a submission for the developer in that case that the weighted test, or tilted balance, in favour of sustainable development should be read across, or incorporated into, the application of paragraph 134 of the NPPF (see paragraph 33 of the judgment). I agree with Coulson J's conclusion rejecting that point.

49. It is plain from the East Northants decision and Mordue that paragraph 134 of the NPPF does *not* involve an unweighted, normal balancing exercise. It is true that when paragraph 134 of the NPPF is being applied in order to see whether (under the second exception) the presumption in favour of sustainable development is disapplied, the *tilted balance in favour* of such development (used in the first exception) is *not* incorporated with paragraph 134. But the decisions of the Court of Appeal, particularly in Mordue, go further. They make it plain that the balancing exercise required by paragraph 134 is to give effect to the presumption *against* granting permission for development which harms the setting of a listed building. Under paragraph 134 there is a tilt in favour of the preservation of that setting. How much weight to give to the harm to the setting of a listed building and to that tilt is, of course, a matter for the decision-maker. But where a proposal would result in harm to the setting of a listed building, the "Barnwell Manor" tilt in section 66(1) (and in the NPPF - see for example paragraph 134), leans in the opposite direction to the presumption in paragraph 14 of the NPPF in favour of the grant of planning permission. Paragraphs 38 to 41 of Coulson J's judgment in Forest of Dean accord with this analysis. This is an important point to keep in mind when considering the criticisms made by Mr Wolfe QC of the officers' report under ground 3.

50. At this point a distinction needs to be drawn between statutory review of an Inspector's decision letter and judicial review of a local authority's decision to grant planning permission based upon an officer's report. The former type of challenge relates to a decision which is entirely contained within a decision letter and subject to a statutory

duty to give reasons dealing with each of the principal important controversial issues. Inadequacy of reasoning in the decision letters of Inspectors is judged by the criteria laid down in Save Britain's Heritage v No.1 Poultry Limited [1991] 1 WLR 153 and South Bucks District Council v Secretary of State for the Environment [2004] 1 WLR 1953.

51. By contrast, a decision by the planning committee of a local authority to grant planning permission is not subject to a statutory duty to give reasons for that decision. The decision is expressed simply by the notice granting permission for the development specified subject to any conditions which may be set out. Although in ex parte Fabre Sullivan J laid down the principle that where the members of the committee agreed with the recommendation in the officer's report it is reasonable to infer that they agreed with the reasoning in that report in the absence of contrary evidence (p 511), that must be read in the context of other principles which he had already laid down in his judgment. Thus, the purpose of an officer's report is not to decide the issues or issues (as in the case of an Inspector's decision letter), but to inform the members of considerations relevant to the merits of a planning application. The report is addressed not to the parties or the participants in the planning application process or to the wider public, but to the members of the Committee with their "substantial background knowledge" of planning policy and practice. So, for example, an officer's report does not necessarily have to rehearse well-known principles of national and local planning policy. Such a report identifies matters which, in the judgment of the officer, he or she considers should be included for consideration by the members. It is trite law that the report need not indicate to the members what conclusions they should draw upon a particular issue or even on the planning application itself. The report may leave that to the members. Although the members are expected to have read the officers' report beforehand, their decision-making process is not confined to the contents of that report. The members are entitled to contribute their own opinions and reasoning to the process and in their meeting they may well debate the merits of a proposal (see the authorities referred to in paragraphs 24-25 above).

52. Mr. Wolfe QC complains that paragraph 16.3 of the officer's report (see paragraph 40 above) merely advised the committee on what degree of benefit the proposal would need to provide in order to outweigh harm to the setting of listed buildings, without suggesting an answer to that question. He goes on to say that the officers' report only purported to weigh harm to the setting of the listed buildings in paragraph 20.5, which formed part of the overall balancing exercise, at which point the proposal was given the benefit of the tilted balance, or presumption, in favour of sustainable development under the second bullet point. But his approach is misconceived for the reasons I have just explained. There is no legal requirement for an officer's report to express a view on how an issue should be determined by the committee. That can simply be left to the members to decide for themselves. In this case there is nothing in the evidence to suggest that the members of the committee did not address the balancing exercise identified in paragraph 16.3 of the officers' report. That exercise was not tainted by the presumption in favour of sustainable development (paragraph 14 of the NPPF).

53. I also reject Mr. Wolfe's submission as involving a misreading of the structure, content and purpose of the officer's report in this case. It is first necessary to appreciate that section 16 of the officers' report dealt separately with "Archaeology and Cultural

Heritage". It formed one of a series of separate sections (5 to 19) dealing with individual topics.

54. Section 5 dealt with housing land supply and the principle of housing development and *in that context* advised that the presumption in favour of sustainable development arose because of the absence of a 5 year supply of housing land, subject to the application of the first exception to the presumption. It might have been better if at that point the possible engagement of the second exception to the presumption had also been mentioned for completeness. But in my judgment what matters in the particular circumstances of the present case is whether "the paragraph 134 issue" was sufficiently drawn to the attention of the Committee. That is precisely what was done in paragraph 16.3 of the officers' report. It has to be remembered that, according to established case law, the purpose of such a report is not to determine the application or the issues it raises. It is not to be confused with a decision letter in a planning appeal which, by contrast, must provide adequate reasoning to determine the principal controversial issues. Accordingly, a committee report is not to be criticised by standards which apply only to decision letters.

55. Sections 6 to 19 of the officers' report covered a wide range of topics, such as landscape and visual impact, design and layout, residential amenity, accessibility and highway safety, noise and air quality issues, flood risk and drainage, open space, outdoor recreation, sports facilities and community facilities, archaeology and cultural heritage, ecology and nature conservation, prematurity, and local green space issues. All of these sections preceded the "overall balancing exercise" in section 20 in which the tilted balance in favour of sustainable development was applied. The officers did not advise that the topics covered in sections 6 to 19 of their report be assessed by the Committee solely in the overall balancing exercise in section 20. Instead, each of those sections plainly enabled the members of the Committee to reach their own views on each of the topics covered before coming to the overall balancing exercise. Mr Wolfe QC made no submission to the contrary. I also note that some of the topics were covered by work in progress and so were to be the subject of updates at the Committee's meeting (eg. paragraphs 8.5, 12.7, 14.4, 16.4 and 18.5).

56. The Claimant's criticisms directed at section 16 of the officers' report should be examined in a proper context. I have already decided under ground 2 that in paragraph 16.3 of the officers' report the Committee was given correct advice on how paragraph 134 of the NPPF should be applied to the circumstances of this case so as to give effect to the presumption or "tilt" in favour of protecting the setting of listed buildings. That paragraph complied with the legal principles set out in decisions such as East Northants and Mordue. The report did not suggest that that exercise, tilted in accordance with section 66(1), should only be applied in the overall balancing exercise in section 20 of the report. None of the sections 6 to 15 or sections 17 to 19 were drafted in that way and there is no reason to read section 16, or the application in paragraph 16.3 of paragraph 134 of the NPPF to the facts of this case, any differently. In other words, that test was given to the Committee to apply as a freestanding test. There is no evidence or other justification to lead the Court to infer that the members did not apply that test.

57. In my judgment, it was not essential to the lawfulness of TBC's grant of permission for the officers to spell out in section 16 of their report what the consequence would be if members judged that the planning benefits of the proposal were less than "moderate". For members experienced in the handling of listed building issues, it would be obvious

that that would amount to an objection to the proposal under paragraph 134 of the NPPF, with the obvious implications that that would have for the application of paragraph 14 of the NPPF (see paragraphs 51 and 54 above).

58. Mr. Wolfe's argument wrongly focuses on paragraph 20.5 of the report and fails to read the document fairly and as a whole. His argument is flawed because, in summary:

(i) paragraph 20.5 of the officers' report did not advise the members on how the listed building issues needed to be balanced;

(ii) the argument improperly requires the Court to disregard paragraph 16.3 of the report which did advise the Committee on how the balance in paragraph 134 of the NPPF should be applied;

(iii) paragraph 16.3 provided a tilted balance, tailor-made for the circumstances of this case, and which *tilted in the opposite direction to the presumption in favour of sustainable development;*

(iv) the presumption in favour of sustainable development was applied in the separate and concluding section of the report; and

(v) the argument is inconsistent with the structure of the report as summarised above.

Point (iii) is particularly important. Because paragraph 16.3 of the officers' report described a balance that was tilted to give effect to the presumption in favour of protecting the setting of listed buildings, and not a presumption in favour of sustainable development, the members were being advised to strike that balance as a separate exercise, and not within the framework of the presumption in paragraph 14 of the NPPF which operates in the opposite direction (see paragraphs 48-9 above).

