APPENDIX C

Case Law

1 Case No: C1/2013/0843 Neutral Citation Number: [2014] EWCA Civ 137

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
THE HON. MRS JUSTICE LANG
CO/4231/2012

2 Royal Courts of Justice Strand, London, WC2A 2LL

Date: 18/02/2014 **Before:**

3 **LORD JUSTICE MAURICE KAY**

VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION LORD JUSTICE SULLIVAN

and

4 **LADY JUSTICE RAFFERTY**

- -

Between:

BARNWELL MANOR WIND ENERGY LIMITED **Appellant**

- and -

(1) EAST NORTHAMPTONSHIRE DISTRICT COUNCIL **Respondents**
(2) ENGLISH HERITAGE
(3) NATIONAL TRUST
(4) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

- -

Gordon Nardell QC and **Justine Thornton** (instructed by **Eversheds LLP**) for the **Appellant**
Morag Ellis QC and **Robin Green** (instructed by **Sharpe Pritchard**) for the **First, Second and Third Respondents**
The Fourth Respondent did not appear and was not represented

Hearing date: 23rd January 2014

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5 Judgment

Lord Justice Sullivan:

Introduction

1. This is an appeal against the order dated 11th March 2013 of Lang J quashing the decision dated 12th March 2012 of a Planning Inspector appointed by the Secretary

of State granting planning permission for a four-turbine wind farm on land north of Catshead Woods, Sudborough, Northamptonshire. The background to the appeal is set out in Lang J's judgment: [2013] EWHC 473 (Admin).

Section 66

2. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") imposes a "General duty as respects listed buildings in exercise of planning functions." Subsection (1) provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

Planning Policy

3. When the permission was granted the Government's planning policies on the conservation of the historic environment were contained in Planning Policy Statement 5 (PPS5). In PPS5 those parts of the historic environment that have significance because of their historic, archaeological, architectural or artistic interest are called heritage assets. Listed buildings, Scheduled Ancient Monuments and Registered Parks and Gardens are called "designated heritage assets." Guidance to help practitioners implement the policies in PPS5 was contained in "PPS5 Planning for the Historic Environment: Historic Environment Planning Practice Guide" ("the Practice Guide"). For present purposes, Policies HE9 and HE10 in PPS5 are of particular relevance. Policy HE9.1 advised that:

> "There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be…. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, including scheduled monuments ….grade I and II* listed buildings and grade I and II* registered parks and gardens….should be wholly exceptional."

Policy HE9.4 advised that:

> "Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should:
>
> (i) weigh the public benefit of the proposal (for example, that it helps to secure the optimum viable use of the heritage asset in the interests of its long-term conservation) against the harm; and
>
> (ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss."

Policy HE10.1 advised decision-makers that when considering applications for development that do not preserve those elements of the setting of a heritage asset, they:

> "should weigh any such harm against the wider benefits of the application. The greater the negative impact on the significance of the heritage asset, the greater the benefits that will be needed to justify approval."

The Inspector's decision

4. The Inspector concluded that the wind farm would fall within and affect the setting of a wide range of heritage assets [22][1]. For the purposes of this appeal the parties' submissions largely focussed on one of the most significant of those assets: a site owned by the National Trust, Lyveden New Bield. Lyveden New Bield is covered by a range of heritage designations: Grade I listed building, inclusion in the Register of Parks and Gardens of Special Historic Interest at Grade I, and Scheduled Ancient Monument [44].

5. It was common ground between the parties at the inquiry that the group of designated heritage assets at Lyveden New Bield was probably the finest surviving example of an Elizabethan Garden, and that as a group the heritage asset at Lyveden New Bield had a cultural value of national, if not international significance. The Inspector agreed, and found that:

> "…this group of designated heritage assets has archaeological, architectural, artistic and historic significance of the highest magnitude." [45]

6. The closest turbine in the wind farm site (following the deletion of one turbine) to Lyveden New Bield was around 1.3 km from the boundary of the Registered Park and 1.7 km from the New Bield itself. The Inspector found that:

> "The wind turbines proposed would be visible from all around the site, to varying degrees, because of the presence of trees. Their visible presence would have a clear influence on the surroundings in which the heritage assets are experienced and as such they would fall within, and affect, the setting of the group." [46]

This conclusion led the Inspector to identify the central question, as follows:

> "Bearing in mind PPS5 Policy HE7, the central question is the extent to which that visible presence would affect the significance of the heritage assets concerned." [46]

7. The Inspector answered that question in relation to Lyveden New Bield in paragraphs 47-51 of his decision letter.

[1] [ ] refers to paragraph numbers in the Inspector's decision.

> "47. While records of Sir Thomas Tresham's intentions for the site are relatively, and unusually, copious, it is not altogether clear to what extent the gardens and the garden lodge were completed and whether the designer considered views out of the garden to be of any particular significance. As a consequence, notwithstanding planting programmes that the National Trust have undertaken in recent times, the experience of Lyveden New Bield as a place, and as a planned landscape, with earthworks, moats and buildings within it, today, requires imagination and interpretation.
>
> 48. At the times of my visits, there were limited numbers of visitors and few vehicles entering and leaving the site. I can imagine that at busy times, the situation might be somewhat different but the relative absence of man-made features in views across and out of the gardens compartments, from the prospect mounds especially, and from within the garden lodge, give the place a sense of isolation that makes the use of one's imagination to interpret Sir Thomas Tresham's design intentions somewhat easier.
>
> 49. The visible, and sometimes moving, presence of the proposed wind turbine array would introduce a man-made feature, of significant scale, into the experience of the place. The array would act as a distraction that would make it more difficult to understand the place, and the intentions underpinning its design. That would cause harm to the setting of the group of designated heritage assets within it.
>
> 50. However, while the array would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the moated orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres, the turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site. Moreover, the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter). Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.
>
> 51. On that basis, the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other. As a consequence, the effect on the setting of these designated heritage assets, while clearly detrimental, would not reach the level of substantial harm."

8. The Inspector carried out "The Balancing Exercise" in paragraphs 85 and 86 of his decision letter.

> "85. The proposal would harm the setting of a number of designated heritage assets. However, the harm would in all cases be less than substantial and reduced by its temporary nature and reversibility. The proposal would also cause harm to the landscape but this would be ameliorated by a number of factors. Read in isolation though, all this means that the proposal would fail to accord with [conservation policies in the East Midlands Regional Plan (EMRP)]. On the other hand, having regard to advice in PPS22, the benefits that would accrue from the wind farm in the 25 year period of its operation attract significant weight in favour of the proposal. The 10 MW that it could provide would contribute towards the 2020 regional target for renewable energy, as required by EMRP Policy 40 and Appendix 5, and the wider UK national requirement.
>
> 86. PPS5 Policies HE9.4 and HE10.1 require the identified harm to the setting of designated heritage assets to be balanced against the benefits that the proposal would provide. Application of the development plan as a whole would also require that harm, and the harm to the landscape, to be weighed against the benefits. Key principle (i) of PPS22 says that renewable energy developments should be capable of being accommodated throughout England in locations where the technology is viable and environmental, economic, and social impacts can be addressed satisfactorily. I take that as a clear expression that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided. In my view, the significant benefits of the proposal in terms of the energy it would produce from a renewable source outweigh the less than substantial harm it would cause to the setting of designated heritage assets and the wider landscape."

Lang J's Judgment

9. Before Lang J the First, Second and Third Respondents ("the Respondents") challenged the Inspector's decision on three grounds. In summary, they submitted that the Inspector had failed to:

(1) have special regard to the desirability of preserving the settings of listed buildings, including Lyveden New Bield;

(2) correctly interpret and apply the policies in PPS5; and

(3) give adequate reasons for his decision.

