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South Cambridgeshire
District Council

31 August 2021

To: Chair – Councillor Henry Batchelor
Vice-Chair in the Chair

All Members of the Planning Committee - Councillors Dr. Martin Cahn, Dr. Claire Daunton (substitute for Pippa Heylings), Peter Fane, Geoff Harvey, Dr. Tumi Hawkins, Judith Rippeth, Deborah Roberts, Heather Williams, Dr. Richard Williams and Eileen Wilson

Quorum: 3

Substitutes if needed: Councillors Dr. Claire Daunton (As substitute for Pippa Heylings), Nick Wright, Sue Ellington, Grenville Chamberlain, Mark Howell, Dr. Shrobona Bhattacharya, Graham Cone, Anna Bradnam, Brian Milnes and Jose Hales

Dear Councillor

You are invited to attend the next meeting of **Planning Committee**, which will be held in the Council Chamber on **Wednesday, 8 September 2021** at **10.00 a.m.. A weblink to enable members of the press and public to listen to the proceedings will be published on the relevant page of the Council's website , normally, at least 24 hours before the meeting.**

Members are respectfully reminded that when substituting on committees, subcommittees, and outside or joint bodies, Democratic Services must be advised of the substitution ***in advance of*** the meeting. It is not possible to accept a substitute once the meeting has started. Council Standing Order 4.3 refers.

Yours faithfully
Liz Watts
Chief Executive

The Council is committed to improving, for all members of the community, access to its agendas and minutes. We try to take all circumstances into account but, if you have any specific needs, please let us know, and we will do what we can to help you.

Agenda Supplement

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Erection of a chalet bungalow with garage and associated infrastructure

The section called ‘Appendices’ consists of appendices 1-6, 8 and 9. Appendix 7 is a separate document and large computer file (over 17 Mb).

Exclusion of Press and Public

The law allows Councils to consider a limited range of issues in private session without members of the Press and public being present. Typically, such issues relate to personal details, financial and business affairs, legal privilege and so on. In every case, the public interest in excluding the Press and Public from the meeting room must outweigh the public interest in having the information disclosed to them. The following statement will be proposed, seconded and voted upon.

"I propose that the Press and public be excluded from the meeting during the consideration of the following item number(s) ….. in accordance with Section 100(A) (4) of the Local Government Act 1972 on the grounds that, if present, there would be disclosure to them of exempt information as defined in paragraph(s) ….. of Part 1 of Schedule 12A of the Act.”

If exempt (confidential) information has been provided as part of the agenda, the Press and public will not be able to view it. There will be an explanation on the website however as to why the information is exempt.

Notes

(1) Some development control matters in this Agenda where the periods of consultation and representation may not have quite expired are reported to Committee to save time in the decision making process. Decisions on these applications will only be made at the end of the consultation periods after taking into account all material representations made within the full consultation period. The final decisions may be delegated to the Corporate Manager (Planning and Sustainable Communities).

(2) The Council considers every planning application on its merits and in the context of national, regional and local planning policy. As part of the Council's customer service standards, Councillors and officers aim to put customers first, deliver outstanding service and provide easy access to services and information. At all times, we will treat customers with respect and will be polite, patient and honest. The Council is also committed to treat everyone fairly and justly, and to promote equality. This applies to all residents and customers, planning applicants and those people against whom the Council is taking, or proposing to take, planning enforcement action. More details can be found on the Council's website under 'Council and Democracy'.

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Claim form and supporting documents
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Judicial Review

Claim form

For Court use only

Name of court

High Court of Justice
Planning Court

Reference number

Date

Day	Month	Year

If you do not have all the documents or information you need for your claim, you must not allow this to delay sending or taking the form to the Administrative Court Office within the correct time. Complete the form as fully as possible and provide what documents you have. The notes to section 9 will explain more about what you have to do in these circumstances.

Time limit for filing a claim

Where an application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed **not later than six weeks** after the grounds to make the claim first arose.

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Section 1 – Details of the claimant(s) and defendant(s)

1. Claimant(s) name and address(es)

First name(s)

Fews Lane Consortium Ltd

Last name

Address

Building and street

The Elms, Fews Lane

Second line of address

Longstanton

Town or city

Cambridge

County (optional)

Cambridgeshire

Postcode

C B 2 4 3 D P

Phone number

01954 789237

Email (if you have one)

1.1 Claimant's or claimant's legal representative's address to which documents should be sent.

Note 1.1: Give full name(s) and address(es) to which all documents relating to the judicial review are to be sent.

First name(s)

Last name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

1.2 Claimant's Counsel's details

First name(s)

Last name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

1.3 1st Defendant's name

South Cambridgeshire District Council

1.4 Defendant's or (where known) Defendant's legal representative's address to which documents should be sent.

Address

Building and street

South Cambridgeshire Hall

Second line of address

Cambourne Business Park

Town or city

Cambridge

County (optional)

Cambridgeshire

Postcode

C B 2 3 6 E A

Phone number

07817 730893

Email

Stephen.Reid@3csharedservices.org

1.5 2nd Defendant's name

1.6 Defendant's or (where known) Defendant's legal representative's address to which documents should be sent.

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

Section 2 – Contact details of other interested parties

2.1 1st Interest party

First name(s)

Landbrook Homes Ltd

Last name

Address

Building and street

36a Church Street

Second line of address

Willingham

Town or city

Cambridge

County (optional)

Cambridgeshire

Postcode

C B 2 4 5 H T

Phone number

Email (if you have one)

2.2 2nd Interest party

First name(s)

Last name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

Section 3 – Details of the decision to be judicially reviewed

3.1 Give details of the decision you seek to have judicially reviewed.

The Claimant challenges the defendant's decision of 27 May 2021 to grant planning permission for the erection of two dwellings in relation to planning application 20/02453/S73.

Note 3.1: Use a separate sheet if you need more space for your answers, marking clearly which section the information refers to.

3.2 Date of decision

Day	Month	Year
27	May	2021

3.3 Name and address of the court, tribunal, person or body who made the decision to be reviewed.

Name

South Cambridgeshire District Council

Address

Building and street

South Cambridgeshire Hall

Second line of address

Cambourne Business Park

Town or city

Cambridge

County (optional)

Cambridgeshire

Postcode

C B 2 3 6 E A

Section 4 – Permission to proceed with a claim for judicial review

This section must be completed. You must answer all the questions and give further details where required.

4.1 Are you making any other applications?

☐ Yes. Complete Section 8.

☑ No

Is the claimant in receipt of a Civil Legal Aid Certificate?

☐ Yes

☑ No

Does your claim, or any application for interim relief or expedition need to be decided urgently?

☐ Yes. Complete form **N463PC** and file this with your application.

☑ No

Have you complied with the pre-action protocol?

☑ Yes

☐ No. Give reasons for non-compliance in the box below.

Have you issued this claim in the region with which the claim is most closely connected?

☑ Yes. Give any additional reasons for wanting it to be dealt with in this region in the box below

☐ No. Give reasons in the box below

Does the claim include any issues arising from the Human Rights Act 1998?

☐ Yes. State the articles which you contend have been breached in the box below.

☑ No

Section 5 – Statement of facts relied on

See attachment.

Note 5: The facts on which you are basing your claim should be set out in this section of the form, or in a separate document attached to the form. It should contain a numbered list of the points that you intend to rely on at the hearing. Refer at each point to any documents you are filing in support of your claim.

Section 6 – Detailed statement of grounds

6.1 The detailed statement of grounds are:

☐ Set out below

☑ attached

Note 6.1: Use a separate sheet if you need more space for your answers, marking clearly which section the information refers to.

Section 7 – Aarhus Convention claim

7.1 I contend that this claim is an Aarhus Convention claim

☑ Yes. Indicate in the following box if you do not wish the costs limits under CPR 45.43 to apply.

☐ No

If you have indicated that the claim is an Aarhus claim set out the grounds below, including (if relevant) reasons why you want to vary the limit on costs recoverable from a party.

This claim for judcial review raises concerns about planned development of built structures affecting the state of land and landscape and having consequential impacts upon the health and safety of individuals. The claim therefore falls within the scope of Article 9(3) of the Aarhus Convention.

Note 7: The Aarhus Convention grants the public rights regarding access to information, public particiaption and access to justice, in government decision-making processes on matters concerning local, national and transboundary environment.

It focuses on interactions between public and public authorities. Please indicate whether you are seeking the costs protection in CPR 45.

Section 8 – Details of remedy (including any interim remedy) being sought

The claimant seeks an order quashing the impupgned decision, a declaration that the defendant has erred in law, and an order that the defendant pays the claimant's costs in the claim.

Note 8: Complete this section stating what remedy you are seeking:
(a) a mandatory order;
(b) a prohibiting order;
(c) a quashing order; or
(d) an injunction restraining a person from acting in any office in which he is not entitled to act.

A claim for damages may be included but only if you are seeking one of the orders set out above.

Section 9 – Other applications

9.1 I wish to make an application for:-

Note 9: You may wish to make additional applications to the Administrative Court in connection with your claim for Judicial Review. Any other applications may be made either in the claim form or in a separate application (form N244). This form can be obtained from any of the Administrative Court Offices listed overleaf or from our website at www.justice.gov.uk.

Statement of truth

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☑ **I believe** that the facts stated in this form are true. I confirm that all relevant facts have been disclosed in this application.

☐ **The claimant** believes that the facts stated in this form are true. **I am authorised** by the claimant to sign this statement.

Signature

☑ Claimant

☐ Litigation friend

☐ Claimant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
8	July	2021

Full name

Daniel Fulton

Name of claimant's legal representative's firm

If signing on behalf of firm or company give position or office held

Director

Section 10 – Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

- ☑ Statement of grounds
  - ☐ Included ☑ attached
- ☑ Statement of the facts relied on
  - ☐ Included ☑ attached
- ☐ Application to extend the time limit for filing the claim form
  - ☐ Included ☐ attached
- ☐ Application for directions
  - ☐ Included ☐ attached
- ☑ Any written evidence in support of the claim or application to extend time
- ☐ Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision
- ☑ Copies of any documents on which the claimant proposes to rely
- ☐ A copy of the legal aid or Civil Legal Aid Certificate (if legally represented)
- ☑ Copies of any relevant statutory material
- ☐ A list of essential documents for advance reading by the court (with page references to the passages relied upon)
- ☑ Where a claim relates to an Aarhus Convention claim, a schedule of the claimant's significant assets, liabilities and income.
  - ☐ Included ☑ attached
- ☑ a detailed statement of the grounds
  - ☐ Included ☑ attached

Note 10: Do not delay filing your claim for judicial review. If you have not been able to obtain any of the documents listed in this section within the time limits referred to on the previous page, complete the notice as best you can and ensure the claim is filed on time. Set out the reasons why you have not been able to obtain any of the information or documents and give the date when you expect them to be available.

Reasons why you have not supplied a document and date when you expect it to be available:-

Due to a software problem, it has not been possible to correctly number the pages and cross-reference them with the relvant passges in the statement of facts and grounds or essential reading list.

The deadline to issue the claim is today, and it will not be possible to resolve this problem prior to this afternoon.

Therefore, the claimant will be issuing the claim today and will provide the court with the essential reading list and a correctly cross-referenced statement of facts and grounds before the claimant's bundle is served on the parties.

Signature

Daniel D. Fulton

Claimant ~~or legal representative~~

Daniel Fulton

The Court and venue

CPR part 54 – claims for Judicial Review are dealt with by the Administrative Court.

The general expectation is that proceedings will be administered and determined in the region with which the claim has closest connection; see Practice Direction 54C 2.5.

- Where the claim is proceeding in the Administrative Court in **London**, documents must be filed in the Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.
- Where the claim is proceeding in the Administrative Court in **Birmingham**, documents must befiled in the Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 BullStreet, Birmingham B4 6DS.
- Where the claim is proceeding in the Administrative Court in **Wales**, documents must be filed in the Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.
- Where the claim is proceeding in the Administrative Court in **Leeds**, documents must be filed in theAdministrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.
- Where the claim is proceeding in the Administrative Court in **Manchester**, documents must befiled in the Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

From: **RCJFeesPayments** RCJFeesPayments@justice.gov.uk
Subject: Payment via Card - Fews Lane Consortium Ltd -v- South Cambridgeshire District Council
Date: 8 July 2021 at 10:27am
To: dgf@fewslane.co.uk
Cc: Administrative Court Office, General Office generaloffice@administrativecourtoffice.justice.gov.uk

Cardholder's name
[redacted]
Card number:
[redacted]
Expiry date (mm/yyyy):
[redacted]
Beneficiary: **ROYAL COURTS OF JUSTICE**
Description: Customer email:
dgf@fewslane.co.uk

VOUCHER
Order reference: **Fews Lane Consortium Ltd -v- South Cambr**
Payment reference: **6047359196**
Date : **2021-07-08 10:26:49**
Authorization code: **008293**
Operation Code: **VEN-Direct sale (payment)**
Phone number: **0207 073 4715**
E-mail address: **RCJfeespayments@justice.gov.uk**
Total: **GBP154**

Signature du titulaire / Handtekening van de kaarthouder
Par sa signature, le titulaire de carte reconnaît l'exactitude de cette facturette. / Door zijn handtekening bevestigt de kaarthouder de juistheid van dit aankoopbewijs.

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Kind regards,

Jiban Nessa
Fees Officel HMCTS I Royal Courts of Justicel Strand, London I WC2A 2LL
Phone: 0203 936 8957
Web: www.gov.uk/hmcts
HM Courts & Tribunals Service

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IN THE HIGH COURT OF JUSTICE **Claim No._____**
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN **(on the application of FEWS LANE CONSORTIUM LTD)**	**Claimant**
- and -	
SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL	**Defendant**
- and -	
LANDBROOK HOMES LTD	**Interested Party**

STATEMENT OF FACTS AND GROUNDS

Note: References in the form "CB/x" are to the page number within the Claimant's permission bundle.