59. In any event, it is plain from the officers' report that the merits of the proposal were judged by TBC to be not merely "moderate" but "substantial". It is of no concern that that assessment was expressed in the overall balancing section of the report (see paragraphs 20.3 and 20.4). Those benefits relate to topics which had been dealt with in earlier sections of the report, even before the officer turned to deal with heritage matters in section 16, and so would have been in the Committee's mind when considering the balance in paragraph 16.3 of the report. Quite apart from that, the committee would have read the report as a whole. It is obvious from the material put before the members that the harm to the setting of listed buildings, even with the benefit of section 66(1) weighting, was less than substantial, or in some instances negligible. For example, the setting of the nearest listed building had already been affected or compromised by existing development. It would also have been obvious to the members that they were being advised that the benefits of the proposal were *substantial* and so in fact exceeded the "moderate benefit" test set out in paragraph 16.3 of the report in order to apply paragraph 134 of the NPPF to the circumstances of this case. There is no reason to think that the members either did not apply paragraph 16.3 of the report or did not reach that obvious conclusion. It should not be forgotten that amongst the voluminous representations, nobody raised any concern about the effect of the proposal on any of the listed buildings. The Claimant's legal arguments under ground 3 are entirely hollow. They have no merit whatsoever.

60. It also follows from my analysis of the materials in the present case dealing with listed building issues, that no proper analogy can be drawn, as Mr. Wolfe QC sought to do, with the reasoning of the Inspector criticised in the Forest of Dean case. The Inspector's decision letter in that case (see paragraph 14 of Coulson J's judgment) did not contain any passage similar to the separate balance described in paragraph 16.3 of the officers' report here. In any event, comparison between the officers' report in the instant case and the decision letter in Forest of Dean is a forensic habit which is to be discouraged (see Mordue at [2016] 1 WLR p.2694 E–F).

61. For the above reasons, I reject ground 3.

Ground 1

62. By section 70(2) of TCPA 1991, when determining whether to grant planning permission for the proposal on the Farm Lane site, TBC was obliged to have regard not only to relevant provisions of the statutory development plan, but also to "any other material considerations." The Claimant submits that the planning authority did not take into account the "Preliminary Findings" issued on 16 December 2015 by the Inspector examining the JCS, in which she said that she was "not minded" to regard the allocation of that part of the A6 site as "sound" for the purposes of section 20 of the PCPA 2004 (see paragraph 17 above). That is plainly correct as a matter of fact, because the preliminary findings did not emerge until after the Committee's meeting on 29 September 2015. The Claimant submits that, contrary to the principles laid down in R (Kides) v South Cambridgeshire District Council [2003] 1 P&CR 19, officers improperly failed to refer the planning application back to Committee so that they could take into account those preliminary findings and consider whether to alter their earlier resolution. It is common ground that the planning officer did not have delegated power to take those findings into account in place of the Planning Committee.

63. Mr. Wolfe QC submits that (a) it was a central part of the justification put forward in the officers' report for the grant of planning permission that the Farm Lane site formed part of the A6 allocation proposed in the emerging JCS and (b) that justification was affected by the Inspector's preliminary findings on the allocation of the Farm Lane site in her examination of the JCS contained in EXAM 146.

A preliminary point – were the Preliminary Findings on the Farm Lane site themselves legally flawed?

64. Mr Martin Kingston QC submitted on behalf of RHL that the preliminary findings of the Inspector in EXAM 146, particularly on the A6 allocation in the JCS, were legally flawed and therefore there was no obligation requiring the Committee to reconsider its decision to grant permission in the light of those findings (see paragraph 18 of skeleton). He argued that the identification of the OAHN must precede the assessment of the merits of sites to meet that need (see eg. Gallagher) and that, by virtue of paragraph 76 of the NPPF, the possible designation of LGS cannot be addressed until the OAHN, followed by the strategic policies for meeting that need, have been established. The argument was presented attractively and forcefully and I am sympathetic towards it.

65. TBC, no doubt for understandable reasons, did not raise or respond to this line of argument. The Claimant, however, did not seek to contradict RHL's argument, no doubt because it recognised its force. Instead, the Claimant merely submitted that any

illegality in these preliminary findings (issued in December 2015) could and should have been dealt with by an application for judicial review at that stage. Given that the time for bringing any such challenge has long passed, the Claimant says that the findings of the JCS Inspector on the Farm Lane part of the A6 allocation must now be treated as valid, "notwithstanding that the reasoning on which they have been based may have been flawed" (Claimant's skeleton paragraph 69; Hoffman-La Roche v Secretary of State for Trade and Industry [1975] AC 295, 366 A–E; O'Reilly v Mackman [1983] 2 AC 237, 283 F). In reply, RHL argued that they had been unable to make an application for judicial review of any of the preliminary findings in EXAM 146 because of the ouster clause in section 113(2) of the PCPA 2004. That in turn was hotly contested in the Claimant's submissions.

66. So the Claimant adopts the unattractive position of asking the court to quash the planning permission on the grounds that the officers acted improperly by failing to ask the Committee to reconsider its decision to deal with the preliminary conclusions in EXAM 146 on the Farm Lane site, without engaging with the argument that those conclusions were tainted by illegality. The Claimant maintains that the matter ought to have been referred back to the Committee so they could consider rescinding their resolution and refusing the application for planning permission. But what if they had done so? As Mr Kingston QC points out, RHL would almost certainly have appealed that decision to the Secretary of State and argued that TBC should not have relied upon the preliminary findings in EXAM 146 in order to rescind their resolution. If RHL is correct in saying that the preliminary findings in EXAM 146 on the Farm Lane site were legally flawed then, subject only to the Hoffman-La Roche argument, it is very probable that TBC would have been criticised by the appeal Inspector, or the SSCLG, for having relied upon those findings, and as a result would have faced the serious risk of being ordered to pay the not insubstantial costs of a planning appeal, applying the costs practice on "unreasonable behaviour".

67. Notwithstanding these very real problems which would have been faced by TBC if it had followed the course for which the Claimant contends, the Claimant has remained silent on the question whether these preliminary findings in EXAM 146 should have been treated as legally flawed, *even at the time when it claims that TBC ought to have acted upon them in the early part of 2016.* At least the Claimant does not suggest that if the findings were legally flawed, TBC was nonetheless obliged to reconsider its decision in order to comply with the principle laid down in Kides. Instead, the Claimant's case simply leaves the issue to be resolved by the court according to which of two "ouster type" principles prevails, Hoffman-La Roche or section 113(2) of PCPA 2004. It is most unsatisfactory that the Claimant and its legal team adopted this highly forensic stance, divorced from the realities of the situation faced by TBC in early 2016.

68. The Claimant's stance is all the more unattractive because the scope and application of the Hoffman-La Roche principle upon which it relies is complex and uncertain. The principle is not necessarily absolute in its effect. For example, it may not apply where the alleged illegality relates to an act or decision by a third party which the decision-maker took (or was expected to take) into account (see for example the differing views in R (Shoesmith) v Ofsted [2011] PTSR 1459 at paragraph 119, 136-7 and 141-147). Furthermore, the scope of section 113(2) is not free from difficulty. The arguments presented in this case by both sides on Hoffman-La Roche and section 113(2) were insufficient to enable me properly to resolve this preliminary point and determine

whether ground 1 should fail on this basis. For the court, this is unsatisfactory because it has meant that time has had to be taken to deal with the parties' detailed submissions on the rest of ground 1, which might have been unnecessary. As for the parties, ground 1 fails in any event for the reasons which now follow.

The case law

69. In Kides the Council resolved in principle to approve an application for housing development on a 30 hectare greenfield site, subject to a report on draft conditions and a section 106 agreement being submitted for approval by the Planning Committee. Eventually, after some 5 years, the section 106 agreement was executed and an officer acting under delegated powers issued the decision notice granting planning permission. That permission was challenged on the grounds that the authority had failed to reconsider its earlier resolution to approve the development in the light of a number of material changes in circumstance which had occurred in the intervening years including the introduction of the Government's PPG3 on housing, new circulars on the provision of affordable housing and steps taken on the review of the Local Plan. The High Court refused permission to apply for judicial review on the basis that the authority had been well aware of these changes, as well as the outstanding application for permission, and did not need to have that application brought back before it. The Court of Appeal dismissed the appeal.

70. In summary, Jonathan Parker LJ (with whom Laws and Aldous LJJ agreed) held:

(i) A consideration is material *in this context* (ie. for the purposes of determining whether an application needs to be referred back to the planning committee) if, viewed objectively, it is a factor which, when placed in the decision-maker's scales, *would* tip the balance to some extent, one way or another. In other words, it must be a factor which has some weight, although it need not be determinative (paragraph 121);

(ii) the duty under section 70(2) is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution to approve a proposal in principle, but before the issue of a decision notice, there has to be a referral of the application back to the committee. The duty is discharged if, as at the date when the decision notice is issued, the authority has considered all material considerations affecting the application, with that application in mind, even if the matter is not placed before the committee for reconsideration (paragraph 122);

(iii) But if the delegated officer becomes aware, or ought reasonably to have become aware, of a new material consideration *just before he is about to issue a decision notice*, the authority is bound to have regard to it (paragraph 125);

(iv) In practical terms, where a new factor arises which might rationally be regarded as "material" under section 70(2), "it must be a *counsel of prudence* for the delegated officer *to err on the side of caution* and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances, the delegated officer can only safely grant permission if he is satisfied that (a) the authority is aware of that new factor, (b) it has considered it with the application in mind, and (c) that on a

reconsideration the authority *would* (not *might*) reach the same decision (paragraph 126).