The Secretary of State, the Fourth Respondent, had conceded prior to the hearing that the Inspector's decision should be quashed on ground (3), and took no part in the proceedings before Lang J and in this Court.

10. Lang J concluded that all three grounds of challenge were made out. [72][2] In respect of ground (1) she concluded that:

> "In order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the "desirability of preserving… the setting" of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status. Thus, where the section 66(1) duty is in play, it is necessary to qualify Lord Hoffmann's statement in *Tesco Stores v Secretary of State for the Environment & Ors* [1995] 1 WLR 759, at 780F-H that the weight to be given to a material consideration was a question of planning judgment for the planning authority" [39]

Applying that interpretation of section 66(1) she concluded that:

> "….the Inspector did not at any stage in the balancing exercise accord "special weight", or considerable importance to "the desirability of preserving the setting". He treated the "harm" to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Indeed, he downplayed "the desirability of preserving the setting" by adopting key principle (i) of PPS22, as a "clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided" (paragraph 86). In so doing, he applied the policy without giving effect to the section 66(1) duty, which applies to all listed buildings, whether the "harm" has been assessed as substantial or less than substantial." [46]

11. In respect of ground (2) Lang J concluded that the policy guidance in PPS5 and the Practice Guide required the Inspector to assess the contribution that the setting made to the significance of the heritage assets, including Lyveden New Bield, and the effect of the proposed wind turbines on both the significance of the heritage asset and the ability to appreciate that significance. Having analysed the Inspector's decision, she found that the Inspector's assessment had been too narrow. He had failed to assess the contribution that the setting of Lyveden New Bield made to its significance as a heritage asset and the extent to which the wind turbines would enhance or detract from that significance, and had wrongly limited his assessment to one factor: the ability of the public to understand the asset based on the ability of "the reasonable observer" to distinguish between the "modern addition" to the landscape and the "historic landscape." [55] - [65]

[2] [ ] refers to paragraph numbers in the judgment.

12. In respect of ground (3) Lang J found that the question whether Sir Thomas Tresham intended that the views from the garden and the garden lodge should be of significance was a controversial and important issue at the inquiry which the Inspector should have resolved before proceeding to assess the level of harm.[68] However, the
Inspector's reasoning on this issue was unclear. Having said in paragraph 47 of his decision that it was "not altogether clear ….whether the designer considered views out of the garden to be of any significance", he had concluded in paragraph 50 that "the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter)." It was not clear whether this was a conclusion that there were no planned views (as submitted by the Appellant) or a conclusion that there were such views but the turbine array would not intrude into them. [70] – [71].

The Grounds of Appeal

13. On behalf of the Appellant, Mr. Nardell QC challenged Lang J's conclusions in respect of all three grounds. At the forefront of his appeal was the submission that Lang J had erred in concluding that section 66(1) required the Inspector, when carrying out the balancing exercise, to give "considerable weight" to the desirability of preserving the settings of the many listed buildings, including Lyveden New Bield. He submitted that section 66(1) did not require the decision-maker to give any particular weight to that factor. It required the decision-maker to ask the right question – would there be some harm to the setting of the listed building – and if the answer to that question was "yes" – to refuse planning permission unless that harm was outweighed by the advantages of the proposed development. When carrying out that balancing exercise the weight to be given to the harm to the setting of the listed building on the one hand and the advantages of the proposal on the other was entirely a matter of planning judgment for the decision-maker.

14. Turning to the policy ground, he submitted that Lang J had erred by taking an overrigid approach to PPS5 and the Practice Guide which were not intended to be prescriptive. Given the way in which those objecting to the proposed wind farm had put their case at the inquiry, the Inspector had been entitled to focus on the extent to which the presence of the turbines in views to and from the listed buildings, including Lyveden New Bield, would affect the ability of the public to appreciate the heritage assets.

15. In response to the reasons ground, he submitted that the question whether any significant view from the lodge or garden at Lyveden New Bield was planned or intended was a subsidiary, and not a "principal important controversial", issue. In any event, he submitted that on a natural reading of paragraph 50 of the decision letter the Inspector had simply found that the turbines would not intrude into such significant views, <u>if</u> <u>any</u>, as were obviously planned or intended, so it had been unnecessary for him to resolve the issue that he had left open in paragraph 47 of the decision. **Discussion**

5.1 Ground 1

16. What was Parliament's intention in imposing both the section 66 duty and the parallel duty under section 72(1) of the Listed Buildings Act to pay "special attention ….. to the desirability of preserving or enhancing the character or appearance" of conservation areas? It is common ground that, despite the slight difference in

wording, the nature of the duty is the same under both enactments. It is also common ground that "preserving" in both enactments means doing no harm: see South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141, per Lord Bridge at page 150.

17. Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?

18. Lang J analysed the authorities in paragraphs [34] – [39] of her judgment. In chronological order they are: The Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303; South Lakeland (see paragraph 16 above);

5.2 Heatherington (UK) Ltd. v Secretary of State for the Environment (1995) 69 P & CR 374; and Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 WLR 759. Bath and South Lakeland were concerned with (what is now) the duty under section 72. Heatherington is the only case in which the section 66 duty was considered. Tesco was not a section 66 or section 72 case, it was concerned with the duty to have regard to "other material considerations" under section 70(2) of the Town and Country Planning Act 1990 ("the Planning Act").

19. When summarising his conclusions in Bath about the proper approach which should be adopted to an application for planning permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the Planning Act, and the duty under (what is now) section 72(1) of the Listed Buildings Act. Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay "special attention" should be the first consideration for the decision-maker (p. 1318 F-H). Glidewell LJ continued:

> "Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight…… As I have said, the conclusion that the development will neither enhance nor preserve will be a consideration of considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decisionmaker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that."

20. In South Lakeland the issue was whether the concept of "preserving" in what is now section 72(1) meant "positively preserving" or merely doing no harm. The House of

Lords concluded that the latter interpretation was correct, but at page 146E-G of his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms:

> "There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

21. In Heatherington, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the Planning Act (since repealed and replaced by the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004). However, Mr. David Keene QC (as he then was), when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the Bath case (above), and said that the statutory objective "remains one to which considerable weight should be attached" (p. 383).

22. Mr. Nardell submitted, correctly, that the Inspector's error in the Bath case was that he had failed to carry out the necessary balancing exercise. In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. Mr. Nardell submitted that there was nothing in Glidewell LJ's judgment which supported the proposition that the Court could go behind the Inspector's conclusion. I accept that (subject to grounds 2 and 3, see paragraph 29 et seq below) the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell LJ's judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."

23. That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred (paragraph 20 above). It is true, as Mr. Nardell submits, that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because

the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."

24. While I would accept Mr. Nardell's submission that Heatherington does not take the matter any further, it does not cast any doubt on the proposition that emerges from the Bath and South Lakeland cases: that Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise.

25. In support of his submission that, provided he asked the right question – was the harm to the settings of the listed buildings outweighed by the advantages of the proposed development – the Inspector was free to give what weight he chose to that harm, Mr. Nardell relied on the statement in the speech of Lord Hoffmann in Tesco that the weight to be given to a material consideration is entirely a matter for the local planning authority (or in this case, the Inspector):

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State." (p.780H).