Essential Reading:

- 1988 Planning application / decision / appeal
  - Appeal decision **[CB/53-54]**
- 2012 application / decision
  - Site plans **[CB/66-69]**
  - Local highway authority consultation response **[CB/70-71]**
  - Officer's report **[CB/74-80]**
- 2016 Planning application / decision / appeal
  - Consultation response from local highway authority dated 7 July 2018 **[CB/90-91]**
  - Correspondence from local highway authority dated 12 December 2018 **[CB/92-94]**
- 2019 Planning application / decision
  - Existing floorplans and elevations **[CB/104]**
  - Proposed site plan **[CB/105]**
  - Proposed floorplans and elevations **[CB/106]**
- Application 20/02453/S73
  - South Cambridgeshire District Council Local Plan 2018 - Policy H/16 **[CB/153]**
  - Statement of Community Involvement (paragraph 4.11) (adopted 2019) **[CB/157]**
  - Representations from claimant dated 20 April 2021 **[CB/158-159]**
  - Officer's Report **[CB/160-181]**

INTRODUCTION

(1) This is an application for permission to bring a claim for judicial review of the decision by South Cambridgeshire District Council ("**the Council**") to approve planning application S/02453/S73, an application submitted under section 73 of the Town and Country Planning Act 1990 seeking permission for the demolition of the existing bungalow and the erection of two dwellinghouses with parking at The Retreat, Fews Lane, Longstanton, Cambridge CB24 3DP ("**the Decision"**).

(2) The Claimant, the Fews Lane Consortium Ltd ("**the Consortium**"), is a community action group formed to represent the interests of local residents in regards to planning and development issues. The Consortium has five shareholders, four of whom reside immediately adjacent to the site of the proposed development.

(3) Landbrook Homes Ltd ("**Landbrook"**) is applicant for planning permission and has been identified by the Claimant as an Interested Party.

(4) The Consortium challenges the Council's Decision on four grounds:

Ground 1: The Defendant ignored a material consideration in failing to consider the key material policy of the development plan, policy H/16, which concerns the erection of additional dwellings within residential gardens.

Ground 2: The Defendant acted unreasonably by failing to consider its 2013 planning decision concerning the same form of development making use of the same access and by failing to explain the obvious inconsistency in its evaluation of highway safety considerations between its 2013 decision and the decision issued on 27 May 2021.

Ground 3: The Defendant breached the Claimant's legitimate expectation created by the Defendant's Statement of Community Involvement that the Claimant's material planning representations submitted on 20 April 2021 would be taken into consideration by the Defendant in reaching its Decision.

Ground 4: The Defendant's planning committee was misdirected in law as to the proper approach to the consideration of planning applications submitted under section 73 of the Town and Country Planning Act 1990 by the following statement, which was included in the officer's report to the committee: "In deciding an application under section 73, the local planning authority must only consider the disputed condition/s that are the subject of the application".

STATEMENT OF FACTS

(5) The Retreat is bungalow of 1960s construction that is accessed via an unpaved carriageway known as Fews Lane.

(6) There are currently 5 dwellings that rely upon Fews Lane for all vehicular and pedestrian access.

(7) Fews Lane is not an adopted highway and is not maintained at public expense or by any public authority.

(8) There is no right of access to Fews Lane for public vehicular traffic. However, a public footpath extends along most of the length of Fews Lane. This public right of way shares the unpaved carriageway surface with private vehicular traffic. There is no separation between pedestrians and vehicular traffic.

(9) The width of the unpaved carriageway of Fews Lane is generally around 3 metres.

(10) In 2012, a planning application **[CB/56-65]** was submitted seeking permission to erection two dwellings with parking and vehicular access within the garden of The Retreat.

(11) The local highway authority's response to the statutory consultation **[CB/70-71]** for this application included the following remarks:

> "Please forward the amended drawing showing the below requirements to the Highway Authority for approval prior to determination of the application:
>
> The access will need to be widened to a minimum width of 5m, for a minimum distance of 5m measured from the near edge of the highway boundary.
>
> Reason: in the interests of highway safety
>
> Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that two 2.0 x 2.0 metre pedestrian visibility splays be provided and shown on the drawings. The splays are to be included within the curtilage of the existing access. This area shall be kept clear of all planting, fencing, walls and the like exceeding 600mm high.
>
> Reason: in the interests of highway safety".

(12) In 2013, outline permission for the erection of two dwellings was granted, subject to a number of conditions. **[CB/81-88]**

(13) Condition No. 10 of the 2013 permission **[CB/82]** provides that:

> "Prior to the occupation of the dwellings hereby permitted visibility splays shall be provided on both sides of the access and shall be maintained free from any obstruction over a height of 600mm within an area of 2m x 2m measured from and along respectively the highway boundary.
>
> (Reason - In the interest of highway safety in accordance with Policy DPl3 of the adopted Local Development Framework 2007.)"

(14) Condition No. 12 of the 2013 permission **[CB/83]** provides that:

> "No development shall take place until a scheme for the widening of the existing access has been submitted to and approved in writing by the Local Planning Authority. The access shall be a minimum width of 5 metres for a minimum distance of 5m from the junction of the carriageway of High Street. The works shall be carried out on accordance with the approved details prior to occupation of the dwellings hereby permitted.
> (Reason - In the interests of highway safety)."

(15) Applications seeking planning permission for the erection of additional dwellings within the garden of The Retreat were submitted in 2015, 2016, and 2018.

(16) In the summer of 2018, the local highway authority decided to change its view as to what highway safety conditions should be attached to any permissions granted for the site. In a letter dated 12 December 2018 **[CB/92-94]**, the local highway authority explained its reasons for doing so:

> "21. The Local Highway Authority can only request works within land that is within the ownership of the applicant or within the public highway.
>
> 1,2. as confirmed previously the applicant does not own the access and the public right of way is only approximately 2m in width in this location therefore the access cannot be widened to 5 metres in width, however it could be constructed in a bound material for 5m from the rear of the footway and the Local Highway Authority will seek a condition to reflect this.
>
> 3. as stated above within points 14,15 the Local Highway Authority believes that pedestrian visibility splays of 1.5m x 1.5m as per Design Manual for Roads and Bridges can be achieved at the junction of Few's Lane and the High Street."

(17) In 2019, planning permission for demolition of The Retreat and its replacement with two dwellinghouses was granted by the Defendant in regards to planning application S/0277/19/FL. **[CB/120-127]**

(18) In 2020, Landbrook submitted planning application 20/02453/S73 **[CB/129-131]**, seeking planning permission for the demolition of The Retreat and its replacement with two dwellinghouses subject to conditions different from those attached to planning permission S/0277/19/FL.

(19) The Defendant's planning committee considered application 20/02453/S73 on 26 May 2021. The committee decided to approve the application, and the decision notice was issued on 27 May 2021. **[CB/182-191]**

(20) The South Cambridgeshire Local Plan (the "**Local Plan**") was adopted by the Defendant on 28 September 2018.

(21) Policy H/16 of the Local Plan **[CB/153]** provides as follows:

"Policy H/16: Development of Residential Gardens

The development of land used or last used as residential gardens for new dwellings will only be permitted where:

a. The development is for a one-to one replacement of a dwelling in the countryside under Policy H/14 and/or:

b. There would be no significant harm to the local area taking account of:

i. The character of the local area;

ii. Any direct and on-going impacts on the residential amenity of nearby properties;

iii. The proposed siting, design, scale, and materials of construction of the buildings;

iv. The existence of or ability to create a safe vehicular access;

v. The provision of adequate on-site parking or the existence of safe, convenient and adequate existing on-street parking;

vi. Any adverse impacts on the setting of a listed building, or the character of a conservation area, or other heritage asset;

vii. Any impacts on biodiversity and important trees;

viii. Ensuring that the form of development would not prevent the development of adjoining sites."

(22) Planning application 20/02453/S73 **[CB/130]** sought permission for the erection of two dwellinghouses **[CB/105]** within the confines of the land that currently is used as the residential garden for The Retreat **[CB/104]**.

(23) Policy H/16 of the Local Plan is not mentioned in the officer's report to the planning committee **[CB/160-181]** and was not considered by the Defendant's planning committee when determining application 20/02453/S73.

(24) The Defendant's 2013 planning decision concerning the same form of development (additional dwellings) making use of the same access (Fews Lane) is not discussed in the officer's report **[CB/160-181]** and was not considered by the Defendant's planning committee when determining application 20/02453/S73.

(25) Paragraph 4.11 of the Defendant's Statement of Community Involvement **[CB/157]** states that:

> "It is current practice to take into account late representations received up to the point of determination of the application."

(26) On 20 April 2021, the Claimant submitted representations on planning application 20/02453/S73 to the Defendant by email. **[CB/158-159]** The email included a chronological list of the relevant planning decisions for the site, which raised a number of material considerations relating to the planning history of the site—specifically that all four of the planning applications for the site that were considered by the Defendant between 2012 and 2016 were invalid, that the extant permission given in relation to application S/0277/19/FL does not constitute a fallback position as it is not capable of implementation, that validity of the most recent four planning applications for the site was disputed, and that the last planning application that appears likely to have complied

with the validation requirements was a 1988 planning application that was refused by the Defendant and refused on appeal.

(27) There is no evidence that these considerations were taken into account by the Defendant in its decision making process for application 20/02453/S73.

LEGAL FRAMEWORK

Materiality of development plan

(28) Section 70(2) of the Town and Country Planning Act 1990 (the "**1990 Act**") **[CB/198]** provides that:

> "In dealing with an application for planning permission or permission in principle**]** the authority shall have regard to—
> (a) the provisions of the development plan, so far as material to the application, [… and]
> (c) any other material considerations."

(29) Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the "**2004 Act**") **[CB/207]** provides that:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

(30) In *City of Edinburgh Council v Secretary of State for Scotland* [1998] 1 All ER 174 (at 186a) **[CB/236]**, Lord Clyde discusses challenges to planning decision brought under section 18A of the Town and Country Planning (Scotland) Act 1972 (which corresponds to section 38(6) of the 2004 Act):

> "it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails

to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

Unreasonableness of failing to consider previous decisions

(31) In *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA 1305, [2018] PTSR 2063 **[CB/243-269]** the Court of Appeal considered whether it was unreasonable for the Secretary of State not to have regard to a previous appeal decision that concerned the same form of development in the same district even though that decision was not put before him by the parties. There was an obvious inconsistency in the decision making approach to the same issue in the two decisions, and this obvious inconsistency was left unexplained. The court held that in these circumstances, it had been unlawful for the Secretary of State not to have had regard to the earlier decision when determining the latter.

(32) In *R (Davison) v Elmbridge Borough Council* [2019] EWHC 1409 (Admin), *Baroness Cumberlege of Newick* was applied in the context of a local planning authority decision. (See [37] - [39] **[CB/280-281]**.

(33) In that case, a previous decision of Elmbridge Borough Council found that a new stadium proposed to be built on greenbelt land would cause a limited adverse impact on the openness of the greenbelt and then went on to grant permission for the proposed stadium. That decision was subsequently quashed on the grounds that the council had misinterpreted paragraph 89 of the National Planning Policy Framework. Meanwhile, the council made a fresh determination on a new planning application, again granting permission for the development but this time reaching a different planning judgment in saying that there would be no adverse impact on the openness of the greenbelt. The claimant, a nearby land owner, sought judicial review on the grounds that the council had departed from its earlier planning judgment on the effects on the openness of the greenbelt without having stated any reasons explaining the change in decision. The court held (at [67]) **[CB/287/288]** that whilst the council was free to come to a different

planning judgement in its second round of decision making, the council had to address and explain the change in position. As the council had failed to do so, the council's decision was quashed.

Legitimate expectations created by Statement of Community Involvement

(34) A legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the Claimant can reasonably expect to continue (per Lord Fraser, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375, at 401B) **[CB/317]**.

(35) In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] 1 AC 453, Lord Hoffmann said at 488G **[CB/376]** that:

> "It is clear that in cases such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called the 'macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

(36) Also in *Bancoult* at 465C **[CB/353]** , Lord Hoffmann said that:

> "In considering whether the representations relied upon to found the legitimate expectation were 'clear, unambiguous and devoid of relevant qualification', the question is how, on a fair reading of the promise, it would have been reasonably understood to those to whom it was made: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, per Dyson LJ, at [56]".

(37) In *R(Majed) v London Borough of Camden* [2009] EWCA Civ 1029, the Court of Appeal held that the defendant local planning authority's Statement of Community Involvement had created a procedural legitimate expectation that went beyond the procedural requirements set by statute. Sullivan LJ explains (at [14]) **[CB/428]** that:

> "Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of a statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute. It seems to me that the Statement [of Community Involvement] is a paradigm example of such a promise and a practice."

(38) Article 33 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the "**2015 Order**") **[CB/220]** provides that:

> "(1) A local planning authority must, in determining an application for planning permission, take into account any representations made where any notice of, or information about, the application has been—
>
> (a) given by site display under article 13, within 21 days beginning with the date when the notice was first displayed by site display; […]
>
> (c) published in a newspaper under article 13, within the period of 14 days beginning with the date on which the notice was published;
>
> (d) given by site display under article 15, within 21 days beginning with the date when the notice was first displayed by site display;
>
> (e) served on an adjoining owner or occupier under article 15, within 21 days beginning with the date when the notice was served on that person, provided that the representations are made by any person who they are satisfied is such an owner or occupier;
>
> (f) published in a newspaper or a website under article 15 , within the period of [21 days] beginning with the date on which the notice or information was published".

(39) In the context of a procedural legitimate expectation claim, quashing order should only be refused if it is inevitable that the outcome would have been the same had the correct

procedures been followed (*R (Copeland) v London Borough of Tower Hamlets* [2011] JPL 40 at [36] **[CB/432]** (emphasis added)):

> "It is necessary for those advancing a 'no different outcome' contention to demonstrate that the decision would **inevitably** have been the same. The point was addressed specifically by May LJ (as he then was) in *Smith v North Eastern Derbyshire Primary Care Trust & Others* [2006] EWCA Civ 1291, [2006] 1 WLR 315, a consultation case. His Lordship stated the principle clearly:
>
> '10 ..... Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision …..'"