The Court concluded that in the Kides case those three requirements were met and therefore there had been no legal requirement for the officer to invite the committee to reconsider its earlier resolution (paragraph 129).

71. In R (Dry) v West Oxfordshire District Council [2010] EWC Civ 1143 the appellant challenged a grant of planning permission for 100 houses. In 2006 the Government issued guidance on flood risk which required a sequential approach to be adopted so as to ensure that there were no reasonably alternative sites with a lower probability of flooding that would be appropriate for the type of development proposed. Flood Maps produced by the Environment Agency in 2006 showed the bulk of the site to be in zone 1, the lowest level of risk. But in 2007 there was a serious flood on the site and when the planning committee dealt with the application in July 2009 they were advised that the 2006 flood risk map was inaccurate and that a further plan was being prepared. They were also told that the sequential test analysis carried out for the developer had assumed that the whole site should be treated as falling within zone 2 and, on that basis, it was demonstrated that no sequentially preferable sites were available. As a result the EA withdrew its objection and the planning committee resolved to grant planning permission. During the 3 month interval before the planning permission was issued, an amended flood risk plan was produced showing most of the site to be within zone 2. The EA also stated that the revised plan did not affect its earlier decision to withdraw its objections to the proposal.

72. The Appellant argued that as a result of the change in the zoning of the site on the revised flood maps, it was not possible to be satisfied that the Committee would have reached the same decision. In Dry Carnwath LJ (with whom Patten and Maurice Kay LJJ agreed) stated that Kides had merely given guidance on what practice is advisable, erring on the side of caution, and that it was necessary to apply that guidance with common sense and with regard to the particular facts of the case (paragraph 16). Because the Court agreed that the new flood risk map had not contained "anything new" in relation to the EA's earlier acceptance of the results of the sequential test analysis (which had been based on the assumption that the whole of the site should be treated as falling within Zone 2), there was no legal basis for requiring the matter to be referred back to the planning committee (paragraph 20)

73. In R (Hinds) v Blackpool Borough Council [2012] EWCA Civ 466 the Court of Appeal stated that the reference in Dry to the guidance in Kides as having been "cautious", should not be treated as offering a route for avoiding the requirements of section 70(2). Nonetheless, the challenge in Hinds to a decision not to refer an application back to committee for reconsideration still failed. There the local authority resolved to grant permission for 584 dwellings after taking into account the Regional Spatial Strategy ("RSS") for the North West. Two months later (and two months before planning permission was formally granted), the Secretary of State for Communities and Local Government announced the government's intention rapidly to abolish RSS's across the country. Indeed, before the permission was issued the government did purport to revoke the RSS by administrative action. On 1 October 2010 that revocation was held by the High Court to have been void (Cala Homes (South) Limited v SSCLG [2010] EWHC 2866 (Admin)). The court also held that the government's stated policy of revoking the RSS's was nonetheless capable of being a material consideration (see paragraphs 37 to

38). Thus, the issue in Hinds was whether that emerging change of policy "was a factor which, in the circumstances of the case, would tip the balance to some extent, one way or another", so that the application had to be referred back to Committee for reconsideration (paragraph 36).

74. Unlike the Kides case, the committee in Hinds had not considered the change in national policy at any point prior to the grant of planning permission (see paragraph 31). But the Court of Appeal held that the change of policy was not a "material consideration" for these purposes because central government's proposal to abolish RSS's did not affect the local authority's decision to grant permission which had been based upon its own local assessment of housing needs for the housing market area. It was also that local assessment which had informed the formulation of housing policy in the RSS, and not the other way round (paragraphs 7(2), 23-24 and 45).

75. Dry and Hinds are both examples of cases where (a) a new consideration arose between the resolution to grant planning permission and the issuing of the decision notice, and (b) the decision-making body within the authority did not take that consideration into account, but (c) the Court decided that that new consideration was not "material" in the circumstances of the case, so that there had been no legal requirement to refer the matter back to the decision-making body.

76. In Wakil v Hammersmith & Fulham UBC [2013] EWHC 2833 (Admin) the complaint was that although the planning committee had taken into account a draft of the NPPF published for consultation in July 2011, it had not taken into account the final version of the NPPF published on 27 March 2012 a few days before the decision notice granting planning permission was issued. Lindblom J (as he was then) summarised the effect of the case law in this way (paragraph 94):

> "When a grant of planning permission is challenged on the ground that the local planning authority, having resolved to approve the developments proposed, ought to reconsider that decision, the court will have to consider whether the new factor relied upon in the challenge would have been capable of affecting the outcome. What is required therefore is not merely some obvious change in circumstances but a change that might have had a material effect on the authority's deliberations had it occurred before the decision was made. The crucial question for the court to consider is whether the new factor might have led the authority to reach a different decision."

Similarly, at paragraph 108 he said:

> "So I think the main question for the court to consider on this ground is whether there was any change in national planning policy between the draft and final versions of the NPPF that might realistically have made a difference to the Council's decision."

The judge's answer at paragraph 110 to that question synthesised the various phrases which have been employed in the authorities:

> "In my view the answer to that question is clearly "No". In the circumstances of this case neither the publication of the policy in the final version of the NPPF nor the content of the policy itself was – in the words of Jonathan Parker LJ in *Kides* – a factor "which when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other", or – as Carnwath LJ put it in *Dry* – a consideration that could have caused " a rational planning committee to change its mind", or – as Pitchford LJ said in *Hinds* – a "change of policy… material on the facts of this case". Nor – applying Pitchford LJ's criterion in *Hinds* – were any of the policies in the NPPF "in conflict with the local requirements on which the planning committee had acted" or such as " could… have affected the merits of the decision.""

77. Mr. Wolfe QC sought to gain some support from the explanation suggested in paragraphs 84 to 85 of St. Albans City and District Council v SSLCG [2015] EWHC 655 (Admin) as to why a "cautious" approach had been suggested by the Court of Appeal in Kides. But St. Albans did not involve an allegation that officers had failed to refer an application back to committee in order to deal with a new consideration. Indeed, paragraph 86 explained why reliance by the Claimant in that case upon Kides was irrelevant to the issue which the Court had to determine there. The analysis set out in St. Albans should not be seen as in any way departing from the combined authority of Kides, Dry, Hinds and Wahil.

The Facts

78. On the principle of development, paragraph 5.6 of the officers' report referred to the site as forming part of the proposed urban extension. In relation to visual and landscape impact, paragraph 6.7 stated that the principle of development was acceptable given that the site had been allocated in both the adopted and emerging development plans. Paragraph 18.1 acknowledged that under policy SD2 of the adopted local plan the site was not to be released for development until the appropriateness of its location for development had been confirmed through the RSS process, which had since been superseded by the JCS. As regards prematurity issues, the officers advised that the emerging JCS had reached "an advanced stage" (paragraph 18.3) and that the development of the Farm Lane site would not prejudice the development of the wider A6 allocation if approved (paragraphs 18.3 to 18.5 and 20.7).

79. Paragraphs 19.2 to 19.5 of the officers' report dealt with a proposal by Leckhampton and Warden Hill Parish Council, put forward for consideration in the JCS process, that "local green space" ("LGS") be designated on parts of the A6 allocation, including the Farm Lane site. Paragraph 76 of the NPPF enables such space to be designated when a development plan is being prepared or reviewed, but because of the protection against development afforded to such space, its identification must "be consistent with the local planning of sustainable development and complement investment in sufficient houses, jobs and other essential services." Paragraph 19.4 of the officers' report advised members that:

> "The emerging JCS considered that whilst there is clearly a strong need for strategic green infrastructure and effective and

> useful green and amenity space as part of the development, these requirements do not outweigh the value of a sustainable urban extension to this part of Cheltenham. Consultation has been carried out on both CBC and the Borough's local plan on areas for local greenspace protection. Such protection would form part of these local plans. The land subject of these representations is, as set out above, an existing Local Plan allocation in the Local Plan. The NPPG advises that LGS designation would rarely be appropriate where the land has planning permission for development. Whilst not specifically referred, it is reasonable to expect that a LGS designation allocation would also rarely be appropriate for an existing residential site allocation"

80. Section 20 of the officers' report dealt with the overall balancing exercise. Paragraph 20.5 stated:

> "With regard to the environmental dimension, the proposed development would intrude into open agricultural land and would be viewed from various public vantage points including public rights of way within the nearby Cotswolds AONB. The site is however allocated for housing in the local plan and emerging JCS given the need for new housing and its sustainability credentials as it is located close to the urban area of Cheltenham where new housing is needed and where it can benefit from the existing and enhanced sustainable transport network. Nevertheless, there would be a landscape impact which would constitute harm in terms of the environmental sustainability of the proposal. The development would also result in the loss of 15 ha of moderate quality farmland. This development would also result in less than substantial harm to the settings of listed buildings in close proximity to the site and negligible impact on other listed buildings."

81. Paragraph 20.9 advised that whilst the proposal would cause harm to the character and appearance of the area, that harm would not significantly and demonstrably outweigh the benefits of the proposal, which should be treated as "sustainable development".