26. As a general proposition, the principle is not in doubt, but Tesco was concerned with the application of section 70(2) of the Planning Act. It was not a case under section 66(1) or 72(1) of the Listed Buildings Act. The proposition that decision-makers may be required by either statute or planning policy to give particular weight to certain material considerations was not disputed by Mr. Nardell. There are many examples of planning policies, both national and local, which require decision-makers when exercising their planning judgment to give particular weight to certain material considerations. No such policies were in issue in the Tesco case, but an example can be seen in this case. In paragraph 16 of his decision letter the Inspector referred to Planning Policy Statement 22 Renewable Energy (PPS22) which says that the wider environmental and economic benefits of all proposals for renewable energy, whatever their scale, are material considerations which should be given "significant weight". In this case, the requirement to give "considerable importance and weight" to the policy objective of preserving the setting of listed buildings has been imposed by Parliament. Section 70(3) of the Planning Act provides that section 70(1), which confers the power to grant planning permission, has effect subject to, inter alia, sections 66 and 72 of the Listed Buildings Act. Section 70(2) requires the decision-maker to have regard to "material considerations" when granting planning permission, but Parliament has made the power to grant permission having regard to material considerations expressly subject to the section 66(1) duty.

27. Mr. Nardell also referred us to the decisions of Ouseley J and this Court in Garner v Elmbridge Borough Council [2011] EWCA Civ 891, but the issue in that case was whether the local planning authority had been entitled to conclude that no harm would be caused to the setting of another heritage asset of the highest significance, Hampton Court Palace. Such was the weight given to the desirability of preserving the setting of the Palace that it was common ground that it would not be acceptable to grant planning permission for a redevelopment scheme which would have harmed the setting of the Palace on the basis that such harm would be outweighed by some other planning advantage: see paragraph 14 of my judgment. Far from assisting Mr.

Nardell's case, Garner is an example of the practical application of the advice in policy HE9.1: that substantial harm to designated heritage assets of the highest significance should not merely be exceptional, but "wholly exceptional".

28. It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE9.4 and HE 10.1 should ignore the overarching statutory duty imposed by section 66(1), which properly understood (see Bath, South Somerset and Heatherington) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a

Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed.

29. For these reasons, I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission. The Appellant's Skeleton Argument effectively conceded as much in contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the Inspector's planning judgment. In his oral submissions Mr. Nardell contended that the Inspector had given considerable weight to this factor, but he was unable to point to any particular passage in the decision letter which supported this contention, and there is a marked contrast between the "significant weight" which the Inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS22, and the manner in which he approached the section 66(1) duty. It is true that the Inspector set out the duty in paragraph 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out.

5.3 Ground 2

30. Grounds 2 and 3 are interlinked. The Respondents contend that the Inspector either misapplied the relevant policy guidance, or if he correctly applied it, failed to give adequate reasons for his conclusion that the harm to the setting of the listed buildings, including Lyveden New Bield, would in all cases be less than substantial. I begin with the policy challenge in ground 2. Lang J set out the policy guidance relating to setting in PPS5 and the Practice Guide in paragraphs 62-64 of her judgment. The contribution made by the setting of Lyveden New Bield to its significance as a heritage asset was undoubtedly a "principal controversial" issue

at the inquiry. In paragraph 4.5.1 of his Proof of Evidence on behalf of the Local Planning Authority Mr. Mills, its Senior Conservation Officer, said:

> "To make an assessment of the indirect impact of development or change upon an asset it is first necessary to make a judgment about the contribution made by its setting."

Having carried out a detailed assessment of that contribution he concluded in paragraph 4.5.17:

> "In summary, what Tresham created at the site was a designed experience that was intimately linked to the surrounding landscape. The presence of the four prospect mounts along with the raised terrace provide a clear indication of the relationship of the site with the surrounding landscape."

Only then did he assess the impact of the proposed development on the setting by way of "a discussion as to the impact of the proposal on how the site is accessed and experienced by visitors."

31. In its written representations to the inquiry English Heritage said of the significance and setting of Lyveden New Bield:

> "The aesthetic value of the Lyveden Heritage Assets partly derives from the extraordinary symbolism and quality of the New Bield and the theatrical design of the park and garden. However, it also derives from their visual association with each other and with their setting. The New Bield is a striking presence when viewed on the skyline from a distance. The New Bield and Lyveden park and garden are wonderfully complemented by their undeveloped setting of woodland, pasture and arable land."

In paragraph 8.23 English Heritage said:

> "The New Bield and Lyveden park and garden were designed to be prominent and admired in their rural setting, isolated from competing structures. The character and setting of the Lyveden Heritage Assets makes a crucial contribution to their significance individually and as a group."

32. In its written representations to the inquiry the National Trust said that each arm of the cruciform New Bield "was intended to offer extensive views in *all directions* over the surrounding parks and the Tresham estate beyond" (paragraph 11). The National Trust's evidence was that "one if not *the* **Principal designed** *view from* within the lodge was from the withdrawing rooms which linked to the important Great Chamber and Great Hall on the upper two levels of the west arm of the lodge" (paragraph 12). The Trust contended that this vista survived today, and was directly aligned with the proposed wind farm site (emphasis in both paragraphs as in the original).

33. In his proof of evidence, the planning witness for the Stop Barnwell Manor Wind Farm Group said that:

> "….the views of Lyveden New Bield from the east, south-east and south, both as an individual structure and as a group with its adjoining historic garden and listed cottage, are views of a very high order. The proposed turbines, by virtue of their monumental scale, modern mechanical appearance, and motion of the blades, would be wholly alien in this scene and would draw the eye away from the New Bield, destroying its dominating presence in the landscape."

34. This evidence was disputed by the Appellant's conservation witness, and the Appellant rightly contends that a section 288 appeal is not an opportunity to re-argue the planning merits. I have set out these extracts from the objectors' evidence at the inquiry because they demonstrate that the objectors were contending that the undeveloped setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset; that the New Bield (the lodge) had been designed to be a striking and dominant presence when viewed in its rural setting; and that the lodge had been designed so as to afford extensive views in all directions over that rural setting. Did the Inspector resolve these issues in his decision, and if so, how?

35. I endorse Lang J's conclusion that the Inspector did not assess the contribution made by the setting of Lyveden New Bield, by virtue of its being undeveloped, to the significance of Lyveden New Bield as a heritage asset. The Inspector did not grapple with (or if he did consider it, gave no reasons for rejecting) the objectors' case that the setting of Lyveden New Bield was of crucial importance to its significance as a heritage asset because Lyveden New Bield was designed to have a dominating presence in the surrounding rural landscape, and to afford extensive views in all directions over that landscape; and that these qualities would be seriously harmed by the visual impact of a modern man-made feature of significant scale in that setting.

36. The Inspector's reason for concluding in paragraph 51 of the decision that the presence of the wind turbine array, while clearly having a detrimental effect on the setting of Lyveden New Bield, would not reach the level of substantial harm, was that it would not be so distracting that it would not prevent, or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield or Lyveden Old Bield or their relationship to each other.

37. That is, at best, only a partial answer to the objectors' case. As the Practice Guide makes clear, the ability of the public to appreciate a heritage asset is one, but by no means the only, factor to be considered when assessing the contribution that setting makes to the significance of a heritage asset. The contribution that setting makes does not depend on there being an ability to access or experience the setting: see in particular paragraphs 117 and 122 of the Practice Guide, cited in paragraph 64 of Lang J's judgment.

5.4 Ground 3

38. The Inspector said that his conclusion in paragraph 51 of the decision letter that the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield had been reached on

the basis of his conclusions in paragraph 50. In that paragraph, having said that the wind turbine array "would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres", the Inspector gave three reasons which formed the basis of his conclusion in paragraph 51.