<u>Interpretation of s. 73 of Town and Country Planning Act 1990</u>

(40) Section 73 of the 1990 Act **[CB/203]** provides that (emphasis added):

> "(1) This section applies […] to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider **only the question of the conditions subject to which planning permission should be granted**, and—
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

(41) In *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 4 All ER 981 at [9] - [11] **[CB/454-455]**, Lord Carnwath states that:

> "'[9] The background to this section (formerly s 31A of the Town and Country Planning Act 1971) was described by Sullivan J in *Pye v Secretary of State for the Environment* [1998] 3 PLR 72 at 85:
>
> > "[P]rior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of conditions had the right to appeal against the original planning permission, but such a course enabled the local planning authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to 'go back on the original decision' to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.
> >
> > It was this problem which section 31A, now section 73, was intended to address ...
> >
> > While section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and un-amended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.
> >
> > In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to "go back on the original planning permission" under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained.
> >
> > The original planning permission comprises not merely the description of the development in the operative part of the planning permission ... but also the conditions subject to which the development was permitted to be carried out …"

This passage was approved by the Court of Appeal in *R v Leicester City Council, a ex p Powergen UK Ltd* (2000) 81 P & CR 47, [2000] JPL 1037 (para 28) per Schiemann LJ.

[10] Sullivan J's comment that such applications are "commonly" referred to as applications to "amend" the conditions was echoed by Schiemann LJ, who noted, at para 1, that such an application is commonly referred to as "an application to modify conditions imposed on a planning permission". This usage is also consistent with the wording used in the statute under which s 31A was originally introduced. It was one of various "minor and consequential amendments" introduced by s 49 and Sch 11 to the Housing and Planning Act 1986, described as "(d) applications to vary or revoke conditions attached to planning permission".

[11] It is clear, however, that this usage, even if sanctioned by statute, is legally inaccurate. A permission under s 73 can only take effect as an independent permission to carry out the same development as previously permitted, but subject to the new or amended conditions. This was explained in the contemporary circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of "an extant planning permission granted subject to conditions" to apply "for relief from all or any of those conditions". It added:

> "If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted."'

(42) In *R (Stefanou) v Westminster City Council* [2017] EWHC 908 (Admin) at [36] **[CB/474]**, Gilbart J states:

"It is common ground that on a s 73 application the LPA was obliged to comply with s 70(2) *TCPA 1990* and s 38(6) of *PCPA 2004*. Thus, it had to have regard to the development plan and any material considerations (s 70(2) *TCPA*) and then determine the application in accordance with the development plan unless material considerations indicated otherwise (s 38(6) *PCPA*). Reference was made to *Pye v Sec of State for the Envt* [1998] 3 PLR 72, approved in *Powergen UK PLC v Leicester City Council* [2000] JPL 1037 [2001] 81 P &CR 47 (CA) per Schiemann LJ."

(43) In *Stefanou* at [88] **[CB/483-484]**, Gilbart J further states that:

> "What is also quite clear, and I so find, is that the WCC officers had approached this application in an entirely inappropriate mindset. The email of 9th February 2016 that
>
> > '*There is a problem I am afraid……*
> > *Your proposals now include the addition of a new storey to the link. These are changes that are much more significant than non-material or other minor amendments.*
> >
> > *Therefore I am afraid that you need to apply for the whole scheme, as revised. Applications for planning permission and listed building consent are required.*
> >
> > *Clearly, in our assessment we will only focus on the revised elements, because the rest has consent…*'
>
> contains a very straightforward error of law. As *Pye* and *Powergen* make clear, the <u>whole</u> scheme now applied for had to be considered in accordance with the relevant tests."

(44) In *Stefanou* at [90] **[CB/484]**, Gilbart J further states:

> "The duty of WCC was to assess this application against the Development Plan as it stood in 2016 and all material considerations as at that date. Given the terms of s 38(6) PCPA 2004, the starting point was the development plan policy, and it was then for WCC to determine if material considerations justified a different outcome."

<u>STATEMENT OF GROUNDS</u>

<u>Ground 1: Defendant ignored policy H/16 of the development plan</u>

(45) The Defendant ignored a material consideration in failing to consider the key material policy of the development plan, policy H/16, which concerns the erection of additional dwellings within residential gardens.

(46) The Defendant is required by section 70(2) of the 1990 Act **[CB/198]** and section 38(6) of the 2004 Act **[CB/207]** to have regard to the development plan and to determine the application in accordance with the development plan unless material considerations indicate otherwise.

(47) As Lord Clyde stated in *City of Edinburgh Council v Secretary of State for Scotland* [1998] 1 All ER 174 (at 186a) **[CB/236]**:

> "it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

(48) Policy H/16 **[CB/153]** specifically provides that, "The development of land used or last used as residential gardens for new dwellings will only be permitted where […] There would be **no significant harm** to the local area **taking account of:**

i. The character of the local area;

ii. Any direct and on-going impacts on the residential amenity of nearby properties;

iii. The proposed siting, design, scale, and materials of construction of the buildings; [and]

iv. **The existence of or ability to create a safe vehicular access**" (emphasis added).

(49) The planning application seeks permission for the demolition of The Retreat and the erection of two dwellinghouses. **[CB/130]** The footprints of the two proposed dwellinghouses **[CB/105]** exceed the footprint of The Retreat, the existing bungalow [**CB/104]** by a considerable extent, which would result in land currently used as a residential garden being occupied by dwellinghouses.

(50) Policy H/16 as not mentioned or discussed anywhere in the officer's report to the Defendant's planning committee **[CB/160-181]**, and this error was left uncorrected at the meeting where the Defendant's planning committee determined the application.

(51) Whilst other policies in the development plan do also address considerations (i) through (iv) to some extent, policy H/16 **[CB/153]** is unique in that in applies a standard of "no significant harm", which is not applied by any other relevant policy.

(52) The standard set in policy H/16 of "no significant harm" was not considered by the Defendant's planning committee. The question of whether significant harm would be caused in relation to any of the itemised material considerations listed is a matter of planning judgment for the decision maker, which was the Defendant's planning committee. The Defendant can not properly argue that the outcome of the decision would have been "highly likely" to have been the same. The planning committee was to exercise its discretion in making its planning assessments and in weighing the various material considerations. Should the court find in favour of this ground, it would be improper for the court to substitute its own assessment and weighing of the various considerations when that discretion has been given by Parliament to the democratically elected local councillors of South Cambridgeshire.

<u>Ground 2: Defendant acted unreasonably in failing to consider its 2013 decision for additional dwellings in Fews Lane</u>

(53) The Defendant acted unreasonably by failing to consider its 2013 planning decision **[CB/81-88]** concerning the same form of development (new housing) **[CB/56]** making use of the same access (Fews Lane) **[CB/66]** and by failing to consider or explain the obvious inconsistency in its evaluation of highway safety considerations between its 2013 decision and the decision issued on 27 May 2021.

(54) There were two obvious inconsistencies in the decision making approach to the same issue in the two decisions.

(55) In the 2013 decision, it was found reasonable and necessary 1) to include a planning condition, "in the interests of highway safety", specifying that,

> "No development shall take place until a scheme for the widening of the existing access has been submitted to and approved in writing by the Local Planning Authority. The access shall be a minimum width of 5 metres for a minimum distance of 5m from the junction of the carriageway of High Street" **[CB/83]**,

and 2) to include a planning condition, "in the interests of highway safety", specifying that,

> "Prior to the occupation of the dwellings hereby permitted visibility splays shall be provided on both sides of the access and shall be maintained free from any obstruction over a height of 600mm within an area of 2m x 2m measured from and along respectively the highway boundary." **[CB/82]**

(56) The 2013 decision was not presented to the Defendant's planning committee or discussed in the officer's report to the committee **[CB/160-181]**, and neither of the two conditions quoted above were attached to the grant of planning permission dated 27 May 2021 **[CB/182-191]**.

(57) The 2013 decision was a material consideration in the determination of application 20/02453/S73, and the weight to be afforded to that material consideration was a matter for the judgment of the decision maker. There is no evidence that the decision maker (the Defendant's planning committee) was made aware of the 2013 decision. The Defendant's planning committee could have attached significant weight to the 2013 decision. It is not for the court to speculate as to what weight the Defendant's planning committee would have assigned to the 2013 decision as a material consideration, and the Defendant has no basis for arguing that it is "highly likely" that the outcome for the Claimant would have been the same if the 2013 decision had been taken into account. Indeed, had the Defendant's planning committee been aware of the 2013 decision, it may

have decided to attach the highway safety conditions attached by the Defendant in its 2013 decision.

(58) It is acknowledged that the Defendant did consider the 1988 appeal decision for the same site and reasoned that circumstances are now materially different due to the bypass for the B1050 that has been constructed around the village since 1988 and has purportedly lessened the level of traffic on High Street.

(59) However, the bypass in question was already in use when the Defendant granted the 2013 consent, and at that time, the Defendant still considered the two highway safety conditions stated above (widening of the access to a minimum width of 5m for at least the first 5m from High Street and 2m x 2m pedestrian visibility splays) to be reasonable and necessary in planning terms.

(60) The Defendant failed to consider its 2013 decision and failed to explain why its decision dated 27 May 2021, which is now being challenged, reached a fundamentally different conclusion on whether the highway safety conditions applied in 2013 (and that were now again requested by neighbours) were not applied.

(61) There is no evidence that the Defendant's planning committee was made aware of the 2013 decision, either in the officer's report or otherwise.

(62) In the Court of Appeal's judgment in *Baroness Cumberlege of Newick*, the court held that it was unreasonable for the Secretary of State not to take into consideration a previous decision for the same type of development in the same district even if none of the parties drew the decision maker's attention to be drawn to the previous decision. (See [34] **[CB/259]**.) (Note that in this case, the Claimant presents evidence in relation to Ground 3 that the Defendant had been made aware of its previous decision in representations made by the by the Claimant on 20 April 2021 **[CB/158-159]** that officers failed to summarise in the officer's report or otherwise convey or make available to the planning committee.)

(63) It is acknowledged that the Court of Appeal's judgment in *Baroness Cumberlege of Newick* concerned a planning appeal decision by the Secretary of State, not a decision by a local planning authority. However, the Court of Appeal's reasoning in that judgment has been applied equally to planning decisions of local planning authorities, including in *R (Davison) v Elmbridge Borough Council* [2019] EWHC 1409 (Admin) at [37] - [39] **[CB/280-281]**.

Ground 3: Breach of legitimate expectation

(64) The Defendant breached the Claimant's legitimate expectation created by the Defendant's Statement of Community Involvement that the Claimant's material planning representations submitted on 20 April 2021 **[CB/158-159]** would be taken into consideration by the Defendant in reaching its Decision.

(65) In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] 1 AC 453, Lord Hoffmann said at 488G **[CB/376]** that:

> "It is clear that in cases such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569.

(66) In *R(Majed) v London Borough of Camden* [2009] EWCA Civ 1029, the Court of Appeal held that a local planning authority's Statement of Community Involvement was capable of creating a procedural legitimate expectation when the statement gives rise to a promise that a local planning authority will do more than is required by statute. Sullivan LJ explains (at [14] **[CB/428]**) that:

> "Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of a statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or practice to do more than that which is required by statute. It seems to me that the

> Statement [of Community Involvement] is a paradigm example of such a promise and a practice."

(67) In the case of application 20/02453/S73, article 13 of the 2015 Order **[CB/210]** required the Defendant to give notice of or information about the application by means of a notice displayed at the site and published in a newspaper, and under article 15 of the 2015 Order **[CB/213]**, the Defendant was required to give notice of or information about the application by means of a notice displayed at the site and by means of a notice published in a newspaper or a website.

(68) As application 20/02453/S73 was required to be publicised in the manner described in the preceding paragraph, the Defendant was required under article 33 of the 2015 Order **[CB/220]** to take into account any representations made about the application within the periods specified in article 33.

(69) However, the Defendant's obligation to take representations into account did not cease at the end of the periods specified in article 33 because the Defendant's Statement of Community Involvement **[CB/157]** created a legitimate expectation on the part of the Claimant that representations would be taken into account as long as they were "received up to the point of determination fo the application", as is provided for in paragraph 4.11 of the Defendant's Statement of Community Involvement:

> "It is current practice to take into account late representations received up to the point of determination of the application."

(70) On 20 April 2021, the Claimant submitted representations on planning application 20/02453/S73 to the Defendant by email **[CB/158-159]**. The email included a chronological list of the relevant planning decisions for the site **[CB/159]**, which raised a number of material considerations relating to the planning history of the site—specifically that:

1. all four of the planning applications for the site that were considered by the Defendant between 2012 and 2016 were invalid,

2. that the extant permission given in relation to application S/0277/19/FL does not constitute a fallback position as it is not capable of implementation,

3. that validity of the most recent four planning applications for the site was disputed, and

4. that the last planning application that appears likely to have complied with the validation requirements was a 1988 planning application that was refused by the Defendant and refused on appeal.

(71) The points enumerated above were all material considerations in the determination of the planning application in question. These factors were not mentioned in the officer's report to the planning committee **[CB/160/181]**, and there is no evidence that the planning committee was aware of or had access to the Claimant's representations submitted on 20 April 2021. Had the Claimant's representations been presented to the committee, it is possible, if not likely, that the Defendant's decision would have been different, particularly in regards to highway safety conditions. In any event, the weight to be afforded to each of these material considerations is a matter for the judgment of the decision maker, which in this case was the democratically elected membership of the Defendant's planning committee. It would not be appropriate, or lawful, for the court to substitute its weighing of the various material considerations in place of the committee's or for the court or the Defendant's officers to speculate as to how the Defendant's planning committee would reconsider the decision if it had been provided with the Claimant's representations.