82. The officers' overall conclusions were:

> "The proposed development accords with Local Plan Policies HOU1 and SD2 and is identified for housing as part of the wider strategic allocation at South Cheltenham/Leckhampton (A6) in the emerging JCS. The Council cannot at this time demonstrate a 5 year supply of deliverable housing sites. For the reasons set out above, it is considered that subject to securing the required contributions towards Affordable Housing, Education, Up Hatherley library, health and community facilities, outdoor recreation and sports facilities and public transport the proposal represents sustainable development."

83. The minutes of the meeting on 29 September 2015 record that officers gave verbal advice in line with the contents of their written report (see for example paragraphs 35.45 and 35.50). One member of the Committee specifically sought advice about the local green space issue. TBC's legal adviser explained (paragraph 35.51) that advice had already been published in connection with the JCS process that the designation of local green space could be dealt with in the subsequent preparation of a revised local plan for TBC, and did not have to be dealt with in the JCS (see also paragraph 35.46). The advisor also reminded members that (a) according to the SSCLG's Planning Practice Guidance, local green space should not be promoted in order to prevent the sustainable development of land for housing which would help to address the housing supply problems of an area and (b) objections to the Council's approach had been made to the Inspector examining the JCS.

84. In paragraph 4 of the Introduction to her Preliminary Findings ("EXAM 146") the Inspector concluded that the thrust of the spatial strategy in the JCS is "sound", although consideration should be given to some rebalancing of development towards Gloucester and Tewkesbury, on the basis that (inter alia) a significant part of Gloucester's OAHN had been proposed to be met through urban extensions to Cheltenham "and might more justifiably be located closer to Gloucester's urban edge". Although the Cheltenham and Gloucester Green Belt is one of the smallest in England and the proposals in the JCS to remove land from the Green Belt represented a significant proportion of its entire area (paragraph 9), the Inspector's preliminary view was that, save for two proposed allocations, exceptional circumstances had been shown to justify the release of Green Belt sites as a "sound" strategy (paragraph 6). It is common ground that apart from the Farm Lane site itself and two allocations in Ashchurch, all the strategic allocations proposed in the JCS would need to be removed from the Green Belt land. These "exceptional circumstances" were acknowledged to be the requirement to meet the very great unmet need for additional housing land. As for the proposed A6 allocation, the Inspector said that she had "reservations" about "parts of the Leckhampton site" (paragraph 7).

85. However, it is important to note, as RHL emphasises, that at the time of EXAM 146, the OAHN for the area of the JCS had yet to be established (see paragraph 12). The latest information indicated that the "policy-off" figure for the number of additional homes required (see Solihull MBC v Gallagher Estates Ltd [2014] EWHC 1283 (Admin); [2014] EWCA Civ 1610) was about 31,830. But the "policy on" figure was likely to be higher, mainly because of the number of new jobs proposed in the JCS (a minimum of 39,500, which represented an increase from 28,000). Consequently, in paragraph 1 of EXAM 146 the Inspector stated that her findings were not only preliminary, but "subject to the determination of the objectively assessed need" and any relevant evidence to be submitted in stage 3 of the hearings on the examination of the JCS.

86. In the section of EXAM 146 dealing with the proposed A6 allocation the Inspector noted without disapproval the outcome of the Green Belt review, which had decided not to recommend adding the Farm Lane site to the Green Belt (paragraph 48). The Inspector also referred to the southern part of the A6 allocation lying adjacent to the Cotswolds AONB and the sensitivity of some areas to development (paragraph 50 to 51). She expressed reservations about the "soundness of developing that part of the proposed allocation which is highly sensitive and which, from my site visit, I noted to

be in clear view from within the AONB and the public recreational areas" (paragraph 52). In paragraph 53 the Inspector dealt with heritage assets and stated "development should be avoided that could have a significant impact on these assets unless appropriate mitigation were demonstrated." In paragraph 57 the Inspector said in relation to the Farm Lane site:

> "I have reservations about developing this area of high landscape and visual sensitivity adjacent to the AONB and GB."

She was aware that TBC had resolved to grant planning permission on the site and that the application was being considered by the Secretary of State for a possible call-in for determination by himself.

87. In paragraph 59 the Inspector's preliminary conclusion in relation to the Cheltenham part of the A6 site was that "some residential development" was justified, but "not on those areas that have high landscape and visual sensitivity". Subject to that proviso she was "minded to find" the Cheltenham part of the A6 allocation "sound".

88. However, in relation to the Farm Lane site lying with TBC's area, the Inspector's preliminary view was (paragraph 60):

> "…*for reasons of landscape sensitivity*, I am not minded to find the Tewkesbury part of the allocation sound. However, this finding may be overtaken by events, depending on the results of the call in request." (emphasis added)

89. It is plain from the structure and language of this part of EXAM 146 that the Inspector's preliminary findings on the soundness of the allocation of the Farm lane site was based solely upon landscape sensitivity in relation to the adjacent AONB and Green Belt, and not any possible designation of LGS.

90. At paragraph 61 she turned to deal with questions she had been asked to address by both the Parish Council and the JCS authorities, namely whether a designation of LGS within the A6 allocation could only be made on areas of the A6 site which are inappropriate for development (paragraph 62) and that any such designation "should be local in character and not be an extensive tract of land" (paragraph 63). She considered the area originally put forward by the Parish Council to be too large (54 hectares) and "to conflict in part with areas that are justified for development". But she accepted that there is scope for some designation of LGS within the A6 allocation (paragraph 64).

91. At paragraph 66 of EXAM 146 the Inspector asked the JCS authorities to consider "indicative areas" for LGS on two alternative scenarios, namely development *either proceeding or not proceeding* on the Farm Lane site. She added that the consideration of detailed boundaries of any LGS should be left to a local plan or neighbourhood plan.

Mr. Skelton's evidence

92. As I have already explained (paragraph 18 above) TBC's Development Manager and its Corporate Leadership Team decided that the application for planning permission should not be referred back to the committee so that it could consider whether to alter its resolution in the light of the preliminary findings in EXAM 146. In several of the

authorities considered above the officers responsible for taking such a decision prepared a contemporaneous memorandum recording the reasoning behind that decision. This must represent good practice because it avoids any later submission that a subsequent witness statement which relies upon that reasoning is tainted by *ex post facto* rationalisation.

93. No such document was produced to the Court. Instead, Mr Skelton's witness statement set out the factors which he took into account. In summary, they included the following:

(i) The Committee had decided that planning permission should be granted in respect of a detailed planning application accompanied by an Environmental Statement, the site was allocated in the adopted local plan, and the Committee had expressly considered the issue of prematurity in relation to the JCS process and rejected a proposal to defer the determination of the application (paragraph 18);

(ii) RHL had argued that the Inspector's preliminary findings on the soundness of individual allocations were themselves premature given that the examination of key issues, such as the OAHN, had yet to be completed (paragraph 19);

(iii) The Secretary of State had received the report of the Inspector dealing with the planning appeal on the Cheltenham part of the A6 allocation and with that knowledge he had decided against calling in for his own determination RHL's application on the Farm Lane site (paragraph 20);

(iv) The Committee had considered that the Farm Lane proposal was not so substantial or its cumulative effect so significant that, applying the Government's Planning Practice Guidance, a grant of permission would be premature in relation to, or undermine, the JCS process (paragraph 21).

(v) The emerging JCS had not advanced significantly further since the resolution of the planning committee passed on 29 September 2015. Therefore, the weight to be attached in the determination of the planning application to the draft housing supply policies in the JCS, including SP2, continued to be limited because they were the subject of unresolved significant objections, referring back to paragraph 5.8 of the officers' report. Accordingly, the weight that could be given to the preliminary findings in EXAM 146 was "very limited" (paragraph 22);

(vi) Moreover, only very limited weight could be given to the preliminary findings in EXAM 146 because firstly, the OAHN had yet to be assessed and secondly, the JCS process had not examined the site in the same way (ie. in the same level of detail) as the Committee had examined the planning application, which had included detailed environmental reports (paragraph 22);

(vii) TBC was still unable to demonstrate a 5 year supply of housing land, which would continue to be a significant factor in the planning balance in favour of the grant of permission (paragraph 23);

(viii) There had been no material change of circumstance capable of changing the Committee's resolution to grant permission (paragraphs 24);

(ix) *In the light of all the above factors*, the limited weight to be given to the preliminary findings in EXAM 146 meant that they would have been incapable of "tipping the balance" (paragraph 24).

94. Although Mr. Wolfe QC tried to suggest by referring to just one or two phrases in Mr. Skelton's witness statement, that the requirement in Kides for an application to be referred back to Committee had been triggered, I do not think that he was reading that evidence fairly and as a whole and in the context of the detailed consideration which had been given to the application by the officers' report to the committee, the responses of consultees, and the members at their meeting. In my judgment, it is plain that Mr. Skelton directed himself in accordance with the approach set out in the decisions of the Court of Appeal, which were synthesised by Lindblom J in Wakil (eg. at paragraphs 94 and 109-110).