39. Those three reasons were:

(a) The turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site.

(b) The turbine array would not intrude on any obviously intended, planned view out of the garden or the garden lodge (which has windows all around its cruciform perimeter).

(c) Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.

40. Taking those reasons in turn, reason (a) does not engage with the objectors' contention that the setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset because Lyveden New Bield was designed to be the dominant feature in the surrounding rural landscape. A finding that the "readily visible" turbine array would not dominate the outlook from the site puts the boot on the wrong foot. If this aspect of the objectors' case was not rejected (and there is no reasoned conclusion to that effect) the question was not whether the turbine array would dominate the outlook from Lyveden New Bield, but whether Lyveden New Bield would continue to be dominant within its rural setting.

41. Mr. Nardell's submission to this Court was not that the Inspector had found that there were no planned views (cf. the submission recorded in paragraph 70 of Lang J's judgment), but that the Inspector had concluded that the turbine array would not intrude into obviously intended or planned views <u>if any</u>. That submission is difficult to understand given the Inspector's conclusion that the turbine array would be "readily visible" from the garden lodge, from the prospect mounds, and from various other places around the site. Unless the Inspector had concluded that there were <u>no</u> intended or planned views from the garden or the garden lodge, and he did not reach that conclusion (see paragraph 47 of the decision letter), it is difficult to see how he could have reached the conclusion that the "readily visible" turbine array would not "intrude" on any obviously intended or planned views from the garden lodge. I am inclined to agree with Mr. Nardell's alternative submission that the Inspector's conclusion that while "readily visible" from the garden lodge, the turbine array would not "intrude" on any obviously intended or planned view from it, is best understood

by reference to his third conclusion in paragraph 50. While visible in views from the garden lodge the turbine array would not intrude upon, in the sense of doing substantial harm to, those views, for the reasons given in the last sentence of paragraph 50.

42. I confess that, notwithstanding Mr. Nardell's assistance, I found some difficulty, not in understanding the final sentence of paragraph 50 – plainly any reasonable observer would know that the turbine array was a modern addition to the landscape and was separate from the planned historic landscape at Lyveden New Bield – but in understanding how it could rationally justify the conclusion that the detrimental effect of the turbine array on the setting of Lyveden New Bield would not reach the level of substantial harm. The Inspector's application of the "reasonable observer" test was not confined to the effect of the turbine array on the setting of Lyveden New Bield. As Lang J pointed out in paragraph 57 of her judgment, in other paragraphs of his decision letter the Inspector emphasised one particular factor, namely the ability of members of the public to understand and distinguish between a modern wind turbine array and a heritage asset, as his reason for concluding either that the proposed wind turbines would have no impact on the settings of other heritage assets of national significance [28] – [31]; or a harmful impact that was "much less than substantial" on the setting of a Grade 1 listed church in a conservation area [36].

43. Matters of planning judgment are, of course, for the Inspector. No one would quarrel with his conclusion that "any reasonable observer" would understand the differing functions of a wind turbine and a church and a country house or a settlement [30]; would not be confused about the origins or purpose of a settlement and a church and a wind turbine array [36]; and would know that a wind turbine array was a modern addition to the landscape [50]; but no matter how non-prescriptive the approach to the policy guidance in PPS5 and the Practice Guide, that guidance nowhere suggests that the question whether the harm to the setting of a designated heritage asset is substantial can be answered simply by applying the "reasonable observer" test adopted by the Inspector in this decision.

44. If that test was to be the principal basis for deciding whether harm to the setting of a designated heritage asset was substantial, it is difficult to envisage any circumstances, other than those cases where the proposed turbine array would be in the immediate vicinity of the heritage asset, in which it could be said that any harm to the setting of a

heritage asset would be substantial: the reasonable observer would always be able to understand the differing functions of the heritage asset and the turbine array, and would always know that the latter was a modern addition to the landscape. Indeed, applying the Inspector's approach, the more obviously modern, large scale and functional the imposition on the landscape forming part of the setting of a heritage asset, the less harm there would be to that setting because the "reasonable observer" would be less likely to be confused about the origins and purpose of the new and the old. If the "reasonable observer" test was the decisive factor in the Inspector's reasoning, as it appears to have been, he was not properly applying the policy approach set out in PPS5 and the Practice Guide. If it was not the decisive factor in the Inspector's reasoning, then he did not give adequate reasons for his conclusion

that the harm to the setting of Lyveden New Bield would not be substantial. Since his conclusion that the harm to the setting of the designated heritage assets would in all cases be less than substantial was fed into the balancing exercise in paragraphs 85 and 86, the decision letter would have been fatally flawed on

grounds 2 and 3 even if the Inspector had given proper effect to the section 66(1) duty.

5.5 Conclusion

45. For the reasons set out above, which largely echo those given by Lang J in her judgment, I would dismiss this appeal.

Lady Justice Rafferty:

46. I agree.

The Vice President:

47. I also agree.

Neutral Citation Number: [2021] EWCA Civ 74

6 Case No: C1/2019/1955/QBACF
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE HOLGATE
[2019] EWHC 1993 (Admin)

7 Royal Courts of Justice Strand, London, WC2A 2LL

Date:
28/01/2021 Before:

SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS LADY JUSTICE ANDREWS
and
SIR GARY HICKINBOTTOM

- -

Between:

R. (on the application of Monkhill Limited)	**Appellant**
- and -	
(1) Secretary of State for Housing, Communities and Local Government	**Respondents**
- and -	
(2) Waverley Borough Council	

- -

Charles Banner Q.C. and **Matthew Fraser** (instructed by **Penningtons Manches Cooper LLP**) for the **Appellant**
Richard Moules (instructed by the **Government Legal Department**) for the **First Respondent**

Hearing date: 3 November 2020

- -

8 Approved Judgment

The Senior President of Tribunals:

8.1 Introduction

1. On many occasions since the National Planning Policy Framework ("the NPPF") was first published by the Government in March 2012 its provisions have had to be considered by the courts. These cases have formed a large part of the work of the Planning Court since it came into being in 2014. Several have come before this court. Two – *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865 and *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 – have reached the Supreme Court. This is another in that series. It invites the court to determine the meaning of the policy relating to development in an Area of Outstanding Natural Beauty ("AONB") in the revised version
of the NPPF published in July 2018, and the relationship of that policy to the "presumption in favour of sustainable development".

2. With permission granted by Flaux L.J., as he then was, the appellant, Monkhill Ltd., appeals against the order of Holgate J., dated 24 July 2019, dismissing its application under section 288 of the Town and Country Planning Act 1990 for an order to quash the decision of an inspector appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, dismissing Monkhill's appeal under section 78 of the 1990 Act against the refusal of planning permission by the second respondent, Waverley Borough Council, for a development of housing on land at Longdene House, Hedgehog Lane in Haslemere. The proposal was to construct up to 29 dwellings in place of several existing buildings on the site, and for the change of use of Longdene House to provide a new dwelling. Most of the site is in the Surrey Hills AONB. The remainder is within an Area of Great Landscape Value ("AGLV"). The inspector's decision, in a decision letter dated 10 January 2019, was a re-determination of the section 78 appeal. The previous decision was quashed in April 2018.

3. Although the version of the NPPF published in July 2018 has now been superseded by a further revised version published in February 2019, the policies we are concerned with were reproduced in the same form, and I shall therefore refer to them in the present tense.