<u>Ground 4: Misdirection as to proper approach to applications under s. 73</u>

(72) The Defendant's planning committee was misdirected in law as to the proper approach to the consideration of planning applications submitted under section 73 of the Town and Country Planning Act 1990 by the following statement, which was included in the officer's report to the committee: "In deciding an application under section 73, the local

planning authority must only consider the disputed condition/s that are the subject of the application" (paragraph 32) **[CB/175]**. Although the quoted statement is taken from the Planning Practice Guidance, it is not a correct statement of law, and it misinterprets section 73 of the 1990 Act.

(73) Section 73 of the 1990 Act **[CB/203]** provides that:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

(74) There is no statutory authority (or common law authority) supporting the position advanced by the Defendant in the officer's report (quoting the Planning Practice Guidance) that the decision maker "must only consider the disputed condition/s that are the subject of the application"

(75) As sub-section 73(2) provides, "On such an application [for planning permission] the local planning authority shall consider only the question of the conditions subject to which planning permission ***should*** be granted" (emphasis added).

(76) The question of the conditions subject to which planning permission *should* be granted is not the same as considering only "the disputed condition/s that are the subject of the application", which is the language used in the impugned statement from the Planning Practice Guidance.

(77) The question of the conditions subject to which planning permission *should* be granted is a matter for the judgment of the decision maker—not a matter to be determined by the applicant in the application form in advance of the decision maker even considering the application.

(78) The Defendant was obliged by section 73 of the 1990 Act to consider the question of which conditions the permission should be subject to. This in no way limits the Defendant from making any changes to the condition not proposed by the applicant.

(79) Under section 73, the extant planning permission is safe regardless of the local planning authority's decision. A decision to refuse a section 73 application leaves the extant permission intact, and a decision to allow the development subject to different conditions creates a new planning permission that runs alongside the extant planning permission. (*Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 4 All ER 981 at [11] **[CB/455]**)

(80) The position in *Lambeth* is entirely consistent with the following passage from the judgment of Gilbart J in *R (Stefanou) v Westminster City Council* [2017] EWHC 908 (Admin) at [88] **[CB/483-484]**:

> "What is also quite clear, and I so find, is that the WCC officers had approached this application in an entirely inappropriate mindset. The email of 9th February 2016 that
>
> > '*There is a problem I am afraid……*
> > *Your proposals now include the addition of a new storey to the link. These are changes that are much more significant than non-material or other minor amendments.*
> >
> > *Therefore I am afraid that you need to apply for the whole scheme, as revised. Applications for planning permission and listed building consent are required.*
> >
> > *Clearly, in our assessment we will only focus on the revised elements, because the rest has consent…*'

contains a very straightforward error of law. As *Pye* and *Powergen* make clear, the whole scheme now applied for had to be considered in accordance with the relevant tests."

(81) The approach taken by the Defendant and in the Planning Practice Guidance is contrary to the proper interpretation of section 73 and is contrary to the approach taken in *Stefanou* and *Lambeth*.

COSTS PROTECTION

(82) This claim is brought as an Aarhus Convention claim under CPR Part 45.41(2) as it raises matters concerning the consequential impacts of built structures upon individuals' health and safety. The claim therefore falls within the scope of Article 9(3) of the Aarhus Convention. The Claimant seeks a costs capping order under CPR Part 45.43 and that the costs limit in CPR Part 45.43(2)(b) be applied.

(83) It would not be feasible for the Claimant to proceed with this claim without the limit on recoverable costs set forth in CPR Part 45.43(2)(b).

(84) In accordance with CPR 45.42(1), a statement of the Claimant's financial resources, including the company's assets, liabilities, income, and expenditure, verified by a statement of truth, is submitted with the claim form. **[CB/48]**

(85) A statement of the aggregate amount of financial support which any person has provided or is likely to provide to the Claimant, verified by a statement of truth, is submitted with the claim form. **[CB/49]**

CONCLUSION

(86) The Claimant submits that it has an arguable (the test at this stage) claim for judicial review. It therefore asks the Court to grant permission to bring judicial review proceedings. For the reasons given above, this is not a case in which the Court can properly exercise its discretion not to quash the Decision on the basis of s31(2A) of the Senior Courts Act 1981.

(87) Accordingly, the Claimant seeks an order quashing the Decision, a declaration that the Defendant erred in law, and an order that the Defendant pay its costs.

IN THE HIGH COURT OF JUSTICE **Claim No._____**
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN **(on the application of FEWS LANE CONSORTIUM LTD)**	**Claimant**
- and -	
SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL	**Defendant**
- and -	
LANDBROOK HOMES LTD	**Interested Party**

STATEMENT OF CLAIMANT'S FINANCIAL RESOURCES

---

(1) I, Daniel Fulton, of The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP serve as Director of the Fews Lane Consortium Ltd (the "Consortium"). I have prepared this statement of the Consortium's financial resources on 8 July 2021.

(2) The Consortium's share capital is £14.

(3) The Consortium's financial year ("FY") ends on 30 November.

(4) The Consortium's YTD income for FY 2021 is £1,434.90.

(5) The Consortium's YTD expenditure for FY 2021 is £1,354.38.

(6) The Consortium's current cash on hand is £86.91.

(7) I believe that the facts stated in this statement of financial support are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

_____
Daniel Fulton
Director
Fews Lane Consortium Ltd

IN THE HIGH COURT OF JUSTICE **Claim No._____**
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN **(on the application of FEWS LANE CONSORTIUM LTD)**	**Claimant**
- and -	
SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL	**Defendant**
- and -	
LANDBROOK HOMES LTD	**Interested Party**

STATEMENT OF FINANCIAL SUPPORT

---

(1) I, Daniel Fulton, of The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP serve as Director of the Fews Lane Consortium Ltd (the "Consortium"). This statement states the aggregate amounts that any person has provided or is likely to provide to the Consortium in support of the Consortium's claim.

(2) This statement has been made on 8 July 2021.

(3) Loaned funds in the amount of £234.40 have been made available to the Consortium in support of this claim by Mr Daniel Fulton, Director of the Fews Lane Consortium Ltd.

(4) It is anticipated that further loaned funds in the amount of up to £770 are likely to be made available by supporters of the Fews Lane Consortium if permission for the claim to proceed is granted to enable the Consortium to pay the required court fee.

(5) I believe that the facts stated in this statement of financial support are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Daniel Fulton
Director
Fews Lane Consortium Ltd

Section A.6
1988 Planning application / decision / appeal
Index

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Register Copy

Form 12

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

DETAILS OF PLANNING APPLICATION

Parish: LONGSTANTON

Reference: S/0791/88/O

D.o.E. Coding: M/1

Map Reference: 57 (75/2) (565)

Grid Reference: E 394 N 672

Applicant: C.C. Hicks

Date Rec'd: 28.3.88

Description: One bungalow

Location: Adj. The Retreat, Fews Lane

Previous Applications affecting this land:

Other related files:
S/1397/85

Amendments &
date received:

Planning Committee/~~Delegation~~
and date 6/7.

Date of Notice
12/7/88

Decision: ~~Part/Approved/with conditions~~/Refused/~~Deferred/Withdrawn~~

D.o.E. Action: Appeal Lodged/Application Referred

Date
19.12.89

Decision: ~~Part Allowed/with conditions~~/Dismissed

Date
12.05.89

Directions:

Date

NOTES:

CHARGE AND FEE PAID £.....

P.C.R.N. .....

MC 6/7.

Form 5
REF. S/0791/88/O

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1971

REFUSAL OF PLANNING PERMISSION

TO: Mr. C.C. Hicks,
The Retreat,
Fews Lane,
Longstanton,
Cambridge.

The Council hereby refuse permission for One bungalow

at Adj. The Retreat, Fews Lane, Longstanton

in accordance with your application dated 25th February 1988

for the following reasons:

1. Fews Lane is a substandard access with poor visibility to High Street and the application, if approved, would create a serious precedent for the release of other plots off this lane thereby aggravating the situation.

2. Notwithstanding the above, the development of this plot may be prejudicial to the future expansion of Longstanton if the policies contained in the Review of the Structure Plan dated May 1987 are approved in that the site lies on, or in close proximity to, the line of a bypass for the village which is considered essential to its proper planned expansion.

Dated: 12th July 1988
Council Offices, Hills Road, Cambridge. CB2 1PB

D. B. Hussell.
Planning Officer

SEE NOTES OVERLEAF

A/863AX/DH/P/LC

PLANNING INSPECTORATE
DEPARTMENT OF THE ENVIRONMENT
Room 1404
Tollgate House Houlton Street Bristol BS2 9DJ
Telex 449321
Direct Line 0272-218 927
Switchboard 0272-218811
GTN 2074

Langford & Co
Solicitors
141 Station Road
WILLINGHAM
Cambridgeshire
CB4 5HG

Your reference
DFL/AMW/Hicks
Our reference
T/APP/W0530/A/89/112719/P4
Date
12 MAY 89

Gentlemen

TOWN AND COUNTRY PLANNING ACT 1971, SECTION 36 AND SCHEDULE 9
APPEAL BY MR C C HICKS
APPLICATION NO: S/0791/88/O

1. As you know I have been appointed by the Secretary of State for the Environment to determine the above mentioned appeal. This appeal is against the decision of the South Cambridgeshire District Council to refuse planning permission for the erection of a bungalow on land adjoining The Retreat, Fews Lane, Longstanton. I have considered the written representations made by you and by the council and also those made by Cambridgeshire County Council. I inspected the site on 21 April 1989.

2. From my inspection of the site and its surroundings and from my consideration of the written representations I am of the opinion that the main issue in this appeal is whether the increase in vehicular traffic that would be generated by your clients' proposal would cause danger to, or interfere with, the free flow of traffic using the B1050.

3. The appeal site, which is of satisfactory size to accommodate the bungalow your client proposes, without interference with amenities of occupiers of your bungalow, is at present a part of your client's extensive gardens, that lie to the west of the bungalow. It is accessible from Fews Lane, an unadopted lane which joins the B1050 on the northern outskirts of Longstanton.

4. Although there is an open frontage to the east of your client's bungalow between the bungalow and the junction of Fews Lane and the B1050, it is not in dispute that the appeal site lies within the current built-up framework of the village. Indeed, the appeal site is shown as such on the inset map for the village, which has been annexed to the 1988 consultation draft of the South Cambridgeshire Local Plan.

5. This Plan shows a proposed area for housing to the north and west of Fews Lane and in the notice of refusal the council gave as the second reason for refusal of the proposal that the development of the appeal site might prejudice the future expansion of the village, because of the proximity to the then proposed line of the by-pass, which would effectively go to the north and west of the proposed housing area to which I have referred. It is clear now, however, that the line of the by-pass will be some distance from the appeal site and the council no longer seek to sustain this reason for refusing your client's proposal. For my part I conclude not only that the appeal site is a sufficient distance from the proposed line of the by-pass as not to prejudice its construction, but also that its development with a bungalow fronting Fews Lane would not prejudice the orderly development of the land to the north and west for housing should it ultimately be allocated for that use.

6. I do however share the council and highway authority's concern as to the effect on traffic using the B1050 of any increased vehicular use of the junction of that road with Fews Lane. At present this junction serves some 3 dwellings (one of which fronts the B1050) and if your client's appeal was allowed, therefore there would be an increase in vehicular use of approximately one-third of the existing use.

7. My concern is not because Fews Lane is unadopted, but because of the considerable restrictions on visibility at the junction. Although the B1050 is straight to the south of the junction the visibility in that direction is considerably impeded by the vegetation including a substantial tree. The effect of this vegetation is that vehicles would have to nose out into the road in order to achieve adequate visibility in a southern direction, this being the direction from which traffic approaching the junction on the near side of the road would be travelling. This I regard as being unsafe because, although the junction is in a restricted area, the road is straight and I anticipate the vehicles would be travelling close to the maximum permitted speed. Accordingly I am of the opinion that the effect on traffic safety affords a sound and clear-cut objection to this proposal.

8. I acknowledge that the removal or reduction in height of the hedges and trees may well improve this visibility in a southerly direction from the junction, but I cannot grant planning permission and impose a condition to this effect, because the land on which the hedges and trees are growing is not within your clients' ownership or control.

9. As far as restriction on visibility in a northwards direction from the junction is concerned, I am of the opinion that the impediment to visibility again caused by hedges would not, were visibility in a southerly direction to be satisfactory, be an overriding planning objection to this proposal. I am of this opinion because traffic approaching the junction from a northerly direction would be on the far carriageway of the main road as it passes the junction, and because of the comparatively small number of vehicle movements in and out of Fews Lane, that I would anticipate would occur would your clients' proposal to proceed.

10. I have considered all other matters raised in the representations, but these are insufficient to outweigh those factors which have led me to my decision.

11. For the above reasons, and in exercise of the powers transferred to me, I hereby dismiss this appeal.

I am Gentlemen
Your obedient Servant

T H M WALKER BA(Oxon) Solicitor
Inspector

Section A.7
2012 Planning application / decision
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Planning & Sustainable Communities
South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA
t: 01954 713155
f: 01954 713152
e: pre-app@scambs.gov.uk
www.scambs.gov.uk

RECEIVED SCDC
17 DEC 2012
DEVELOPMENT CONTROL

South Cambridgeshire District Council

Application for Planning Permission.
Town and Country Planning Act 1990

S/2561/12/FL

You can complete and submit this form electronically via the Planning Portal by visiting www.planningportal.gov.uk/apply

Publication of applications on planning authority websites

Please note that the information provided on this application form and in supporting documents may be published on the Authority's website. If you require any further clarification, please contact the Authority's planning department.

Please complete using block capitals and black ink.
It is important that you read the accompanying guidance notes as incorrect completion will delay the processing of your application.