95. Next Mr. Wolfe sought to rely upon paragraph 72 of the judgment in Pemberton International Ltd v Lambeth LBC [2014] EWHC 1998 (Admin) in order to discount the weight to be attached to Mr. Skelton's witness statement explaining why officers decided not to refer the application back to committee. But that passage was addressing *a failure* by an officer *to take a relevant consideration into account* when deciding to grant planning permission and evidence from that officer on whether his decision would have been any different if he had had regard to that matter. That is not the situation here. Mr. Skelton's witness statement explains how he reached his decision and the view he reached on various factors. He did not purport to give evidence on whether his decision not to refer the application back to Committee could not have been different if he had also taken some additional factor into account. He did not have to respond to a challenge of that kind in this case.

96. Although the citation of Pemberton was not apposite in this case, I accept the obvious point that the Court should be alert to the risk of a witness statement seeking to rationalise what has or has not happened prior to the decision under challenge. But in this case the point raised by Mr Wolfe QC merely involved an advocate's scattering of "forensic chaff", as unfortunately happened in certain other parts of his submissions. He did not even seek to explain why any part of Mr. Skelton's statement should be treated as rationalisation after the event. On the contrary, in my judgment it is plain that the witness statement was based upon and consistent with contemporaneous documents. The Claimant has not suggested that the witness statement did not truthfully and accurately set out the views which Mr Skelton, and his colleagues, had reached at the relevant time. Nor was it suggested that there was any basis for making an application to cross-examine him in order to show otherwise. No specific criticism was made to show that the statement should be treated as unreliable in any respect.

Discussion

97. The decision which the Court is required to make is not a theoretical exercise. It requires the application of "common sense" (per Carnwath LJ) and "realism" (per Lindblom J) to the specific circumstances of the case, not least the basis upon which the Committee reached its decision to grant planning permission.

98. The saved policies in the adopted local plan, the Tewkesbury Borough Local Plan provide a good starting point. Paragraph 5.2 of the officers' report referred to policy SD2. This was not a case where the officers' report to committee relied solely upon a draft allocation in an emerging development plan. Here reliance was placed upon the fact that the site had for many years formed part of an allocation in the statutory development plan. The report also correctly referred to the caveat in policy SD2, that planning permission would not be granted until the site was identified through the RSS process as a suitable location for strategic development. It also explained that the JCS process now substituted for the former RSS. The explanatory text to policy HOU 1 of the adopted local plan clarified what the RSS process had been intended to deal with, namely the review of the Green Belt boundary. However, by the time of the Committee meeting and EXAM 146, that review had been carried out and the Farm Lane site was *not* to be added to the Green Belt. Mr. Wolfe QC therefore accepted that the object of the caveat contained in policy SD2 has been satisfied and so the limitation in SD2 on the grant of permission no longer applied. In this context it is important to note that policy SD2 allocated the Farm Lane/Leckhampton Lane site, after having explicitly taken into account the adjacency of its southern boundary to the AONB and the need for a well-designed landscaping scheme "to provide an appropriate meeting of town and country". Not surprisingly, therefore, Mr. Wolfe QC made no criticism of the approach taken by TBC that the release of the Farm Lane site for the proposed development is supported by its allocation in SD2 of the local plan.

99. Turning to the emerging JCS, Mr Wolfe QC focussed on those parts of the officers' report which referred to the draft plan as having reached an "advanced stage" (paragraphs 18.2 and 18.3), as if to imply that great weight was thereby being given to the allocation in that plan, which in turn was undermined by the preliminary findings in EXAM 146. The argument is misconceived. It involves a failure to read the passages quoted in context and a failure to read the report as a whole. The context in which officers used the phrase "advanced stage" was the application of the Government's Planning Practice Guidance on the possible prematurity of a planning application in relation to an emerging development plan. The Guidance states that such an objection is unlikely to be appropriate unless two criteria are met, the second of which is that the draft plan should be at an "advanced stage". The officers were merely stating that the JCS (in other words the draft plan as a whole) was sufficiently advanced that the issue of prematurity as a potential objection could be considered by the Committee in this case. That piece of reasoning did not involve any evaluation of the separate issue as to how much weight should be attached to *the A6 allocation* in the JCS given the unresolved objections to that allocation.

100. It is highly relevant that the Claimant's argument failed to deal with paragraph 5.8 of the officers' report. This paragraph also made the point that in procedural terms the JCS had reached an "advanced stage" as a draft plan, but then went on to add:

> "… but it is not yet formally part of the development plan for the area and the weight that can be attached to each of its policies will be subject to the criteria set out above, including *the extent to which there are unresolved objections*. In respect of the distribution of housing (Policy SP2) there are *significant strong objections* to this policy." (emphasis added)

Thus, it is plain that TBC greatly reduced the weight to be given to the draft allocation in the emerging JCS in view of "significant strong objections" to the policy which remained to be resolved. TBC recognised that one outcome of the JCS process might be that those objections would be upheld. The same flaw appears in paragraph 23 of the Claimant's skeleton which misleadingly referred to only that part of paragraph 5.7 of the officers' report which dealt with the procedural stage reached by a draft *plan*, and failed to deal with the immediately following text which directly relates the weight which may be given to a draft *policy* to the extent and *significance* of unresolved objections to that policy. Such filleting of an officers' report is misleading and improper. From the Claimant's perspective it is also pointless; its case is not advanced one iota.

101. The members of the committee debated at some length whether their consideration of the application should be deferred to await the outcome of the JCS examination (paragraphs 35.53 to 35.55). A formal resolution to that effect was rejected, with at least one Councillor explicitly relying upon the allocation in the adopted local plan (paragraph 35.55 of the minutes). Thus, it is plain that the Planning Committee decided to approve the proposed development on the Farm Lane site whilst appreciating that the Inspector examining the JCS might uphold objections to its allocation.

102. I should record that Mr. Wolfe QC confirmed during his submissions that the Claimant does not raise any challenge to the interpretation or application of national policy on prematurity, or to TBC's conclusions on that subject.

103. The explanation for the Committee's stance on prematurity is not difficult to find. For example, in paragraph 20.5 of the officers' report it was recognised that notwithstanding the impact of the proposal on the landscape, the site had been allocated in the local plan (and was proposed to be allocated in the emerging JCS) because of the need for new housing and the site's sustainability given its location "close to the urban area of Cheltenham where new housing is needed" and the ability of that location to benefit from "the existing and enhanced sustainable transport network". Those were value judgments which TBC was entitled to make. The Council also attached importance to the lack of a 5 year supply of housing land, the provision of "a good mix of housing", the delivery of "much needed affordable housing" and the benefits related to the application site that would be provided though the section 106 agreement (paragraph 20.4 of the officers' report). These were powerful reasons as to why TBC was prepared to grant planning permission in advance of knowing whether the examining Inspector would endorse the allocation of the Farm Lane site and on the basis of its assessment of the impact of the development on the landscape, particularly the AONB, supported by the clear views of the statutory bodies it had consulted (see paragraphs 11-12 above and paragraphs 109 and 114-5 below).

104. It follows from the above analysis that when the officers' report to the Committee is read as a whole, the contention in paragraph 50 of the Claimant's skeleton that the inclusion of the site in the A6 allocation in the emerging JCS "formed a central part of the justification to grant planning permission" is wholly misconceived.

105. I also respectfully agree with, and apply, the insightful analysis by Patterson J of the functional differences between the determination of a planning application and the examination of a draft development plan, especially one of a strategic nature such as the JCS (see R (Smech Properties Limited) v Runnymede Borough Council [2015]

EWHC 823 (Admin) at paragraphs 112 to 113 - an issue not dealt with on appeal at [2016] EWCA Civ 42). Here, the Committee had to determine a detailed planning application in accordance with section 70 (2) of TCPA 1990 and section 38(6) of the PCPA 2004, that is to say by reference to the statutory development plan and other material planning considerations, and not simply the emerging JCS. By contrast the examining Inspector was dealing solely with the JCS. She had to consider whether the draft plan and its policies met the statutory tests in 20(5) of PCPA 2004, including the requirement of soundness. "Soundness" refers to such matters as whether a plan has been prepared to meet objectively assessed development and infrastructure requirements, whether the plan is the most appropriate strategy when considered against reasonable alternatives and is based upon proportionate evidence, whether the plan would be deliverable, and the consistency of its policies with the NPPF (paragraph 182 of the NPPF). Thus, as Patterson J put it, an examination of a development plan is a "more strategic and spatial" exercise. It does not require the Inspector to consider the level of detail which would be appropriate to a planning application. Indeed, as Mr. Kingston QC pointed out, the well-entrenched practice in the examination of local plans discourages the consideration of site-specific detail.

106. Whereas the officers' report and the Committee had considered RHL's application for full planning permission in detail and had reached firm and final conclusions on the weight to be given to a number of factors, the examining Inspector did not have (in accordance with normal practice) that same level of information on the development of the Farm Lane site when she issued her preliminary findings in EXAM 146. Furthermore, in that document she only reached preliminary findings which were subject (inter alia) to the determination of the extent of the OAHN. That clearly indicated to TBC that the "reservation" expressed by the Inspector about the allocation of the Farm Lane site might be overcome, either because of an overriding requirement to meet the OAHN when finally established (and/or any additional "policy-on" need) or because of additional information submitted in stage 3 of the examination hearings. Inevitably these considerations greatly reduced any weight that could properly be given to her preliminary findings.