8.2 The issue in the appeal

4. Monkhill's single ground of appeal gives rise to one principal issue for us to decide:

   whether the inspector was wrong to interpret the first sentence of paragraph 172 of the NPPF, which says "great weight should be given to conserving and enhancing landscape and scenic beauty" in an AONB, as a policy whose application is capable of providing "a clear reason for refusing" planning permission under paragraph 11d)i of the NPPF.

8.3 Paragraph 11 of the NPPF

5. In chapter 2 of the NPPF, "Achieving sustainable development", under the heading "The presumption in favour of sustainable development", paragraph 11 states in its relevant part:

> "11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> …
>
> For decision-taking this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

Footnote 6 states:

> "[6]The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those listed in paragraph 176) and/or designated Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an [AONB], a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change."

Footnote 7 states:

> "[7]This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites … ."

6. Paragraph 12 acknowledges that "[the] presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making".

7. The original policy for the "presumption in favour of sustainable development", in paragraph 14 of the 2012 version of the NPPF, was in different terms:

> "14. At the heart of [the NPPF] is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> …
>
> For decision-taking this means:
>
> - approving development proposals that accord with the development plan without delay; and
> - where the development plan is absent, silent or relevant policies are out-ofdate, 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]"

Footnote 9 stated:

> "[9]For example, those policies relating to sites protected under the Birds and Habitats Directives … and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."

8.4 Paragraph 172 of the NPPF

8. In chapter 15 of the NPPF, "Conserving and enhancing the natural environment", paragraph 170 states that "[planning] policies and decisions should contribute to and enhance the natural and local environment by … a) protecting and enhancing valued landscapes … (in a manner commensurate with their statutory status or identified quality in the development plan) … ." The relevant statutory provision for Areas of Outstanding Natural Beauty is in section 85(1) of the Countryside and Rights of Way

Act 2000, which provides that "[in] exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty".

9. Paragraph 172 of the NPPF states:

> "172. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within these designated areas should be limited. Planning permission should be refused for major development[55] other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:
>
> a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
>
> c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

Footnote 55 states:

> "[55]For the purposes of paragraphs 172 and 173, whether a proposal is "major development" is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined."

10. Paragraph 173 states:

> "173. Within areas defined as Heritage Coast (and that do not already fall within one of the designated areas mentioned in paragraph 172), planning policies and decisions should be consistent with the special character of the area and the importance of its conservation. Major development within a Heritage Coast is unlikely to be appropriate, unless it is compatible with its special character."

8.5 The inspector's decision letter

11. The council's case before the inspector was based on its first reason for refusing planning permission, which was that "the proposal, as a result of the urbanising impact and harm to the landscape character would cause material harm to the intrinsic character, beauty and openness of the Countryside beyond the Green Belt, the AONB and the AGLV".

12. In his decision letter the inspector identified three main issues: first, "the effects of the proposed development on … [the] character and appearance of the area and the AONB"; second, its effects on "highway safety"; and third, its effects on the "[supply] of housing land" (paragraph 9). Having summarised the content of the relevant provisions of the development plan, he referred to relevant policies in the NPPF, noting that "[paragraph] 11 of [the NPPF]… sets out how decisions should apply a presumption in favour of sustainable development", and paragraph 172 "provides that great weight should be given to conserving and enhancing landscape and scenic beauty in AONBs which have the highest status of protection in relation to these issues" (paragraph 15).

13. On the first main issue, the inspector found that although the proposal was not for "major development" in the AONB, it "would result in significant overall harm to the character and appearance of the area" (paragraph 31). His assessment led him to this conclusion (in paragraph 33):

> "33. … I consider that the outline proposal … would be likely to result in a scheme that had a significant adverse effect on the character and appearance of the area. This would not conserve or enhance the landscape and scenic beauty of the AONB. The resultant harm, in accordance with [the NPPF], should be given great weight in the planning balance. The proposal would not safeguard the intrinsic character of the countryside and so would be at odds with LPP1 Policy RE1. It would also conflict with LPP1 Policy RE3 because it would not respect the distinctive character of the landscape. LPP1 Policies RE1 and RE3 are consistent with [the NPPF]."

14. On the second main issue he did "not consider that any … harm to highway safety should weigh significantly against the proposal" (paragraph 37).

15. On the third main issue he found that the "housing land supply … would be between 3.37 years and 4.6 years", which he described as a "significant shortfall" (paragraph 41). He concluded that "[given] the housing land supply situation and the degree of shortfall", these additional dwellings, including affordable housing, were "benefits which should be given significant weight in the planning balance" (paragraph 42).

16. In his "Conclusions", taking into account the support it gained from development plan policies favouring the provision of housing in Haslemere, the increase in the supply of affordable housing and the enhancement of biodiversity, but also its conflict with plan policies for the protection of the AONB, the AGLV and the countryside, the inspector concluded that the proposal would be "contrary to the provisions of the development plan taken as a whole". Sub-paragraph c) in paragraph 11 of the NPPF did not apply, because the proposal did "not accord with an up-to-date development plan" (paragraph 46).

17. His crucial conclusions, culminating in the dismissal of the appeal, followed (in paragraphs 47 to 51):

> "47. I have found that [the council] cannot demonstrate a 5 year supply of deliverable housing sites, and so paragraph 11d) is engaged by virtue of Footnote 7. Paragraph 11d) i. refers to the application of [the] policies [of the NPPF] that protect areas or assets of particular importance. The appellant argues that no such policies are engaged in this case. I disagree. In paragraph 11d) i. the reference to "protect" has its ordinary meaning to keep safe, defend and guard. It seems to me that that is precisely what paragraph 172 seeks to achieve with respect to landscape and scenic beauty in AONBs. This … policy [of the NPPF] for AONBs states that they have the highest status of protection in relation to conserving and enhancing landscape and scenic beauty, and that within AONBs the scale and extent of development should be limited. The inclusion of AONBs in Footnote 6 brings into play the whole of paragraph 172, not just that part which deals with major development, as the appellant's closing submissions seem to imply.
>
> 48. Given my findings about the effects on the character and appearance of the area, as set out above, I consider that applying … policies [of the NPPF] for the AONB here provides a clear reason for refusing the proposed development. So the provisions of paragraph 11 d) i. disengage the tilted balance. Therefore, the planning balance in this case is a straight or flat balance of benefits against harm.
>
> 49. The appeal scheme would provide additional housing in Haslemere, including affordable units, in an area of need. There would also be some benefits to the local economy and to biodiversity. But in my judgement these benefits would be outweighed by the harm to the character and appearance of the area, along with the harm to the AONB which attracts great weight. I find that the planning balance falls against the proposal.
>
> 50. The proposal would be contrary to the provisions of the development plan taken as a whole. It would not gain support from [the NPPF]. There are no material considerations here which indicate that the determination of the appeal should be other than in accordance with the development plan.
>
> 51. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be dismissed. … ."

The judgment of Holgate J.