1. Applicant Name and Address

Title: Mr & Mrs
First name: Colin
Last name: Hicks
Company (optional):
Unit:
House number:
House suffix:
House name: The Retreat
Address 1: Fews Lane
Address 2:
Address 3:
Town: Longstanton
County: Cambridgeshire
Country:
Postcode: CB24 3DP

2. Agent Name and Address

Title:
First name:
Last name:
Company (optional): Morris and Partners
Unit:
House number: 51
House suffix:
House name:
Address 1: Newnham Road
Address 2:
Address 3:
Town: Cambridge
County: Cambridgeshire
Country:
Postcode: CB3 9EY

3. Description of the Proposal

Please describe the proposed development, including any change of use:

Erection of two Bungalows.

Has the building, work or change of use already started? ☐ Yes ☑ No

If Yes, please state the date when building, work or use were started (DD/MM/YYYY): (date must be pre-application submission)

Has the building, work or change of use been completed? ☐ Yes ☑ No

If Yes, please state the date when the building, work or change of use was completed: (DD/MM/YYYY): (date must be pre-application submission)

4. Site Address Details

Please provide the full postal address of the application site.

Unit: | House number: | House suffix:

House name: 'The Retreat'

Address 1: Fews Lane

Address 2:

Address 3:

Town: Longstanton

County: Cambridge

Postcode (optional): CB24 3DP

Description of location or a grid reference. (must be completed if postcode is not known):

Easting: | Northing:

Description:

5. Pre-application Advice

Has assistance or prior advice been sought from the Local Planning authority about this application? ☑ Yes ☐ No

If Yes, please complete the following information about the advice you were given. (This will help the authority to deal with this application more efficiently).

Please tick if the full contact details are not known, and then complete as much as possible: ☐

Officer name: Paul Sexton

Reference: PRE/0333/12

Date (DD/MM/YYYY): (must be prior to application submission) 13th Sept 2012

Details of pre-application advice received?

Submit an application

6. Pedestrian and Vehicle Access, Roads and Rights of Way

Is a new or altered vehicle access proposed to or from the public highway? ☐ Yes ☑ No

Is a new or altered pedestrian access proposed to or from the public highway? ☐ Yes ☑ No

Are there any new public roads to be provided within the site? ☐ Yes ☑ No

Are there any new public rights of way to be provided within or adjacent to the site? ☐ Yes ☑ No

Do the proposals require any diversions / extinguishments and/or creation of rights of way? ☐ Yes ☑ No

If you answered Yes to any of the above questions, please show details on your plans/drawings and state the reference of the plan (s)/drawings(s)

7. Waste Storage and Collection

Do the plans incorporate areas to store and aid the collection of waste? ☑ Yes ☐ No

If Yes, please provide details:

Bin and Cycle storage within Garage with hard point for collection at front of site adjoing roadway

Have arrangements been made for the separate storage and collection of recyclable waste? ☐ Yes ☑ No

If Yes, please provide details:

8. Authority Employee / Member

With respect to the Authority, I am:
(a) a member of staff
(b) an elected member
(c) related to a member of staff
(d) related to an elected member

Do any of these statements apply to you? ☐ Yes ☑ No

If Yes, please provide details of the name, relationship and role

$Date: 2010-03-19 $ $Revision: 2368 $

9. Materials

If applicable, please state what materials are to be used externally. Include type, colour and name for each material:

	Existing (where applicable)	Proposed	Not applicable	Don't Know
Walls		All to be detailed upon submission of details following the grant of consent	☐	☐
Roof			☐	☐
Windows			☐	☐
Doors			☐	☐
Boundary treatments (e.g. fences, walls)			☐	☐
Vehicle access and hard-standing			☐	☐
Lighting			☑	☐
Others (please specify)			☑	☐

Are you supplying additional information on submitted plan(s)/drawing(s)/design and access statement? ☑ Yes ☐ No

If Yes, please state references for the plan(s)/drawing(s)/design and access statement:

4 copies of Drawing Nos CC.117.1 sheets one and two and Location plan.

10. Vehicle Parking

Please provide information on the existing and proposed number of on-site parking spaces:

Type of Vehicle	Total Existing	Total proposed (including spaces retained)	Difference in spaces
Cars		4 2 per unit plus Garages	
Light goods vehicles/ public carrier vehicles			
Motorcycles		–	
Disability spaces		–	
Cycle spaces		–	
Other (e.g. Bus)		–	
Other (e.g. Bus)			

11. Foul Sewage

S/0181/13

Please state how foul sewage is to be disposed of:

- [x] Mains sewer
- [ ] Cess pit
- [ ] Septic tank
- [ ] Other
- [ ] Package treatment plant

Are you proposing to connect to the existing drainage system? [ ] Yes [ ] No

If Yes, please include the details of the existing system on the application drawings and state references for the plan(s)/drawing(s):

12. Assessment of Flood Risk

Is the site within an area at risk of flooding? (Refer to the Environment Agency's Flood Map showing flood zones 2 and 3 and consult Environment Agency standing advice and your local planning authority requirements for information as necessary.) [x] Yes [ ] No

If Yes, you will need to submit a Flood Risk Assessment to consider the risk to the proposed site.

Is your proposal within 20 metres of a watercourse (e.g. river, stream or beck)? [x] Yes [ ] No

Will the proposal increase the flood risk elsewhere? [ ] Yes [x] No

How will surface water be disposed of?

- [ ] Sustainable drainage system
- [ ] Existing watercourse
- [x] Soakaway
- [ ] Pond/lake
- [ ] Main sewer

Note the slab levels of the Dwelling will be set 300mm above ground level as agreed with Environment Agency

13. Biodiversity and Geological Conservation

To assist in answering the following questions refer to the guidance notes for further information on when there is a reasonable likelihood that any important biodiversity or geological conservation features may be present or nearby and whether they are likely to be affected by your proposals.

Having referred to the guidance notes, is there a reasonable likelihood of the following being affected adversely or conserved and enhanced within the application site, or on land adjacent to or near the application site?

a) Protected and priority species:

- [ ] Yes, on the development site
- [ ] Yes, on land adjacent to or near the proposed development
- [x] No

b) Designated sites, important habitats or other biodiversity features:

- [ ] Yes, on the development site
- [ ] Yes, on land adjacent to or near the proposed development
- [x] No

c) Features of geological conservation importance:

- [ ] Yes, on the development site
- [ ] Yes, on land adjacent to or near the proposed development
- [x] No

14. Existing Use

Please describe the current use of the site:

Garden to The Retreat

Is the site currently vacant? [ ] Yes [x] No

If Yes, please describe the last use of the site:

When did this use end (if known)? DD/MM/YYYY (date where known may be approximate)

Does the proposal involve any of the following? If yes, you will need to submit an appropriate contamination assessment with your application.

Land which is known to be contaminated? [ ] Yes [x] No

Land where contamination is suspected for all or part of the site? [ ] Yes [x] No

A proposed use that would be particularly vulnerable to the presence of contamination? [ ] Yes [x] No

15. Trees and Hedges

Are there trees or hedges on the proposed development site? [ ] Yes [ ] No

And/or: Are there trees or hedges on land adjacent to the proposed development site that could influence the development or might be important as part of the local landscape character? [ ] Yes [x] No

If Yes to either or both of the above, you may need to provide a full Tree Survey, at the discretion of your local planning authority. If a Tree Survey is required, this and the accompanying plan should be submitted alongside your application. Your local planning authority should make clear on its website what the survey should contain, in accordance with the current 'BS5837: Trees in relation to construction - Recommendations'.

16. Trade Effluent

Does the proposal involve the need to dispose of trade effluents or waste? [ ] Yes [x] No

If Yes, please describe the nature, volume and means of disposal of trade effluents or waste

No trees or hedges are to be removed

{Date: 2010-03-19 15:5;Revision: 2368-5

Residential Units (including conversion)

Does your proposal include the gain, loss or change of use of residential units? ☑ Yes ☐ No
If Yes, please complete details of the changes in the tables below:

Proposed Housing

Market Housing	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐		✓	✓			7
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							7

Social Rented	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Intermediate	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Key worker	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Total proposed residential units (A + B + C + D) = 2

Existing Housing

Market Housing	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Social Rented	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Intermediate	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Key worker	Not known	Number of Bedrooms 1	2	3	4+	Unknown	Total
Houses	☐						
Flats and maisonettes	☐						
Live-work units	☐						
Cluster flats	☐						
Sheltered housing	☐						
Bedsit/studios	☐						
Unknown type	☐						
Totals (a + b + c + d + e + f + g) =							

Total existing residential units (E + F + G + H) =

TOTAL NET GAIN or LOSS of RESIDENTIAL UNITS (Proposed Housing Grand Total - Existing Housing Grand Total): 2

SDate: 2010-03-19 #5 SRevision: 2268 S

18. All Types of Development: Non-residential Floorspace

Does your proposal involve the loss, gain or change of use of non-residential floorspace? ☐ Yes ☑ No

If you have answered Yes to the question above please add details in the following table:

Use class/type of use		Not applicable	Existing gross internal floorspace (square metres)	Gross internal floorspace to be lost by change of use or demolition (square metres)	Total gross internal floorspace proposed (including change of use)(square metres)	Net additional gross internal floorspace following development (square metres)
A1	Shops	☐				
	Net tradable area:	☐				
A2	Financial and professional services	☐				
A3	Restaurants and cafes	☐				
A4	Drinking establishments	☐				
A5	Hot food takeaways	☐				
B1 (a)	Office (other than A2)	☐				
B1 (b)	Research and development	☐				
B1 (c)	Light industrial	☐				
B2	General industrial	☐				
B8	Storage or distribution	☐				
C1	Hotels and halls of residence	☐				
C2	Residential institutions	☐				
D1	Non-residential institutions	☐				
D2	Assembly and leisure	☐				
OTHER						
Please Specify		☐				
	Total					

In addition, for hotels, residential institutions and hostels, please additionally indicate the loss or gain of rooms

Use class	Type of use	Not applicable	Existing rooms to be lost by change of use or demolition	Total rooms proposed (including changes of use)	Net additional rooms
C1	Hotels	☐			
C2	Residential Institutions	☐			
OTHER		☐			
Please Specify		☐			

19. Employment

Please complete the following information regarding employees:

	Full-time	Part-time	Total full-time equivalent
Existing employees			
Proposed employees			

20. Hours of Opening

Please state the hours of opening for each non-residential use proposed:

Use	Monday to Friday	Saturday	Sunday and Bank Holidays	Not known

21. Site Area

Please state the site area in hectares (ha) 0.15 ha excluding existing Bungalow and Garden

SDate: 2010-03-19 #5 SRevision: 2368 S

Please describe the activities and processes which would be carried out on the site and the end products including plant, ventilation or air conditioning. Please include the type of machinery which may be installed on site:

Is the proposal a waste management development? ☐ Yes ☑ No

If the answer is Yes, please complete the following table:

	Not applicable	The total capacity of the void in cubic metres, including engineering surcharge and making no allowance for cover or restoration material (or tonnes if solid waste or litres if liquid waste)	Maximum annual operational throughput in tonnes (or litres if liquid waste)
Inert landfill	☐		
Non-hazardous landfill	☐		
Hazardous landfill	☐		
Energy from waste incineration	☐		
Other incineration	☐		
Landfill gas generation plant	☐		
Pyrolysis/gasification	☐		
Metal recycling site	☐		
Transfer stations	☐		
Material recovery/recycling facilities (MRFs)	☐		
Household civic amenity sites	☐		
Open windrow composting	☐		
In-vessel composting	☐		
Anaerobic digestion	☐		
Any combined mechanical, biological and/ or thermal treatment (MBT)	☐		
Sewage treatment works	☐		
Other treatment	☐		
Recycling facilities construction, demolition and excavation waste	☐		
Storage of waste	☐		
Other waste management	☐		
Other developments	☐		

Please provide the maximum annual operational throughput of the following waste streams:

Municipal	
Construction, demolition and excavation	
Commercial and industrial	
Hazardous	

If this is a landfill application you will need to provide further information before your application can be determined. Your waste planning authority should make clear what information it requires on its website.

23. Hazardous Substances

Does the proposal involve the use or storage of any of the following materials in the quantities stated below? ☐ Yes ☑ No ☐ Not applicable

If Yes, please provide the amount of each substance that is involved:

Acrylonitriile (tonnes)		Ethylene oxide (tonnes)		Phosgene (tonnes)	
Ammonia (tonnes)		Hydrogen cyanide (tonnes)		Sulphur dioxide (tonnes)	
Bromine (tonnes)		Liquid oxygen (tonnes)		Flour (tonnes)	
Chlorine (tonnes)		Liquid petroleum gas (tonnes)		Refined white sugar (tonnes)	

Other: Other:

Amount (tonnes): Amount (tonnes):

SDate: 2010-03-19 15 SRevision: 2368 5

24. Ownership Certificates

One Certificate A, B, C, or D, must be completed, together with the Agricultural Holdings Certificate with this application form

CERTIFICATE OF OWNERSHIP - CERTIFICATE A

Town and Country Planning (General Development Procedure) Order 1995 Certificate under Article 7

I certify/The applicant certifies that on the day 21 days before the date of this application nobody except myself/ the applicant was the owner *(owner is a person with a freehold interest or leasehold interest with at least 7 years left to run)* of any part of the land or building to which the application relates.

Signed - Applicant:	Or signed - Agent: [redacted]	Date (DD/MM/YYYY):
	Moms and Partners	

CERTIFICATE OF OWNERSHIP - CERTIFICATE B

Town and Country Planning (General Development Procedure) Order 1995 Certificate under Article 7

I certify/ The applicant certifies that I have/the applicant has given the requisite notice to everyone else (as listed below) who, on the day 21 days before the date of this application, was the owner *(owner is a person with a freehold interest or lecsehold interest with at least 7 years left to run)* of any part of the land or building to which this application relates.

Name of Owner	Address	Date Notice Served

Signed - Applicant:	Or signed - Agent:	Date (DD/MM/YYYY):

CERTIFICATE OF OWNERSHIP - CERTIFICATE C

Town and Country Planning (General Development Procedure) Order 1995 Certificate under Article 7

I certify/ The applicant certifies that:

- Neither Certificate A or B can be issued for this application
- All reasonable steps have been taken to find out the names and addresses of the other owners *(owner is a person with a freehold interest or leasehold interest with at least 7 years left to run)*of the land or building, or of a part of it , but I have/ the applicant has been unable to do so.