107. A crucial factor for the propriety of the decision not to refer back was the basis upon which the Inspector reached a provisional view that the allocation might be treated as "unsound".

108. Although she referred in paragraph 53 to possible impact on heritage assets, her conclusion in paragraph 60 did not rely upon that factor, but solely upon "landscape sensitivity". In any event it is clear from the careful and detailed assessment of the heritage issues that TBC's Committee was satisfied that there was no basis for refusing planning permission because of any impact on heritage assets (see paragraphs 33 to 36 and the discussion under ground 2 above). The Inspector's comments in paragraph 53 of EXAM 146 could not possibly have affected the balancing exercise carried out by the Committee, or caused a rational planning committee to alter its assessment of the merits of the decision, or to change its mind on whether or not planning permission should be granted.

109. With regard to "landscape sensitivity", the Inspector merely stated in paragraph 57 that she had "reservations" about the Farm Lane site being developed, given its adjacency to the AONB and Green Belt. Ms Wigley for TBC pointed out that the Inspector's views were expressed without having the more detailed material that was before the members

specifically on this topic, such as the analysis in the officer's report, the review by TBC's landscape consultant of RHL's detailed Landscape and Visual Impact Assessment, the amendment of the detailed plans to include a substantial buffer area in the southern part of the Farm Lane site so at to protect the setting of the AONB, and the withdrawal by Natural England and the CCB of their previous concerns in the light of that amendment. TBC was entitled to attach considerable weight to the views of those consultees given their statutory responsibilities under sections 84(1)(b) and 87(1) of the Countryside and Rights of Way Act 2000 and section 2(2)(b) of the Natural Environment and Rural Communities Act 2006 (see R (East Meon Forge) v East Hampshire District Council [2014] EWHC 3543 (Admin) at paragraphs 108-109). I also note in passing that the Parish Council stated at the Committee meeting on 29 September 2015 that the increased area of open space proposed might be large enough to provide a solid and sufficient boundary between the built development and the AONB (paragraph 35.47 of the minutes).

110. Furthermore, the Inspector's concern about the landscape sensitivity of the Farm Lane site was not a new consideration as such. This was a matter which had previously been assessed by TBC's officers and consultant in detail, along with its statutory consultees. The members of the Committee had already reached their own conclusions on this issue, as well as other relevant planning considerations. Looking at landscape impact properly in the context of all the main issues I have identified, and which were considered by officers and members in detail, I cannot accept that the "preliminary findings" or "reservations" expressed in EXAM 146 (which were liable to change) on only that one issue, in the rather different context of examining the soundness of the strategic policies in the draft JCS, as opposed to evaluating the detailed proposals of a planning application, and without having the detailed material relevant to the determination of the planning application, could possibly have tipped the balance already struck by the Committee "to some extent", or resulted in the committee altering its assessment of the merits of the decision, or changing its mind on whether or not to grant planning permission. The suggestion to the contrary is wholly unrealistic.

111. For completeness I should mention that the Claimant also sought to rely upon paragraphs 61 to 66 of EXAM 146, which dealt with possible LGS designation. This point was completely untenable. The Inspector's reasoning followed after having stated her "reservation" as to whether the Farm Lane site should be allocated because of impact on landscape. It did not form part of the basis upon which the Inspector arrived at her reservation, or preliminary view, on soundness. By definition the designation of LGS is dependent upon the conclusions reached as to what areas of land should be allocated for sustainable development, and not the other way round (see paragraph 76 of the NPPF and paragraph 62 of EXAM 146). Plainly the Inspector's suggestion that LGS designation be addressed was provisional, in that it was subject to (inter alia) establishing the scale of the OAHN for the area of the three planning authorities and how that need should be met, including whether the Farm Lane site should be allocated notwithstanding impact on the landscape.

112. It follows from the above analysis that I also accept the explanation given by Mr Skelton as to why senior officers of TBC decided that the application should not be referred back to the committee and that their reasoning was sufficient to satisfy the principle in the Kides line of authority. Ground 1 must be rejected.

The Claimant's reliance upon the Inspector's Interim Report – May 2016

113. In May 2016 the Inspector issued a further document in the examination of the JCS entitled "Interim Report". Because that post-dated the grant of planning permission, it is irrelevant to the merits of ground 1 (see Hinds at paragraph 44). In paragraph 35 of its skeleton argument the Claimant appeared to accept that position, but in paragraphs 74 to 75 Mr Wolfe QC sought impermissibly to rely upon paragraphs 113 to 114 of the Interim Report. There the Inspector commented for the first time on the views of consultees and TBC's landscape consultant on RHL's application. Apart from being legally irrelevant to the merits of ground 1, these comments do not assist the Claimant's case in any event.

114. I regret to have to say that paragraph 113 of the Report is somewhat misleading. The Inspector suggested that the letter from Natural England dated 5 August merely stated "that they did not wish to comment" and she purported to rely upon "the significant concerns over the impact on the AONB" raised by Natural England in their letter of 7 November 2014. The true position is that in the first letter Natural England did object to the proposal essentially because of significant concerns relating to the *combined impact* on the AONB of development on the application site *and neighbouring sites* and the absence of adequate information including a buffer of sufficient size in the southern part of the application site. Subsequently, RHL provided that information and the design for a larger buffer. The second letter made it plain that Natural England no longer raised any objection to the development of the Farm Lane site after having seen RHL's amended landscape proposals.

115. It is also unfortunate that, having relied upon the fact that in its second letter Natural England deferred to the views of the CCB, the Inspector has misstated those views. She said "Whilst the Cotswolds Conservation Board did not object to the West of Farm Lane planning application, the Board commented that the most suitable option for the land's future management and retention of character would be to leave it undeveloped as agricultural land". Read in context, the Inspector's remark plainly implied that "the land" being referred to by CCB was the whole of the Farm Lane site. It was not. In its email of 15 June 2015 CCB made it clear that the amended plans provided by RHL overcame its earlier concerns regarding the proposal to develop the Farm Lane site (which once again had concerned the inadequate size of the southern buffer proposed at that stage). CCB simply added that the most suitable option would have been for the *buffer land*, not the whole of the Farm Lane allocation, to be left as agricultural land. But even so, that was not raised as an objection to the proposal. CCB's position in the email remained the same as in its first letter to TCB, namely that it had "no objection to the development of the site for residential purposes."

116. Paragraph 114 of the Inspector's Interim Report relied upon TBC's landscape officer as having stated that the proposed development would negatively impact upon "two stunning views", bringing the perception of the southern edge of Cheltenham closer to the viewer. But this passage was also taken out of context. In his first response the officer explained why he thought that the developer's assessment had understated the impact upon the AONB of the proposal then before the council. He went on to express his concern that the buffer proposed at that stage for the southern part of the site was too small. He concluded by saying that housing development on the Farm Lane site would be *acceptable* but the masterplan then proposed was not. When the officer was subsequently re-consulted on RHL's amended plans he stated that they were "appropriate" and showed a "good buffer to the AONB". The Inspector failed to refer

to that later communication. It is therefore clear that that officer's final position was that he had no objection to the proposal as permitted by TBC.

117. Plainly, there is a difference of opinion between the JCS Inspector on the one hand and TBC and its consultees on the other. It is not the court's role to resolve those differences. But I am surprised that Mr Wolfe QC should have thought it appropriate to rely upon these attempts by the Inspector in paragraphs 113 to 114 of her Interim Report to draw support for her earlier preliminary findings. On any view they cannot assist the Claimant.

Conclusion

118. For the above reasons, ground 1 must be rejected.

Ground 4

Whether EIA was required for a project which comprised the whole of the A6 site

119. The Claimant complains that for the purposes of satisfying the requirements of environmental impact assessment, the developer's Environmental Statement and TBC failed to treat the Farm Lane proposal as a part of a larger "project", namely the whole of the A6 strategic allocation comprising development within the areas of both TBC and Cheltenham Borough Council. It is accepted that the ES submitted for the Farm Lane site did address cumulative environmental impacts relating to the whole of the strategic site, but paragraph 45 of the Statement of Facts and Grounds complains that significantly less information was provided to TBC than if environmental effects had been assessed on the basis that "the project" comprised the whole of the A6 allocation site.

120. Regulation 3(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No 1824 – "the 2011 Regulations") provides that:

> "The relevant 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 they shall state in their decision that they have done so."