18. Holgate J. set out (in paragraph 39 of his judgment) 15 points on the "meaning and effect" of paragraph 11 of the NPPF, and a shorter, eight-point "practical summary" (in paragraph 45). The 15 points are common ground in this appeal, and in my view rightly so. They include these propositions:

> " …

5) Where there are relevant development plan policies, but the most important for determining the application are out-of-date, planning permission should be granted (subject to section 38(6) [of the Planning and Compulsory Purchase Act 2004]) *unless either* limb (i) *or* limb (ii) is satisfied;

6) Because paragraph 11(d) states that planning permission should be granted *unless* the requirements of either alternative is met, it follows that if either limb (i) or limb (ii) is satisfied, the presumption in favour of sustainable development ceases to apply. The application of each limb is essentially a matter of planning judgment for the decision-maker;

7) Where more than one "Footnote 6" policy is engaged, limb (i) is satisfied, and the presumption in favour of sustainable development overcome, where the individual or cumulative application of those policies produces a clear reason for refusal;

…

10) Under limb (i) the test is whether the *application* of one or more "Footnote 6 policies" provides a clear reason for refusing planning permission. The mere fact that such a policy is *engaged* is insufficient to satisfy limb (i). Whether or not limb (i) is met depends upon the outcome of *applying* the relevant "Footnote 6" policies

(addressing the issue on paragraph 14 of NPPF 2012 which was … resolved in

8.6 [Barwood Strategic Land II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893] at [22(2)]);

11) Limb (i) is applied by taking into account only those factors which fall within the ambit of the relevant "Footnote 6" policy. Development plan policies and other policies of the NPPF are not to be taken into account in the application of limb (i) (see Footnote 6). … ;

12) The application of some "Footnote 6" policies (e.g. Green Belt) requires *all* relevant planning considerations to be weighed in the balance. In those cases because the outcome of that assessment determines whether planning should be granted or refused, there is no justification for applying limb (ii) in addition to limb (i). … ;

13) In other cases … , the relevant "Footnote 6 policy" may not require all relevant considerations to be taken into account. For example, paragraph 196 of the NPPF requires the decision-maker to weigh only "the less than substantial harm" to a heritage asset against the "public benefits" of the proposal. Where the application of such a policy provides a clear reason for refusing planning permission, it is still necessary for the decision-maker to have regard to all other relevant considerations before determining the application or appeal (s. 70(2) of the 1990 Act and s. 38(6) of the 2004 Act). But that exercise must be carried out without applying the tilted balance in limb (ii), because the

presumption in favour of granting permission has already been disapplied by the outcome of applying limb (i). That is the consequence of the decision-making structure laid down in paragraph 11(d) of the NPPF;

…".

19. Rejecting Monkhill's argument that the first part of paragraph 172 of the NPPF does not qualify under "limb (i)" because it does not state any test for a balancing exercise, and therefore cannot provide "a clear reason for refusing the development proposed", the judge said (in paragraphs 51 to 53):

> "51. It is necessary to read the policy in paragraph 172 as a whole and in context. Paragraph 170 requires planning decisions to protect and enhance valued landscapes in a manner commensurate with their statutory status and any qualities identified in the development plan. Paragraph 172 points out that National Parks, the Broads and AONBs have "the highest status of protection" in relation to the conservation and enhancement of landscapes and scenic beauty. Not surprisingly, therefore, paragraph 172 requires "great weight" to be given to those matters. The clear and obvious implication is that if a proposal harms these objectives, great weight should be given to the decision-maker's assessment of the nature and degree of harm. The policy increases the weight to be given to that harm.
>
> 52. Plainly, in a simple case where there would be harm to an AONB but no countervailing benefits, and therefore no balance to be struck between "pros and cons", the effect of giving great weight to what might otherwise be assessed as a relatively modest degree of harm, might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case. But where there are also countervailing benefits, it is self-evident that the issue for the decision-maker is whether those benefits outweigh the harm assessed, the significance of the latter being increased by the requirement to give "great weight" to it. This connotes a simple planning balance which is so obvious that there is no interpretive or other legal requirement for it to be mentioned expressly in the policy. It is necessarily implicit in the *application* of the policy and a matter of planning judgment. The "great weight" to be attached to the assessed harm to an AONB is capable of being outweighed by the benefits of a proposal, so as to overcome what would otherwise be a reason for refusal.
>
> 53. Interpreted in that straight forward, practical way, the first part of paragraph 172 of the NPPF is capable of sustaining a clear reason for refusal, whether in the context of paragraph 11(d)(i) or, more typically where that provision is not engaged, in the general exercise of development management powers."

20. Holgate J. concluded that "the first part of paragraph 172 … qualifies as a policy to be applied under limb (i) of paragraph 11(d) …", and "is also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads" (paragraph 63).

Did the inspector misinterpret paragraph 172 of the NPPF?

21. For Monkhill, Mr Charles Banner Q.C. argued that the inspector misunderstood the policy in paragraph 172 of the NPPF, and in particular that he misinterpreted the policy in the first part of the paragraph by concluding that it could, in principle, satisfy paragraph 11d)i, thus disapplying the so-called "tilted balance" under paragraph 11d)ii. The judge was wrong to support the inspector's interpretation of the policy.

22. The main contention advanced by Mr Banner is that a policy that simply specifies a degree of weight to be given to a particular consideration is not capable of providing, in its application, a "clear reason for [refusal]". Merely giving "great weight" to "conserving and enhancing landscape and scenic beauty" in an AONB does not provide a "clear reason for [refusal]". Whether planning permission should be refused requires a balancing of all considerations for and against the proposed development.

23. On Mr Banner's argument, the application of a policy will only be capable of providing a "clear reason for [refusal]" if that policy itself provides that permission should, or should normally, be refused unless certain requirements or criteria are met, or if it provides for its own, self-contained balancing exercise. The first sentence of paragraph 172 of the NPPF says nothing about the weight to be given to any other considerations, including the benefits of a proposal. Its application is incapable of providing a "clear reason for refusing" planning permission. By contrast, the second part of paragraph 172, which relates specifically to "major development", says that "planning permission should be refused … other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest", and then identifies three matters to be assessed. Apart from the policy in the first part of paragraph 172 the NPPF policies referred to in footnote 6, though framed in differing terms, are of that nature. The range of the footnote 6 policies is so wide, Mr Banner submitted, that it will often be necessary for a decisionmaker to consider whether the application of the relevant policy provides a "clear reason for refusing the development proposed". In every such case the conclusion reached will determine whether the "tilted balance" under paragraph 11d)ii is disapplied.

24. Mr Banner did not criticise the inspector's conclusions (in paragraph 33 of his decision letter) that the proposed development "would not conserve or enhance the landscape and scenic beauty of the AONB" and that the "resultant harm, in accordance with [the NPPF] should be given great weight in the planning balance". But, he submitted, the inspector erred when concluding (in paragraph 48) that the application of paragraph 172 "[provided] a clear reason for refusing the proposed development" under paragraph 11d)i, instead of applying the "tilted balance" under paragraph 11d)ii, and giving "great weight" to the conservation and enhancement of the landscape and scenic beauty of the AONB when he did so.

25. Elegantly as those submissions were presented by Mr Banner, I cannot accept them. They do not, in my view, reflect an accurate understanding of the policies we are considering and the way in which those policies are intended to operate. I think Holgate J. was right to reject them, for the reasons he gave. I agree with him that the inspector's decision is not flawed by a mistaken interpretation, or unlawful application, of relevant policy.

26. When a question of the proper interpretation of national planning policy arises in legal proceedings, one must remember that the court is not construing a statute or contract. It is seeking to discern the true, practical meaning of a policy issued by the Government, whose purpose is to bring clarity, consistency and predictability to the operation of the planning system. It is trite that the court does not adopt the same linguistic rigour in construing a planning policy as it does to the construction of a legislative provision or a clause in a contract (see *East Staffordshire Borough Council*, at paragraphs 8 and 9).