The steps taken were:

Name of Owner	Address	Date Notice Served

Notice of the application has been published in the following newspaper (circulating in the area where the land is situated):	On the following date (which must not be earlier than 21 days before the date of the application):

Signed - Applicant:	Or signed - Agent:	Date (DD/MM/YYYY):

$Date: 2010-03-19 #5 $Revision: 2368 $

24. Ownership Certificates (continued)

CERTIFICATE OF OWNERSHIP - CERTIFICATE D

Town and Country Planning (General Development Procedure) Order 1995 Certificate under Article 7

I certify/ The applicant certifies that:

- Certificate A cannot be issued for this application
- All reasonable steps have been taken to find out the names and addresses of everyone else who, on the day 21 days before the date of this application, was the owner *(owner is a person with a freehold interest or leasehold interest with at least 7 years left to run)* of any part of the land to which this application relates, but I have/ the applicant has been unable to do so.

The steps taken were:

Notice of the application has been published in the following newspaper (circulating in the area where the land is situated):

On the following date (which must not be earlier than 21 days before the date of the application):

Signed - Applicant:

Or signed - Agent:

Date (DD/MM/YYYY):

25. Agricultural Land Declaration

AGRICULTURAL LAND DECLARATION

Town and Country Planning (General Development Procedure)Order 1995 Certificate under Article 7

Agricultural Land Declaration - You Must Complete Either A or B

(A) None of the land to which the application relates is, or is part of, an agricu[redacted]

Signed - Applicant:

Or signed - Agent: Moms and Partners

Date (DD/MM/YYYY):

(B) I have/ The applicant has given the requisite notice to every person other than myself/ the applicant who, on the day 21 days before the date of this application, was a tenant of an agricultural holding on all or part of the land to which this application relates, as listed below:

Name of Tenant	Address	Date Notice Served

Signed - Applicant:

Or signed - Agent:

Date (DD/MM/YYYY):

26. Planning Application Requirements - Checklist

Please read the following checklist to make sure you have sent all the information in support of your proposal. Failure to submit all information required will result in your application being deemed invalid. It will not be considered valid until all information required by the Local Planning Authority has been submitted.

The original and 3 copies of a completed and dated application form: ☑

The original and 3 copies of the plan which identifies the land to which the application relates drawn to an identified scale and showing the direction of North: ☑

The original and 3 copies of other plans and drawings or information necessary to describe the subject of the application: ☑

The correct fee: ☑

The original and 3 copies of a design and access statement, if required (see help text and guidance notes for details): ☐

The original and 3 copies of the completed, dated Ownership Certificate (A, B, C, or D - as applicable): ☑

The original and 3 copies of the completed, dated Article 7 Certificate (Agricultural Holdings): ☑

$Date: 2010-03-19 #5 $Revision: 2368 5

27. Declaration

I/we hereby apply for planning permission/consent as described in this form and the accompanying plans/drawings and additional information.

Signed - Applicant:

Or signed - Agent: [redacted] Morris and Partners

Date (DD/MM/YYYY): (date cannot be pre-application)

28. Applicant Contact Details

Telephone numbers

Country code: National number: [redacted] Extension number:

Country code: Mobile number (optional): [redacted]

Country code: Fax number (optional):

Email address (optional):

29. Agent Contact Details

Telephone numbers

Country code: 01223 National number: 351695 Extension number:

Country code: Mobile number (optional):

Country code: 01223 Fax number (optional): 351698

Email address (optional): design@morrisandpartners.net

30. Site Visit

Can the site be seen from a public road, public footpath, bridleway or other public land? ☐ Yes ☑ No

If the planning authority needs to make an appointment to carry out a site visit, whom should they contact? *(Please select only one)* ☐ Agent ☑ Applicant ☐ Other (if different from the agent/applicant's details)

If Other has been selected, please provide:

Contact name: Telephone number:

Email address:

The site consists of land to the north and east of an existing Bungalow known as the 'Retreat' off Fews Lane longstanton. The site is within the village framework. The proposal is to provide 2 single storey units one Bedroom and No 2 Bedroom which will provide a acceptable housing mix the dwellings will be built in traditional materials and both provided with Garages/stores to provide waste storage for refuse bins etc In addition each unit will be provided with parking spaces off Road so parking in the private drive Fews Lane will be avoided

SDate: 2010-03-19 #5 SRevision: 2368 S

71242

n the Registe

TITLE NUMBER

CB271242

S/2561/12/FL

N

CAMBRIDGESHIRE : SOUTH CAMBRIDGESHIRE

NCE SURVEY MAP REFERENCE: TL3967SW

SCALE 1:1250 Enlarged from 1/2500

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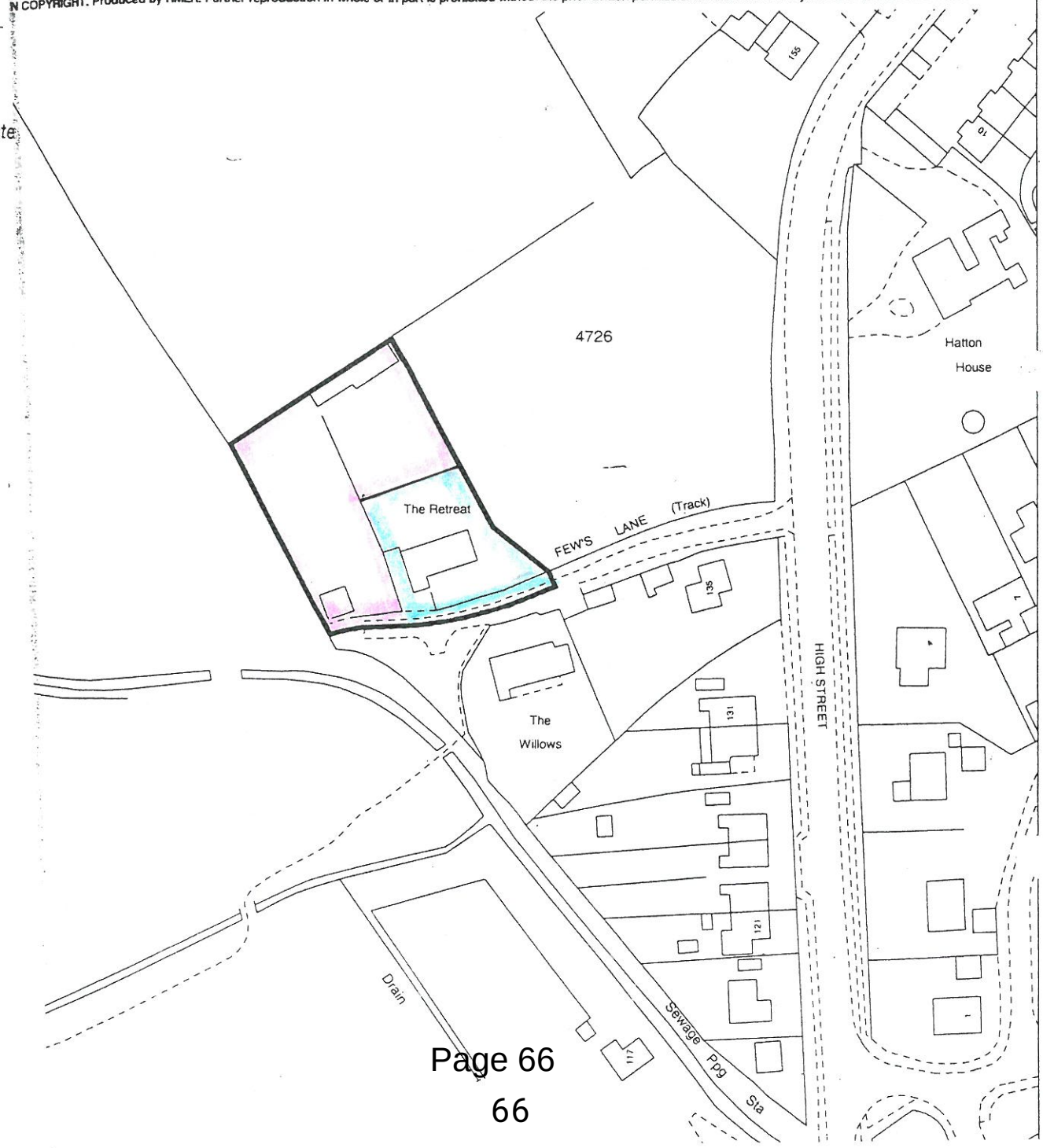

.71242

n the Registe

TITLE NUMBER

CB271242

S/0191/13

N

CAMBRIDGESHIRE : SOUTH CAMBRIDGESHIRE

NCE SURVEY MAP REFERENCE: TL3967SW

SCALE 1:1250 Enlarged from 1/2500

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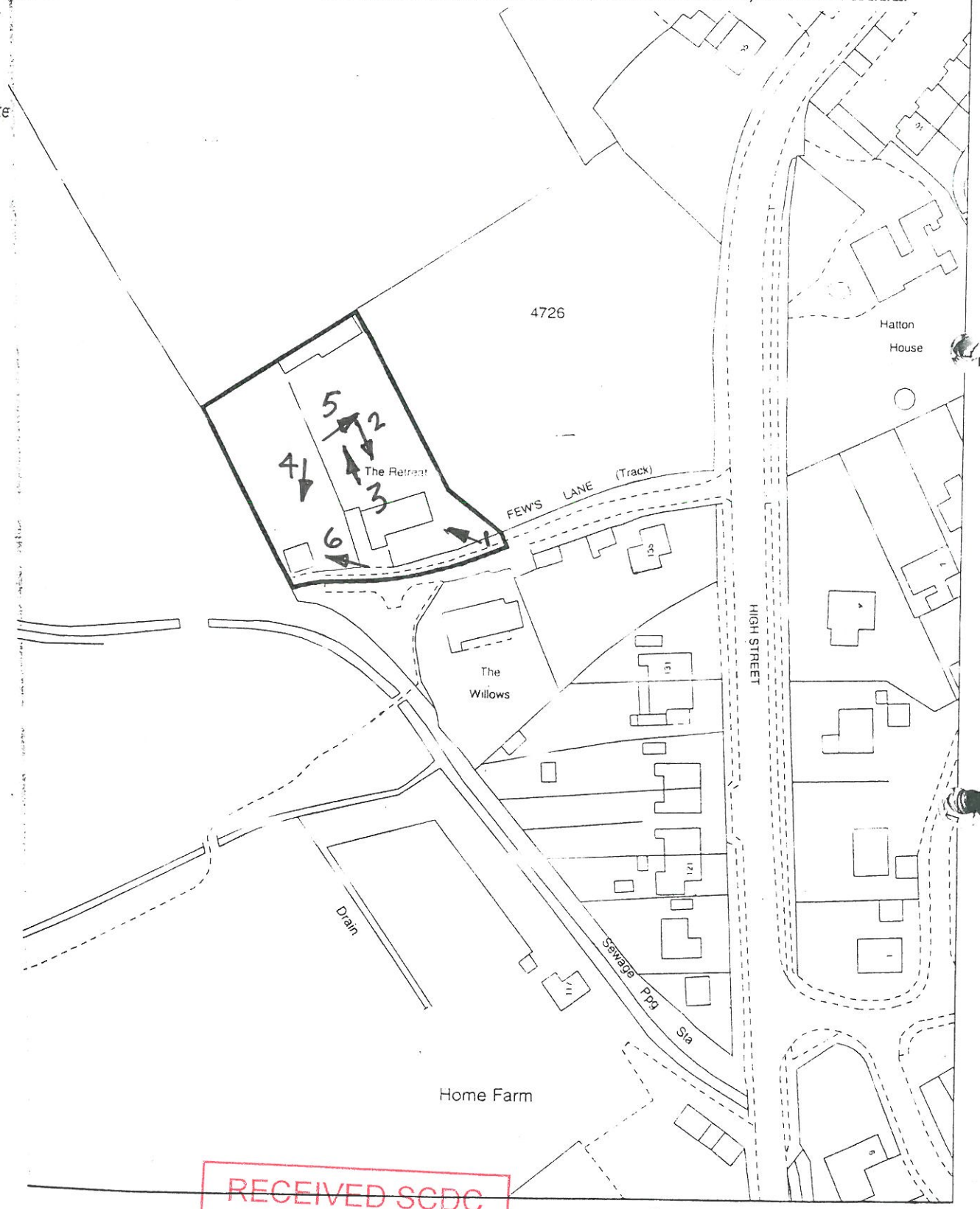


RECEIVED SCDC
28 JAN 2013
DEVELOPMENT CONTROL

H.M. LAND REGISTRY
HG
09/2003

S/2561/12/FL

MORRIS & PARTNERS Architects

NOTES. Work: 'The Retreat' Fews Lane Longstanton, Cambs Client: Mr & Mrs C. Hicks