By Regulation 2(1) "environmental information" means the "environmental statement" and any further information or representations made about the environmental effects of the development. An "environmental statement" means a statement:

> "… (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but (b) that includes at least the information referred to in Part 2 of Schedule 4…"

Part 1 of schedule 4 includes:

> "4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, *cumulative*, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from (a) the existence of the development; the use of natural resources; and the emission of pollutants, the creation of nuisances and the elimination of waste, … " (emphasis added)

It is to be noted that "cumulative effects" are dealt with in Part 1 rather than Part 2 of Schedule 4. That accords with paragraph 5 of Annex IV to Directive 2011/92/EU which refers to "a description of the likely significant effects of the project on the environment resulting from, inter alia: … (e) the accumulation of "effects from other existing and/or approved projects…"

121. The Claimant submits that the "project" in this case should have been treated as the A6 strategic site because the proposal for the Farm Lane site formed part of the same substantial development (paragraphs 123 to 124 of the skeleton). Mr. Wolfe QC sought to rely, in particular, upon Bowen-West v SSCLG [2012] Env. L.R. 22; Burridge v Breckland District Council [2013] EWCA Civ. 228; and R (Larkfleet Limited) v South Kesteven District Council [2016] Env. L.R. 4. I am bound to say, however, that his argument involved a highly selective citation of passages taken out of context, which makes it necessary for me to summarise the cases more fully.

122. In Bowen-West the challenge was to a decision on an appeal to grant planning permission for the disposal of low level radioactive waste until 2013 at a landfill site which already had planning permission for the disposal of hazardous waste until 2013. At the time of the decision the developer had announced that it would also seek planning permission for a major extension of the landfill so as allow disposal of both types of waste to continue until 2016. But the Environmental Statement for the proposal the subject of the planning appeal only addressed the environmental effect of that proposal in isolation. Between paragraphs 22 to 26 the Court of Appeal rejected the first contention that the "project" to be assessed comprised the development of the whole site, including the extension area. In summary, the Court held that:

(i) The smaller proposal was a stand-alone project which could be considered on its merits, notwithstanding the developer's intention to seek a further permission for development continuing until 2026;

(ii) The smaller proposal could go ahead irrespective of the larger proposal. The former did not represent an integral part of the latter;

(iii) It was therefore inescapable that the "project" related solely to the smaller proposal, whether the issue was treated as a matter of law or a matter of judgment for the planning authority (and irrespective of the standard of review).

123. Between paragraphs 27 and 38 the Court rejected the second contention that the larger proposal involved indirect, secondary, or cumulative effects which ought to have been

taken into account in the assessment for the smaller proposal. Laws LJ (with whom Tomlinson and Kitchin LJJ agreed) held that the issue was one of fact or judgment for the planning authority taking the decision (paragraph 28). It rejected the contention that the issue was one of law or that where "it is intended to continue or supplant a limited scheme with a larger one, the effects of the latter are to be treated as cumulative effects of the former" (paragraph 30). The issues which arise in challenges to screening decisions on whether EIA is required at all are not comparable to scoping decisions on the ambit of an EIA which is required. Disapprobation of piecemeal applications as a device to avoid larger proposals from being subjected to EIA is not an approach which can be read across to the appropriate scope of an EIA which is required to be undertaken. The scope of an EIA is essentially a matter of judgment (paragraphs 32 to 33). The circumstances in Bowen-West were distinguishable from Brown v Carlisle City Council [2011] Env LR 5 where a section 106 obligation prevented the carrying out of a freight distribution centre in isolation from wider works to Carlisle airport. Thus, the airport works formed an integral part of the freight distribution centre (paragraph 33). The Court held that the grant of planning permission in the Bowen-West case for the smaller scheme involved an acceptance of the principle of disposal of low level radioactive waste on the site, but only to the extent allowed by the permission for that scheme (paragraph 35). The Court acknowledged that the effects of the larger scheme, or the effects of that scheme together with the earlier smaller scheme, would be assessed by EIA if and when a consent was sought for that larger scheme (paragraph 37). The Court concluded that no Wednesbury error had been committed, and that in any event the Secretary of State's decision was correct on the facts (paragraph 38).

124. The Court went on to indicate (obiter) that the intensity of review in relation to the *scope* of EIA is the conventional Wednesbury approach, the exercise being concerned with fact-finding and not with issues or functions involving any consideration of proportionality (paragraphs 39 to 41).

125. Mr. Wolfe QC relied upon paragraphs 29 and 43 of the decision in Burridge, but once again the passages cited were wrenched completely out of context. That was a case where no EIA had been required at all and the criticism related to piecemeal applications and the circumvention of the 2011 Regulations by the "splitting" of a project. It was held that on the facts of that case, the two proposed developments were "functionally interdependent" and could only be regarded as an "integral part of the same development". That conclusion was inescapable given that one proposal was for a biomass renewable energy plant and the other was for a combined heat and power plant about 1km distant linked by a pipeline to carry the biogas produced by the former to the latter. The sole source of fuel for the CHP development was the renewable energy plant (paragraphs 2, 25, 40 to 43 and 78 to 79). By contrast the Claimant did not suggest that any such functional interdependence existed in the present case.

126. Larkfleet involved a challenge to the grant of a planning permission for the construction of a link road on the ground that the ES for that scheme failed to consider cumulative impacts resulting from a sustainable urban extension which would be served by the link road. It was contended that the road scheme should not have been treated as a separate "project" for the purposes of the 2011 Regulations. The Court of Appeal agreed with the rejection of the challenge by Lang J. Sales LJ (with whom Moore-Bick and Tomlinson LJJ agreed) held that simply because two sets of proposed works have a cumulative effect on the environment does not make them a single "project". It is

legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different projects. Where two or more distinct, but linked, projects are contemplated, the objective of the 2011 Regulations and the Directive is sufficiently secured by consideration of their cumulative effects, so far as that is reasonably possible, in the EIA scrutiny applicable when permission for the first project (in that case the link road) is sought, combined with the requirement for subsequent EIA scrutiny for the second or subsequent projects. The adequacy and appropriateness of environmental protection under the EIA Directive may be further underwritten by any assessment carried out at the strategic level through the scrutiny of development plan policies under the SEA Directive (paragraphs 36 to 38).

127. The Claimant in the Larkfleet case submitted that the link road really formed part and parcel of a larger project which included the urban extension, because there were functional connections between the two (eg. the link road was essential to provide access to the urban extension), the construction of the link road depended upon the developer of the urban extension making a financial contribution under a section 106 agreement, and the linkage between the two was identified in (inter alia) the development plan. The Court of Appeal held that none of these factors, whether taken individually or cumulatively, was sufficient to conclude that the link road was properly to be treated as forming part of a wider "project" (paragraphs 46 to 51). The urban extension could not be granted planning permission unless the link road was constructed, but the latter could be built irrespective of whether permission for the urban extension was to be granted. Furthermore, there was a freestanding justification for the link road (ie. to complete a by-pass) whether or not the urban extension was subsequently approved (paragraph 46).

128. In both the statement of Facts and Grounds (paragraph 46) and the skeleton argument (paragraph 122) in the present case, the Claimant relied upon the following points to show that the Farm Lane site should have been considered as forming an integral part of a larger, single project, namely the A6 strategic allocation:

(i) The overall allocation in the emerging JCS;

(ii) The consideration given in the officers' report to whether it would be premature to grant permission on the Farm Lane site given that it forms part of the wider A6 allocation;

(iii) The assessment in the officers' report of the illustrative master plan submitted by the developer of the Farm Lane site for the wider area of the allocation (paragraph 18.3);

(iv) The officers' report agreed to benefits which were referable to the wider allocation as if they were benefits of the Farm Lane proposal (paragraph 20.4);

(v) The officers' report stated that the Farm Lane development would complement the emerging A6 allocation (paragraph 20.7).

129. It is to be noted that the Claimant has not sought to argue that the Farm Lane proposal formed an integral part of a single project comprising the A6 allocation by reference to

one or more of the factors identified in the authorities to which I have been referred. Thus, the Farm Lane development is capable of being developed as a freestanding scheme irrespective of whether the development of the A6 area within Cheltenham Borough is permitted or takes place. No functional *interdependence* (as opposed to mere links or connections) was suggested. Furthermore, there is no dispute that the proposed development on the Cheltenham part of the A6 allocation has also been the subject of EIA, and to that extent the objectives of the Directive have been satisfied.

130. As regards the five matters relied upon by the Claimant (see paragraph 119 above), it is plain from (inter alia) Larkfleet that points (i) to (v), whether taken individually or as a whole, are insufficient for the Farm Lane proposal to be regarded as an integral part of a wider "project" comprising the A6 strategic allocation. The mere allocation in the draft JCS policy of the overall A6 area for development does not support a conclusion that only the development of the whole of that area could be treated as a "project" for the purposes of EIA, and not some part of that area (the Claimant's point (i)). Point (v) is misstated because in fact paragraph 20.7 of the officers' report dealt with only one aspect of prematurity, namely whether the proposal would prejudice the implementation of the wider strategic allocation. When paragraph 20.7 is read properly, point (v) is no more than a repetition of point (iii). The master plan referred to in paragraph 18.3 of the officers' report (the Claimant's point (iii)) was assessed in order to see whether permission should be refused for the Farm Lane development as a *stand alone* development because its implementation would *prejudice* the development of the whole of the A6 allocation, if the remaining development were to be approved in due course. TBC's judgment is that it would not. Point (ii) relates to paragraphs 18.1 to 18.5 of the officers' report which explained why the Farm Lane proposals did not give rise to any prematurity objection as regards the ongoing JCS process. TBC's judgment was that approval of the Farm Lane development was not dependent upon approval of the development on the remainder of the A6 site. The Farm Lane development can go ahead in any event, whether or not the latter is approved. Point (iv) is fallacious. The benefits summarised in paragraph 20.4 of the officers' report were contributions which would be provided as part of the Farm Lane proposal, and not the wider benefits which paragraph 18.3 explains would not be prejudiced by the grant of a separate permission for that proposal. This is also plain from the more detailed analysis in earlier parts of the officers' report, read fairly and as a whole (see eg, paragraphs 13.1 to 13.4 and 14.1 to 14.4).