27. In considering the policies in the revised versions of the NPPF, published in July 2018 and February 2019, the court will bear in mind that when the Government prepared those policies it was able to take into account the ample case law in which their predecessors – the policies in the original, 2012 version of the NPPF – had been the subject of judicial interpretation and comment. As Mr Banner's submissions demonstrated, this certainly applies to the NPPF's policy for "the presumption in favour of sustainable development", which was reformulated in the July 2018 version. At least some of the court's observations on the previous policy seem to have come through (see, for example, *East Staffordshire Borough Council*, at paragraphs 22 and 23). This does not mean that the court should adopt a less than objective approach to interpreting the new policies, or strain the meaning of the words used to give them a different sense from their natural meaning when read in their proper context. The court's role is merely one of interpreting the policy as written, and in context. Planning policies are meant to be intelligible to a wide audience, not merely to lawyers and other professional people. They should not be subjected to over-interpretation. A straightforward reading of them should always be favoured. Otherwise their true meaning and effect, as intended by the policy-maker, is liable to be lost.

28. The crucial question in this appeal is whether, on its true construction, the policy in paragraph 11d)i of the NPPF includes the application of the policy in the first part of paragraph 172, because the application of that policy is capable of providing a "clear reason for refusing" planning permission. In my opinion, as Holgate J. held, it does. The sense of the word "provides" in paragraph 11d)i is that the application of the policy in
question yields a clear reason for refusal – in the decision-maker's view, as a matter of planning judgment (see paragraphs 51 to 53 and 63 of the judgment of Holgate J.). It is not that the policy itself contains some provision expressed in words one might expect to see in a local planning authority's decision notice. And I do not accept that a policy, when applied, can only provide a "clear reason for [refusal]" if it includes its own selfcontained criteria or test, failure of which will be, or will normally be, fatal to the proposal. That is not what the policy in paragraph 11d)i says, and it is not to be inferred from the policy. Nor is there any indication in footnote 6 that this was what the

Government intended. Nowhere is it suggested that the footnote includes only some parts of the policies to which it refers, or that only a policy formulated in a particular way will qualify as relevant for the purposes of paragraph 11d)i.

29. In my view, as Mr Richard Moules submitted for the Secretary of State, the policy in the first part of paragraph 172, which refers to the concept of "great weight" being given to the conservation and enhancement of landscape and scenic beauty in an AONB, clearly envisages a balance being struck when it is applied in the making of a

planning decision in accordance with the statutory regime under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act (see *Hopkins Homes Ltd.*, at paragraphs 21 and 75, and *East Staffordshire Borough Council*, at paragraph 13). It is, as the judge recognised, a balance between what can properly be seen, on one hand, as a breach of, or conflict with, the policy and, on the other, any countervailing factors. To speak of a breach of the policy when the development would harm the AONB, or of a conflict with the policy in those circumstances, seems entirely realistic.

30. This, in my view, is plain on a straightforward reading of paragraph 172 in its context, having regard to its obvious purpose. The policy is not actually expressed in terms of an expectation that the decision will be in favour of the protection of the "landscape and scenic beauty" of an AONB, or against harm to that interest. But that, in effect, is the real sense of it – though this, of course, is not the same thing as the proposition that no development will be permitted in an AONB. If the effects on the AONB would be slight, so that its highly protected status would not be significantly harmed, the expectation might – I emphasise "might" – be overcome. Or it might be overcome if the effects of the development would be greater, but its benefits substantial. This will always depend on the exercise of planning judgment in the circumstances of the individual case.

8.7 31. In Bayliss v Secretary of State for Communities and Local Government [2014] EWCA Civ 347, at paragraph 18 of his judgment (cited by Ouseley J. in Franks v Secretary of

State for Communities and Local Government [2015] EWHC 3690 (Admin), at paragraph 25), Sir David Keene said this of the concept of "great weight" in the equivalent policy in the first sentence of paragraph 115 of the original version of the NPPF, which was in almost exactly the same terms as the first sentence of the paragraph 172 of the July 2018 version:

> "18. … [That] national policy guidance, very brief in nature on this point, has to be interpreted in the light of the obvious point that the effect of a proposal on an AONB will itself vary: it will vary from case to case; it may be trivial, it may be substantial, it may be major. The decision maker is entitled to attach different weights to this factor depending upon the degree of harmful impact anticipated. Indeed, in my view it would be irrational to do otherwise. The adjective "great" in the term "great weight" therefore does not take one very far. … ."

32. I agree. The most important point here, however, as Holgate J. recognised (in paragraph 53 of his judgment), is that the requirement in the policy in the first part of paragraph 172 for "great weight" be given to the conservation and enhancement of landscape and scenic beauty in an AONB does not prevent its application providing a clear reason for the refusal of planning permission.

33. That it can be so applied is plain from the policy's context and purpose. Its context is a chapter of the NPPF whose objectives, as stated in the chapter heading, are "Conserving and enhancing the natural environment". The central aim of the policies in that chapter, stated in paragraph 170, is "protecting and enhancing valued

landscapes", including those in AONBs. This is consistent with the statutory obligation in section 85(1) of the Countryside and Rights of Way Act to "have regard to the purpose of conserving and enhancing the natural beauty of the [AONB]". Paragraph 172 itself is in terms that stress the imperative of protection. Emphasis is placed on "conserving", as well as "enhancing", an AONB's landscape and scenic beauty. AONBs are described there as having "the highest status of protection in relation to these issues", and the "scale and extent of development" within them and the other designated areas, the policy says, "should be limited".

34. I accept Mr Moules' submission that the language of the first part of paragraph 172, read in that context and in the light of that purpose, can perfectly well found a "clear reason for [refusal]", in accordance with paragraph 11d)i. It embodies the principle that decisions on applications for planning permission, as well as policies in development plans, should work to "[conserve and enhance] landscape and scenic beauty" in AONBs, so that in a relevant case, when the policy is applied, a balance will be struck in which appropriate weight is given to any conflict with that objective, and in striking the balance the decision-maker will have in mind the need to protect the AONB and to limit the scale and extent of development within it. In doing this, the decision-maker will have to exercise planning judgment. The application of the policy necessarily involves a balancing exercise in which any harmful effects of the proposed development on the AONB are given due weight, having regard to what the policy says, and any benefits of the proposal are set against them, leading to a conclusion, as a matter of planning judgment, on whether there is a "clear reason for refusing the development proposed". If there are no benefits to set against the harm to the AONB, or if there are benefits but they are insufficient to outweigh the harm, the decision-maker might properly conclude that the "application" of the policy does indeed provide "a clear reason for refusing the development proposed".

35. I see nothing at odds with this understanding of the first part of paragraph 172 in the inspector's relevant conclusions here. He discerned the true meaning of the policy, rightly applied it under paragraph 11d)i, and conducted an impeccable balancing exercise, setting benefit against harm. His conclusions demonstrate a lawful application of the policies in both of those passages of the NPPF, consistent with their correct interpretation, and fully in compliance with the statutory requirements for decision-making in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. And that is enough to dispose of Monkhill's appeal.

36. If the interpretation urged on us by Mr Banner were right, it would, in my view, produce a result incompatible with the objectives of paragraphs 11 and 172, read together. As Mr
Moules submitted, it would prevent the policy in paragraph 172 being given its full potential effect under the policy in paragraph 11d). Here again I agree with the judge's analysis.

37. The "tilted balance", or positive presumption, under paragraph 11d)ii is not available in every case where there are "no relevant policies" of the development plan or the "most important policies" in the plan are "out-of-date". It is deliberately disapplied in the situation provided for in paragraph 11d)i, where policies of the NPPF that "protect areas or assets of particular importance" – the footnote 6 policies – are engaged, applied and found to justify planning permission being withheld (see the first instance judgment in *Forest of Dean District Council v Secretary of State for Communities and Local*

Government [2016] P.T.S.R. 1031, at paragraph 28). Otherwise, the "tilted balance" could work against the protection afforded by those policies and undermine them. This would not only be hostile to the evident objective of the policy in paragraph 11d)i. It would also be inimical to the explicit strategy of the NPPF itself for "sustainable development".