Reference No.: CC 117.1 Notes made by: HR Date: Nov 2012 Sheet No.: two

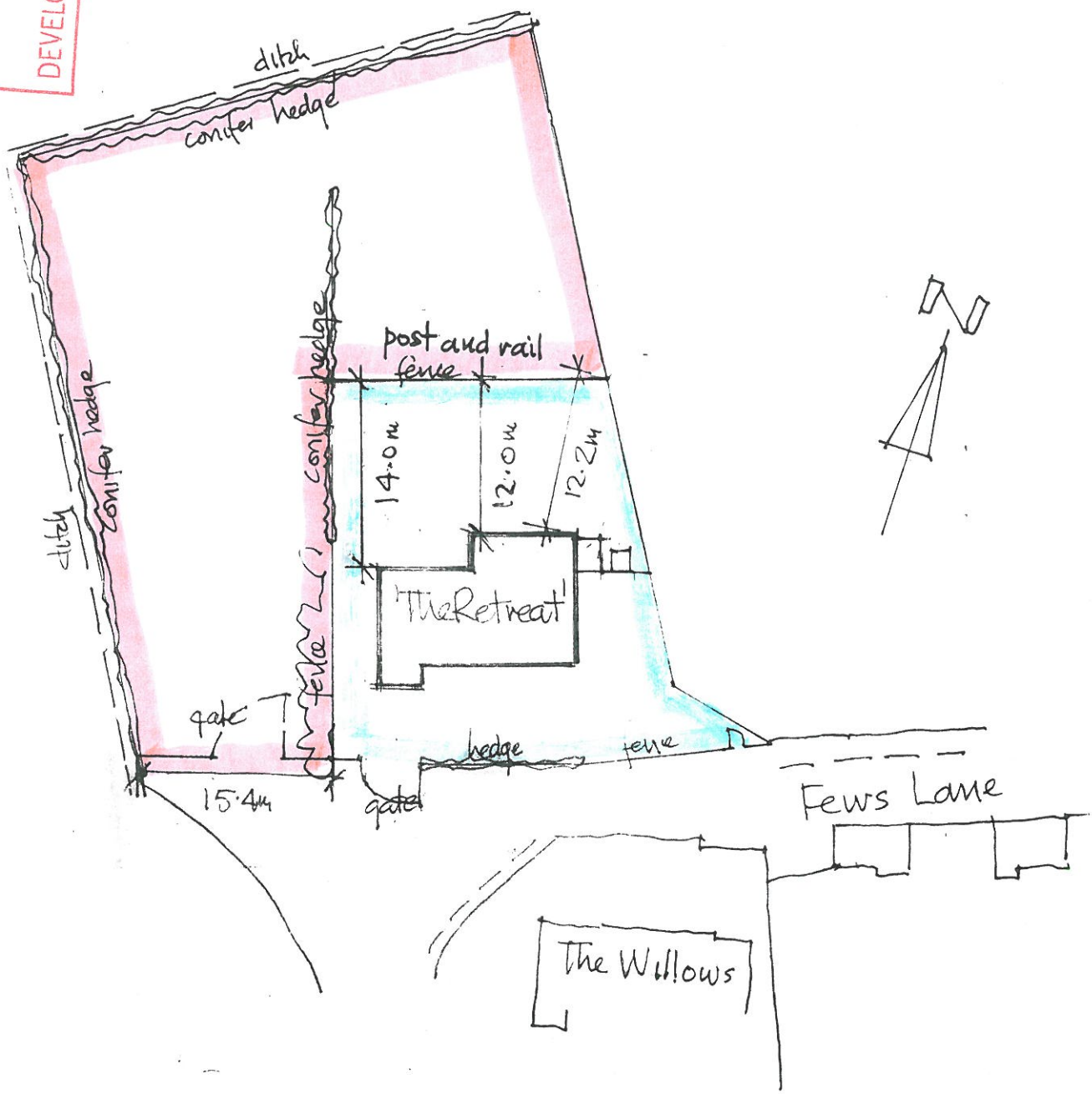
Description of notes: Site Layout 1/500

RECEIVED SCDC 17 DEC 2012 DEVELOPMENT CONTROL

Total Site Area 0.227ha

Application Site Area 0.15 ha

fee 3 x 385 = £1155



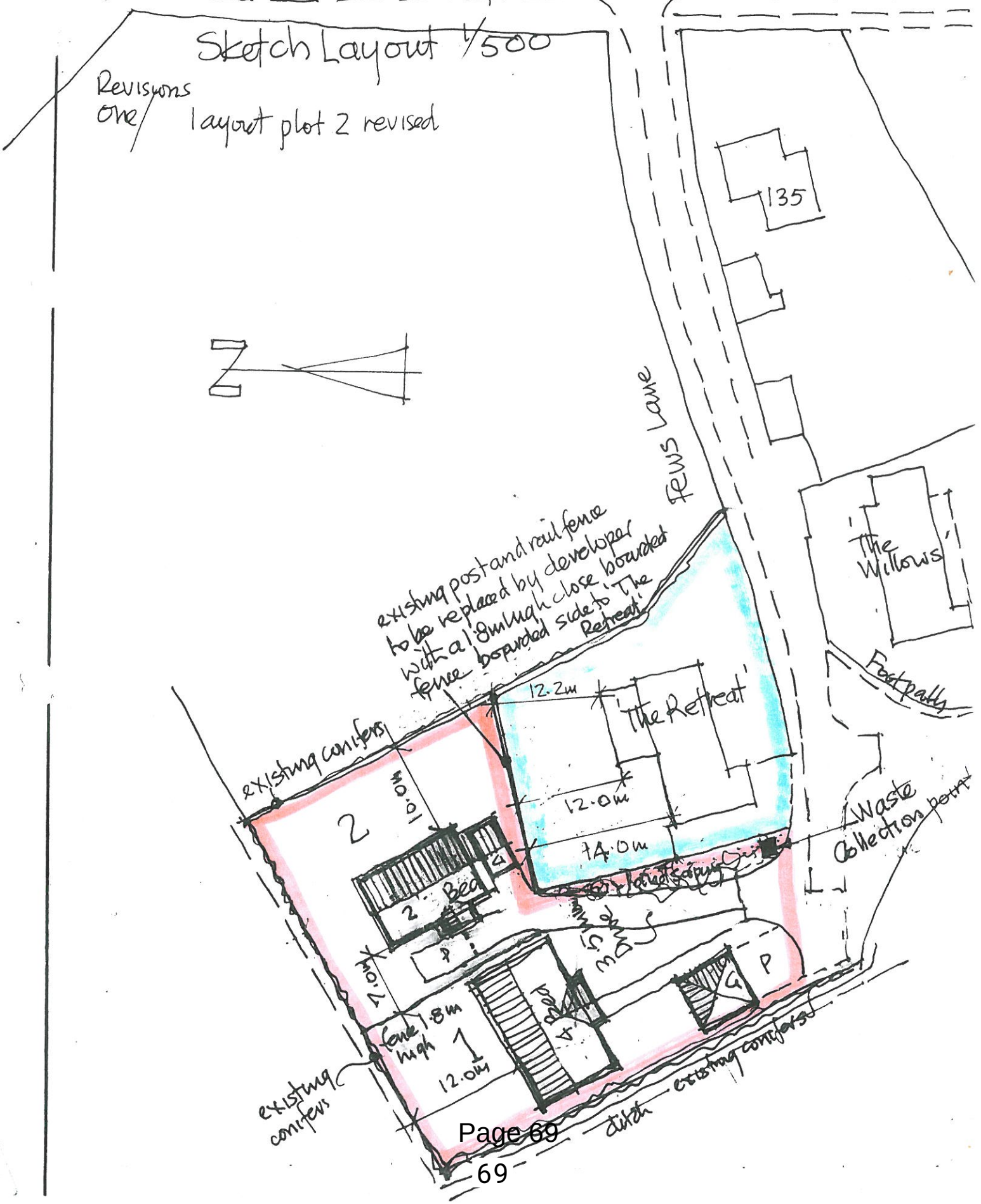
S/2561121FL

MORRIS & PARTNERS Architects

NOTES. Work: The Retreat Fews Lane Longstanton Client: Mr & Mrs Colin Hicks

Reference No.: CC.117.1. Notes made by: HR Date: July 2012 Sheet No.: One revised

Description of notes:



Cambridgeshire County Council

PLANNING CONSULTATION RESPONSE

To: SCDC Planning Team	**Economy, Transport and Environment** Executive Director, Alex Plant **Highways Development Control** South and City Highways Station Road Whittlesford CB22 4NL
App Reference: S/2561/12 Date: 26/2/13	**Contact**: Vikki Keppey

Re: The Retreat Fews Lane Longstanton

Please forward the amended drawing showing the below requirements to the Highway Authority for approval prior to determination of the application:

The access will need to be widened to a minimum width of 5m, for a minimum distance of 5m measured from the near edge of the highway boundary.

Reason: in the interests of highway safety

Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that two 2.0 x 2.0 metres pedestrian visibility splays be provided and shown on the drawings. The splays are to be included within the curtilege of the existing access. This area shall be kept clear of all planting, fencing, walls and the like exceeding 600mm high.

Reason: in the interests of highway safety

Please add a condition to any permission that the Planning Authority is proposal requiring that the proposed access be constructed so that its falls and levels are such that no private water from the site drains across or onto the adopted public highway.

Reason: for the safe and effective operation of the highway

Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that the existing intensified access be constructed using a bound material to prevent debris spreading onto the adopted public highway.

Reason: in the interests of highway safety

In the event that the Planning Authority is so minded as to grant permission to the proposal please add an informative to the effect that the granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

Vikki Keppey
Highway Development Control Engineer

EQUALITY FRAMEWORK FOR LOCAL GOVERNMENT ACHIEVING

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minicom: 01480 376743
www.scambs.gov.uk

South Cambridgeshire District Council

[redacted]
Longstanton Parish Council
Parish Office
The Village Institute
24 High Street
Longstanton
CAMBRIDGE
CB24 3BS

Planning and New Communities
Contact: Paul Sexton
Direct Dial: 01954 713255
Fax: 01954 713152
Direct email: paul.sexton@scambs.gov.uk
Our Ref: S/2561/12/FL
Date 31 January 2013

This letter (with no plans attached) has been emailed to the Parish Council prior to sending out in the post, and for information, to the Ward Members

Dear Sir/Madam

Proposal: **Erection of two bungalows**
Location: **The Retreat, Fews Lane, Longstanton, Cambridge, Cambridgeshire, CB24 3DP**
Applicant: **Mr & Mrs Colin Hicks**

Attached is a copy of the above application for your retention.

Any comments that your Parish Council wishes to make should be made **on this form** and returned to the above address **no later than 21 days from the date of this letter.** (You should note that at the expiry of this period the District Council could determine the application without receipt of your comments.)

Comments of the Parish Council:-

The Parish Council is concerned about drainage problems in the area and over-development of the site. The road is very narrow and so there is also concern about the increase in traffic here

Recommendation of the Parish Council:- (please tick one box only)

Approve		Refuse		No Recommendation	✓

Signed: [redacted] Date: 11.02.13
Clerk of the Parish Council or Chairman of the Parish Meeting

EXPLANATION OF APPLICATION SUFFIX

O	Outline	LDC	Lawful Development Certificate
F	Full	PNA	Prior Notification of Agricultural Development
RM	Reserved Matters	PND	Prior Notification of Demolition Works
LB	Listed Building Consent	PNT	Prior Notification of Telecommunications Development
CAC	Conservation Area Consent	HSC	Hazardous Substance Consent
A	Advertisement Consent		

Your Ref: S/2561/12/FL

RECEIVED SCDC
18 FEB 2013
DEVELOPMENT CONTROL

[redacted]
Longstanton
Cambs
CB24 3BT

Planning and New Communities
Mr Paul Sexton
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge
CB23 6EA

13th February 2013

Dear Sir

Erection of two bungalows
The Retreat, Fews Lane, Longstanton, Cambs. CB24 3DP

We wish to make the following comments to the proposed development:

(1) Fews Lane is an unadopted lane/road with right of way for footpath plus vehicle access for residents only. The lane has a width of 3 metres with no passing places. The exit on High Street is 30 metres from the entrance to a new development of at least 88 houses. The proposal does not show this development next to Fews Lane which is very misleading. Traffic from Willingham wishing to enter Longstanton has to approach via a blind bend, already a very hazardous situation.

(2) Services have not been mentioned. The sewage system just copes with the demand now, as the fall of it is very shallow. Should the plan be passed it would set a precedent for further development on the opposite side of Fews Lane.

(3) Any approval of these plans should stipulate that Fews Lane is left in a satisfactory state by the developers both during and after construction, (with the owners of the new properties contributing to future upkeep.)
The existing trees and shrubs along Fews Lane should be retained.

Yours faithfully

[redacted]

Paul and Pat Miles

Delegation Report
S/2561/12/FL

The Retreat, Fews Lane, Longstanton, Cambridge, Cambridgeshire, CB24 3DP

Erection of two bungalows

Proposed Development

This outline application, with all matters reserved, proposes the erection of two bungalows on a 0.15ha area of land which currently forms part of the garden area of The Retreat, Fews Lane, Longstanton.

The density of the development will be 13 dph (this remains the same if the existing dwelling is included in the calculation)

The application is accompanied by a Design and Access Statement and Draft Heads of Terms.

Site and Surroundings

The Retreat is a detached bungalow at the end of Fews Lane, a narrow unmade lane, with no footpaths leading from High Street. Fews Lane currently serves the applicants dwelling and two other properties. The existing dwelling is located in the south east corner of the site.

To the north, west and east the site is bounded by new residential development which forms part of the Home Farm development. To the south is a bungalow. There is a drain along the north and west boundary of the site.

The north, west and east boundaries are well screened and the existing garden well laid out and maintained.

The site is within the village framework and a very small section in the south west corner is within Flood Zones 2 and 3.

Policy

History

S/0798/88/O – One bungalow – Refused – Appeal Dismissed

Consultations

Longstanton Parish Council makes no recommendation but comments 'The Parish Council is concerned about drainage problems in the area and over-development of the site. The road is very narrow and so there is also concern about the increase in traffic here.

The Local Highway Authority requires that the access be widened to 5m for its first 5m from High Street. Pedestrian visibility splays of 2.0m x 2.0m should be provided either side of the access. These matters can be dealt with by condition. The access should be constructed so that its falls and levels are such that no private water drains

onto the public highway, and constructed in a bound material to prevent debris spreading onto the public highway.

The Environment Agency comments that its national flood mapping indicates that the south west boundary of the site borders Flood Zone 2. A Flood Risk Assessment is required where any part of an application site is shown to be within floodzones 2 or 3. However, in view of the limited intrusion into the floodplain, and the existing buildings, in this instance the proposal would be acceptable to the Agency provided conditions and informatives were included in any planning consent.