131. For these reasons I entirely agree with Lewis J that the "single project" ground of challenge (originally ground 1) is unarguable. The submissions made on this part of the case were no better in substance than those put before Lewis J. It was inappropriate for the Claimant to seek permission to apply for judicial review in respect of this ground.

The treatment of cumulative impacts

132. It is to be noted that on the basis that TBC was entitled to treat the Farm Lane project as a single project, no complaint is now made that the assessment of cumulative impacts in the ES was legally inadequate, despite any earlier suggestion to the contrary in paragraph 49 of the Statement of Facts and Grounds, which had alleged irrationality. In the light of authorities such as R (Blewett) v Derbyshire County Council [2004] Env LR 29 arguments of this kind would face very considerable difficulties. Instead, the Claimant's alternative argument under ground 4 proceeds on the basis that the ES did assess cumulative impacts. Moreover, Ms Wigley showed the court how they had been

dealt with in the ES (see for example, paragraph 2.2.24, chapters on individual topics and chapter 19).

133. The Claimant contends that it was improper for the members of the planning committee to take into account the wider benefits of the A6 allocation without also taking into account the environmental impacts of development on the overall allocation (paragraph 127 of the Skeleton). Mr Wolfe QC relies upon the fact that the report did not direct the members of the committee to consider the ES for themselves (see eg. paragraphs 83-84 in R (Hunter) v North Somerset Council [2013] EWCA Civ 1320) and he complains that the cumulative impacts identified in the ES were not summarised in the officers' report to the planning committee.

134. However, the Claimant's argument assumes that in the officers' report (Mr Wolfe QC referred to paragraph 20.4) regard was had to the "benefits" of development on the Cheltenham part of the A6 allocation. That is not a correct reading of the report. For example, paragraph 20.4 simply formed part of an overall summary which referred to the benefits which would be provided by the proposal for the Farm Lane site, including the section 106 obligation for that site. Any references to "benefits" or "facilities" which would be provided on the Cheltenham part of the allocation, if that were to be approved, were simply made in the context of considering whether the grant of a permission for free-standing development on the Farm Lane site would *prejudice the delivery* of the other part of the A6 allocation and the benefits associated therewith (paragraphs 14.2 - 14.3 and 18.3 - 18.5). The Claimant did not identify any passage in the officers' report, or in any other evidence, to show that when TBC decided to grant planning permission on the Farm Lane site it relied upon the cumulative benefits of development taking place on the overall A6 strategic allocation as a justification for granting that permission on the smaller site. The Claimant's suggestion that TBC's approach was not even-handed, because the decision was influenced by the benefits, but disregarding the disbenefits, of the larger scheme, is factually incorrect and the legal argument is therefore misconceived. This complaint does not get off the ground.

135. For the above reasons I have come to the clear conclusion that the Claimant's contentions under ground 4 are unarguable and so the application for permission must be refused.

Other matters

136. However, it is appropriate that I add some observations on one point made during the Claimant's submissions. Mr Wolfe QC pointed out that regulation 3(4) imposes an obligation on *the local planning authority* to take "the environmental information" as a whole into account and suggested that in cases such as the present one, that referred to the members of TBC's planning committee. He appeared to be willing to go so far as to suggest that the members are expected to read the whole of this information, without citing any authority directly in point. The practical consequences, including delays to the determination of planning applications and the effect on recruitment to planning committees, underline how unrealistic this suggestion was.

137. It should be remembered that an authority is also subject to a duty to have regard to all material planning considerations when determining planning applications (section 70(2) of TCPA 1990). In that context, it is well-established that a committee is entitled to rely upon professional advisers, the officers of the authority, to seek further

information as they see fit, to appraise the material received by the local authority and to prepare a report. That report is not required to contain a detailed citation of all relevant materials or information. Indeed, it should not be overlong or burdensome so as to defeat its purpose by discouraging members from reading the document and grasping the issues and essential information. It is the function of the officers to judge what material should be drawn to the attention of the members (Morge v Hampshire CC [2011] PTSR 337 at paragraph 36 and R (Maxwell) v Wiltshire County Council [2011] EWHC 1840 (Admin) at paragraph 43. The duty under regulation 3(4) is cast in very similar terms. It would be inconsistent with the analogous legal approach to section 70(2) to require members to read the whole of an ES and the other "environmental information" in each case where EIA is required. Mr Wolfe QC made no attempt to explain why, in relation to a local planning authority as decision-maker (or indeed the Secretary of State determining a planning application or an appeal), regulation 3(4) of the 2011 Regulations should require to be satisfied in any different way from the equally important obligation imposed by section 70(2) of TCPA 1990.

138. Mr Wolfe's suggestion was not properly developed in argument and the other parties did not have a proper opportunity to respond to it during the hearing itself. I would not be prepared to give permission for a suggestion "floated" in this way during oral submissions. In any event, from the limited submissions I heard it is plain that the point should be rejected.

139. For the above reasons, I refuse to grant permission for the Claimant to rely upon ground 4.

Conclusion

140. For the above reasons, the renewed application for permission to apply for judicial review on ground 4 is refused and the Claim for judicial review in relation to grounds 1 to 3 is dismissed. It also follows that the injunction granted by Lewis J on 9 November 2016, as varied by me in a consent order made at the hearing on 29 November 2016, is discharged from the moment this judgment is handed down in court.

Consequential matters

141. The parties agree in substance upon the terms of the order which the court should make, save in two respects. First, the First Interested Party applies for an order requiring the Claimant to pay its costs in relation to the latter's application for an injunction restraining it from carrying out development on the Farm Lane site and that these costs be summarily assessed in the sum of £15,000. The Claimant resists that application. Second, the Claimant applies for permission to appeal to the Court of Appeal. That too is resisted. The parties agree that these issues are to be determined by the court on the written submissions they have provided and without an oral hearing.

142. The application by the First Interested Party for an order for costs proceeds on the basis that the Claimant's application for an injunction fell outside the scope of an "Aarhus Convention claim" as defined in CPR 45.41(2) and the costs protection provided by CPR 45.43 to a "party to an Aarhus Convention claim." Such a claim is defined as a "claim for judicial review" of a decision to which the Convention applies. In the present case the decision to grant planning permission for residential development on the Farm Lane site is a decision to which the Convention applies. Nevertheless, the First

Interested Party submits that the application for an injunction was a separate application, albeit that it was an ancillary application made within the ambit of the present claim CO/2872/2016. On the arguments presented I am not persuaded that the application for an injunction was a separate matter falling outside the claim for judicial review of the planning permission for residential development. That conclusion is supported to some extent by the provisions of CPR Practice Direction 25A paragraph 5.1B (and see also European Commission v UK Case C-530/11; [2014] QB 988 and Article 9(4) of the Aarhus Convention). However, I acknowledge that this is a subject which could benefit from more detailed argument in a subsequent case.

143. The First Interested Party has also mentioned that the Claimant's application for an injunction would have had the effect of restraining the carrying out of works under a second planning permission granted by TBC for certain items of infrastructure related to the residential development, which permission was not the subject of the claim for judicial review at all. In my judgment, this argument does not justify the order sought. First, the injunction which the Claimant *obtained* was drafted so as to relate only to works authorised by the residential development permission and not the infrastructure permission. Second, in so far as the First Interested Party may have incurred additional costs specifically in order to limit the injunction obtained in that way, the application for costs I am asked to deal with is not so limited. Moreover, there is no information before the court which identifies any such additional costs, if they were incurred. Given the way in which the First Interested Party has chosen to present its application for costs, it would not be a proper use of the resources of the parties or of the court for this limited aspect of costs to be pursued further.

144. The Claimant's application for permission to appeal was made by email without indicating which of the grounds the Claimant might wish to pursue, or how the application is said to satisfy either of the tests in in CPR 52.6(1) in relation to any of the grounds. In view of the court's order made pursuant to paragraph 140 above, I assume that the application for permission relates only to grounds 1 to 3. Permission to apply for judicial review has been refused on ground 4.

145. The Claimant's application is simply presented as a "formal request" and suggests that if any application is to be pursued, and considered substantively, then that will be the subject of an application to the Court of Appeal. This way of proceeding is unfortunate because where permission to appeal is refused, the Court of Appeal is denied the usual opportunity of considering the response of the first instance judge to the proposed grounds of appeal. Given the way in which the application is made, I refuse permission to appeal. This is not a case where any of the grounds would have a real prospect of success and there is no other compelling reason for an appeal to be heard.