38. Under paragraph 11d)i, it is not enough that a footnote 6 policy, restrictive of development, is engaged. The policy in question must actually be applied (see *R. (on the application of Watermead Parish Council) v Aylesbury Vale District Council* [2018] P.T.S.R. 43, at paragraph 45, and *East Staffordshire Borough Council*, at paragraph 22(2)), and its application must provide a "clear reason for [refusal]". Only then will the "tilted balance" under paragraph 11d)ii be disapplied by the operation of paragraph 11d)i. If the policy in paragraph 11d)i is to be operated effectively, it is therefore essential that policies referred to in footnote 6 are not artificially excluded in the absence of clear words with that effect.

39. That, however, would seem to be a consequence of Mr Banner's suggested interpretation of the first part of paragraph 172. Mr Banner's construction would create a distinction with artificial consequences between proposals for "major development" in an AONB, judged by the approach referred to in footnote 55, and proposals not in that category. The consequence would be that proposals for less than "major development" could only be subject to the "tilted balance" under paragraph 11d)ii. The application of the "tilted balance" under paragraph 11d)ii could depend on the decision-maker's finding on the question of whether the proposal was or was not for "major development". Despite AONBs having the "highest status of protection" under the policies in paragraphs 170 and 172, proposed development in an AONB that was not "major", and regardless of the level of harm, would not be subject to the exercise required under paragraph 11d)i. Such proposals would enjoy the application of the positive presumption under paragraph 11d)ii. To this extent, the protection given to AONBs by government policy would be weakened.

40. As Mr Moules submitted, it makes no sense to read paragraph 172 as confining the possible disapplication of the "tilted balance" under paragraph 11d)ii to "major development". The range in scale of development that might be proposed in an AONB runs from the very small to the very large. The interpretation of the policy in paragraph 172 that I believe is correct allows for the policy it contains to be applied realistically to the whole range of proposals, giving suitable weight to any harm to the AONB on the facts of the case in hand. It avoids a stark divide in policy treatment between two similar proposals on either side of the line – wherever it happens to be – between "major" and non-"major", one gaining the application of the "tilted balance" under paragraph 11d)ii, the other not.

41. Though there are differences of degree and language, there is no material distinction between the protective nature of the policy in the first part of paragraph 172 and the other policies in the NPPF whose application, Mr Banner accepted, is capable of providing a "clear reason for [refusal]" so as to come within the scope of paragraph 11d)i. I do not accept that a material distinction arises from the absence of a clearly stated criterion or requirement against which a proposal must be judged. And there is no other material difference, in principle, between the various policies gathered in footnote 6. What they have in common is that they are all policies of protection for

selected interests of “particular importance”, even though, individually, they differ in the strength of that protection. There is no single formula used in them all.

42. For example, the policy in the second part of paragraph 172, relating to “major development”, states the approach to such proposals, which is that planning permission for them should be “refused … other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest”. It identifies three matters to be assessed in the consideration of such a proposal. This policy indicates the need for the balance to be struck differently, as a matter of planning judgment, when the proposal is for “major development”. It requires the decision-maker to strike the balance in that way to find whether it produces a “clear reason for refusing” planning permission. But it does not state, or imply, that the application of the first part of the policy is not, in itself, capable of doing that in a case where the proposal is for development other than “major development”.

43. A similar exercise to that entailed in the first part of paragraph 172 is also implicit in the first sentence of paragraph 173. The policy requirement here, for decision-making, is that the decision “should be consistent with the special character of the area [of Heritage Coast] and the importance of its conservation”. This too allows for the striking of a balance, the outcome of which may be that a clear reason for the refusal of planning permission emerges. A proposal may be, or may not, “consistent with the special character of the area and the importance of its conservation”. If it is not, the inconsistency may be outweighed when the policy is applied in an individual case.

44. The second sentence of paragraph 173 concerns “[major] development within a Heritage Coast”, which is said to be “unlikely to be appropriate, unless it is compatible with its special character”. Here too, as in paragraph 172, there is a specific approach for “major development”, which brings this part of the policy within the scope of paragraph 11d)i. But this does not prevent the policy for proposals other than “major development”, in the first sentence of paragraph 173, from coming within paragraph 11d)i as well. There is no such suggestion in the words of paragraph 173, nor is it a necessary inference from them. In both paragraphs 172 and 173, and for both “major development” and development that is not “major development”, there is a steer for the decision-maker on the approach to take. As one might expect, the policy in each of these two paragraphs is in stronger terms for “major development”. But the protection expressed in it also extends to development that is not “major”. In both paragraphs the policies of protection qualify, in full, within footnote 6 and paragraph 11d)i.

45. Likewise in my view, paragraph 196, which says that “[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 …”, falls within
the reach of paragraph 11d)i. This policy must be read together with the policy in paragraph 194 that “[any] harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification”. Like paragraphs 172 and 173, it allows for an appropriate balancing exercise to be undertaken. It is inherent in the policy that if the harm to the heritage asset is not outweighed there may be a “clear reason” for refusing planning permission. Here again, the policy does not prescribe the outcome of the balancing exercise in a particular case. That is for the

decision-maker to resolve by applying the policy appropriately, in accordance with the relevant principles.

46. Similar points can be made about the policies for development in the Green Belt, in paragraphs 143 to 145. Paragraph 143 contains the long-established policy that "[inappropriate] development" in the Green Belt "should not be approved except in very special circumstances"; and the second sentence in paragraph 144, the familiar concept that "['very] special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations". These policies would appear to meet Mr Banner's suggested qualification for inclusion in the scope of paragraph 11d)i. But the first sentence of paragraph 144, which says that "[when] considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt", would seem not to qualify because it is simply an instruction on weight. As Mr Moules pointed out, if this were so, a proposal for development that was not "inappropriate" – because, for example, it fell within one of the exceptions in paragraph 145 – might only be dealt with in the "tilted balance" under paragraph 11d)ii, regardless of the "substantial weight" that government policy requires to be given to any harm to the Green Belt.

47. Finally, Mr Banner sought support for his argument in the "pedigree" of paragraph 11d)i. He drew our attention to the Government's consultation document on the proposed revision of the NPPF, published in March 2018. The new policy, he contended, was clearly a deliberate change from the formulation in paragraph 14 of the NPPF as originally published, which referred to development being "restricted", not "refused" (see the first instance judgments in *Borough of Telford & Wrekin v Secretary of State for Communities and Local Government* [2016] EWHC 3073 (Admin), at paragraphs 36 to 38, and *Forest of Dean District Council*, at paragraphs 25 to 29). The policy in the first part of paragraph 172 is not even in terms suggesting development should, in principle, be "restricted", let alone "refused"; it merely indicates the degree of weight to be given to one particular factor.

48. I do not find that submission persuasive. It does not confront the task of interpretation with which the court is faced on the current version of the NPPF. It does not undo the interpretation of the first part of paragraph 172 as a policy whose "application" under paragraph 11d)i, in the way I have described, is capable of providing a "clear reason for refusing" planning permission. The fact that the policy does not in its own terms articulate that "clear reason for [refusal]" does not disqualify it as a relevant policy under paragraph 11d)i.

8.8 Conclusion

49. For the reasons I have given, I would dismiss the appeal.

Lady Justice Andrews

50. I agree.

Sir Gary Hickinbottom

51. I also agree.