Conditions are requested ensuring that there are no raising of ground levels, details of surface water disposal system, ensure access to provide maintenance of the existing watercourse and, ensure that finished floor levels are set no lower that 300mm above existing site levels.

The Housing Development Officer comments that the applicant has provided clear evidence to confirm that Registered Providers have been approached about the affordable unit on this site and no interest has been expressed in an interest for making an offer for the unit. She is therefore satisfied that a commuted sum in lieu of on-site affordable housing can be explored, and the applicant has been advised that a valuation will need to be undertaken by the Councils' appointed independent valuers. The applicant has agreed to pay the cost of the valuation.

Cambridgeshire Archaeology comments that the site lies in an area of high archaeological potential and should be subject to a programme of archaeological investigation, which should be secured by condition.

Drainage Manager – No comments received at the application stage. At the pre-application he advised that the ditch was maintained from the other side, and recommended that a scheme for surface water drainage should be required.

Representations

One letter has been received from the occupiers of No.135 High Street raising the following concerns:

Fews Lane is an unadopted lane/road, with right of way for footpath and vehicle access for residents only. It is 3 metres wide with no passing places, with the exit on High Street 30 metres from the entrance to a new development of at least 88 houses, which the plan does not show. Traffic from Willingham wishing to enter Longstanton has to approach via a blind bend, already a very hazardous situation.

The sewage system just copes with demand now as the fall is very shallow. Approval would set a precedent for further development on the opposite side of Fews Lane.

Any approval should stipulate that Fews Lane is left in a satisfactory state both during and after construction, with new occupiers contributing to its upkeep. Existing trees and shrubs along Fews Lane should be retained.

Planning Comments

The key issues to be considered are the principle of development, character of the area, residential amenity, highway and drainage

Principle of development

The site is within the village framework and therefore the principle of development is acceptable, subject to compliance with other policies in the plan.

The density of the proposed development is 13dph. Although this is below the average density sought by Policy DP/1, the number of dwellings proposed is appropriate given the existing pattern of development in Fews Lane, and the restricted width of the road.

Although all matters are reserved the application indicates that there will be one – 2.bed and one 4-bed property, which would comply with Policy HG/2.

Impact on the character of the area

The site comprises the garden land to the side and rear of the existing single-storey dwelling. The west and north boundaries are defined by tall hedges with two-storey dwellings beyond.

The erection of two single storey dwellings, whilst intensifying built development at the end of this rural lane, would not have an adverse impact on the character of the area.

Impact on residential amenity

The proposed development will have no material adverse impact on the residential amenity of the occupiers of the existing dwellings in Mitchcroft Road to the north and Hart Close to the west.

The existing dwelling will be left with a rear garden which has a minimum depth of 12m, and a minimum width of 22m, which provides adequate amenity space for that dwelling.

Highway safety

Fews Lane is a narrow lane, however the Local Highway Authority has not objected to the application, and has accepted that visibility at the junction with High Street is adequate for the development proposed. A condition can be imposed on any consent requiring the widening of Fews Lane to 5m for the first 5m from High Street.

The provision of temporary parking for construction vehicles within the site can be secured by condition.

Drainage

A condition can be included in any consent requiring floor and site levels as required by the Environment Agency, and requiring a scheme for surface water drainage.
Other matters

A scheme of archaeological investigation can be secured by condition.

The consent should require the applicant to enter into a scheme for the provision of affordable housing, which in this case might take the form of a commuted sum, open space contribution, community facilities contribution, and waste receptacle provision.

Recommendation

That the application is approved subject to conditions.

1. Approval of the details of the layout of the site, the scale and appearance of buildings, the means of access and landscaping (hereinafter called "the reserved matters") shall be obtained from the Local Planning Authority in writing before any development is commenced.
(Reason - The application is in outline only.)

2. Application for the approval of the reserved matters shall be made to the Local Planning Authority before the expiration of three years from the date of this permission.
(Reason - The application is in outline only.)

3. The development hereby permitted shall be carried out in accordance with the following approved plans: 1:1250 scale location plan and Drawing No. CC117.1
(Reason - To facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990.)

4. All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies DP/2 and NE/6 of the adopted Local Development Framework 2007.)

5. No development shall take place until details of the materials to be used in the construction of the external surfaces of the buildings, and parking and turning facilities for the dwellings, hereby permitted, have been submitted to and approved in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved details.
(Reason - To ensure the appearance of the development is satisfactory, and adequate facilities are provided for parking and turning in accordance with Policies DP/2 and DP/3 of the adopted Local Development Framework 2007.)

6. Prior to the commencement of any development, a scheme for the provision and implementation of foul water drainage shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with the implementation programme agreed in writing with the Local Planning Authority.
(Reason - To reduce the risk of pollution to the water environment and to ensure a satisfactory method of foul water drainage in accordance with Policy NE/10 of the adopted Local Development Framework 2007.)

7. Prior to the commencement of any development, a scheme for the provision and implementation of surface water drainage shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with the implementation programme agreed in writing with the Local Planning Authority.
(Reason - To ensure a satisfactory method of surface water drainage and to

prevent the increased risk of flooding in accordance with Policies DP/1 and NE/11 of the adopted Local Development Framework 2007.)

8. No development shall take place until a plan showing the finished floor levels of the proposed dwellings in relation to the existing levels of the surrounding land has been submitted to and agreed in writing by the Local Planning Authority. The finished floor levels should be set no lower than 300mm above existing site levels, and there shall be no raising of existing ground levels. The development shall be constructed in accordance with the approved details. (Reason - In the interests of residential and visual amenity, in accordance with Policy DP/3 of the adopted Local Development Framework 2007 and to reduce the risk of flooding to the existing dwelling and the proposed development.)

9. During the period of construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays and 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.
(Reason - To minimise noise disturbance for adjoining residents in accordance with Policy NE/15 of the adopted Local Development Framework 2007.)

10. Prior to the occupation of the dwellings hereby permitted visibility splays shall be provided on both sides of the access and shall be maintained free from any obstruction over a height of 600mm within an area of 2m x 2m measured from and along respectively thehighway boundary.
(Reason - In the interest of highway safety in accordance with Policy DP/3 of the adopted Local Development Framework 2007.)

11. The proposed access shall be constructed so that its falls and levels are such that no private water from the site drains across or onto the adopted public highway, and the existing intensified access shall be constructed using a bound material to prevent debris spreading onto the public highway.
(Reason - In the interests of highway safety).

12. No development shall take place until a scheme for the widening of the existing access has been submitted to and approved in writing by the Local Planning Authority. The access shall be a minimum width of 5 metres for a minimum distance of 5m from the junction of the carriageway of High Street. The works shall be carried out on accordance with the approved details prior to occupation of the dwellings hereby permitted.
(Reason - In the interests of highway safety).

13. No development shall take place on the application site until the implementation of a programme of archaeological work has been secured in accordance with a written scheme of investigation which has been submitted to and approved in writing by the Local Planning Authority.
(Reason - To secure the provision of archaeological excavation and the subsequent recording of the remains in accordance with Policy CH/2 of the adopted Local Development Framework 2007.)

14. Before development commences, a plan specifying the area and siting of land to be provided clear of the public highway for the parking, turning, loading and unloading of all vehicles visiting the site during the period of construction, and a scheme for the hours of deliveries to and collections from the site, shall be submitted to and approved in writing by the Local Planning Authority; such space shall be maintained for that purpose during the period of construction.
Reason – In the interest of highway safety and the amenity of the occupiers of

adjacent properties in accordance with Policies DP/2 and DP/3 of the adopted Local Development Framework 2007.)

15. No development shall take place until a scheme for the provision of affordable housing, open space, community facilities infrastructure, and waste receptacles to meet the needs of the development in accordance with adopted Local Development Framework Policies DP/4, HG/3, SF/10 and SF/11 has been submitted to and approved in writing with the Local Planning Authority. The scheme shall include a timetable for the provision to be made and shall be carried out in accordance with the approved details (Reason - To ensure that the development contributes towards affordable housing, open space, community facilities infrastructure and waste receptacle provision in accordance with Policies DP/4, HG/3, SF/10 and SF/11 of the Adopted Local Development Framework 2007).

16. The dwellings hereby permitted shall not exceed one storey in height and all accommodation contained within it shall be on the ground floor only. (Reason - To ensure the development is satisfactorily assimilated into the area and does not have an adverse impact on the amenity currently enjoyed by the occupiers of adjacent dwellings in accordance with Policy DP/2 of the adopted Local Development Framework 2007.)

Reasons for Approval

1. The development is considered generally to accord with the Development Plan and particularly the following policies:
ST/6 - Group Villages
DP/1 - Sustainable Development
DP/7 - Development Frameworks
DP/4 - Infrastructure and New Developments
DP/3 - Development Criteria
DP/2 - Design of New Development
SF/11 - Open Space Standards
SF/10 - Outdoor Playspace, Informal Open Space, and New Developments
HG/3 - Affordable Housing
HG/2 - Housing Mix
HG/1 - Housing Density
NE/1 - Energy Efficiency
TR/2 - Car and Cycle Parking Standards
NE/11 - Flood Risk
Development Frameworks: Longstanton
Open Space in New Developments SPD
District Design Guide SPD - Adopted March 2010
Affordable Housing SPD - Adopted March 2010
National Planning Policy Framework

2. The proposal conditionally approved is not considered to be significantly detrimental to the following material considerations, which have been raised during the consultation exercise:
Highway safety
Drainage

3. All other material planning considerations have been taken into account. None is of such significance as to outweigh the reason for the decision to approve the planning application.

Informatives

1. Environment Agency

   All surface water from roofs shall be piped direct to an approved surface water system using sealed downpipes. Open gullies should not be used.

   The maximum acceptable depth for soakaways is 2.00 metres below existing ground level.

   Only clean, uncontaminated surface water should be discharged to any soakaway, watercourse or surface water sewer.

   An acceptable method of foul drainage disposal would be connection to the public foul sewer.

   Under the Flood Water Management Act 2010, since 6 April 2012 Cambridgeshire County Council has been responsible for Ordinary Watercourses Regulation in this area. If it is intended to do works to any ordinary watercourse prior written consent may be required from the County Council - contact http://www.cambridgeshire.gov.uk/environment/floodandwater/flooding/ordinarywatercourse.htm

2. The granting of planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that separate permission must be sought from the Highway Authority for such works.

Signature of Delegation Officer **Date**

[redacted] 24/3/17

Paul Sexton
Principal Planning Officer

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

Form 4
Ref. S/2561/12/OL

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
SUBJECT TO CONDITIONS

Decision Date: 25 March 2013

Morris & Partners
51, Newnham Road
Cambridge
CB3 9EY

The Council hereby grants permission for Outline consent for the erection of two bungalows (all matters reserved)

At: The Retreat, Fews Lane, Longstanton, Cambridge, Cambridgeshire, CB24 3DP
For: Mr & Mrs Colin Hicks

In accordance with your application dated 23 December 2012 and the plans, drawings and documents which form part of the application, subject to conditions set out below.

1. Approval of the details of the layout of the site, the scale and appearance of buildings, the means of access and landscaping (hereinafter called 'the reserved matters') shall be obtained from the Local Planning Authority in writing before any development is commenced.
(Reason - The application is in outline only.)
2. Application for the approval of the reserved matters shall be made to the Local Planning Authority before the expiration of three years from the date of this permission.
(Reason - The application is in outline only.)
3. The development hereby permitted shall be carried out in accordance with the following approved plans: 1:1250 scale location plan and Drawing No. CC117.1
(Reason - To facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990.)
4. All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies DP/2 and NE/6 of the adopted Local Development Framework 2007.)
5. No development shall take place until details of the materials to be used in the construction of the external surfaces of the buildings, and the parking and turning facilities for the dwellings, hereby permitted have been submitted to and approved in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved details.
(Reason - To ensure the appearance of the development is satisfactory, and adequate facilitoes are provided for parking and turning in accordance with Policies DP/2 and DP/3 of the adopted Local Development Framework 2007.)

6. Prior to the commencement of any development, a scheme for the provision and implementation of foul water drainage shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with the implementation programme agreed in writing with the Local Planning Authority.
(Reason - To reduce the risk of pollution to the water environment and to ensure a satisfactory method of foul water drainage in accordance with Policy NE/10 of the adopted Local Development Framework 2007.)

7. Prior to the commencement of any development, a scheme for the provision and implementation of surface water drainage shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with the implementation programme agreed in writing with the Local Planning Authority.
(Reason - To ensure a satisfactory method of surface water drainage and to prevent the increased risk of flooding in accordance with Policies DP/1 and NE/11 of the adopted Local Development Framework 2007.)

8. No development shall take place until a plan showing the finished floor levels of the proposed dwellings in relation to the existing levels of the surrounding land has been submitted to and agreed in writing by the Local Planning Authority. The finished floor levels should be set no lower than 300mm above existing site levels, and there shall be no raising of existing ground levels. The development shall be constructed in accordance with the approved details.
(Reason - In the interests of residential and visual amenity, in accordance with Policy DP/3 of the adopted Local Development Framework 2007 and to reduce the risk of flooding to the existing dwelling and the proposed development.)

9. During the period of construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays and 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.
(Reason - To minimise noise disturbance for adjoining residents in accordance with Policy NE/15 of the adopted Local Development Framework 2007.)

10. Prior to the occupation of the dwellings hereby permitted visibility splays shall be provided on both sides of the access and shall be maintained free from any obstruction over a height of 600mm within an area of 2m x 2m measured from and along respectively the highway boundary.
(Reason - In the interest of highway safety in accordance with Policy DP/3 of the adopted Local Development Framework 2007.)

11. The proposed access shall be constructed so that its falls and levels are such that no private water from the site drains across or onto the adopted public highway, and the existing intensified access shall be constructed using a bound material to prevent debris spreading onto the public highway.
(Reason - In the interests of highway safety).

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
SUBJECT TO CONDITIONS

Decision Date: 25 March 2013

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12. No development shall take place until a scheme for the widening of the existing access has been submitted to and approved in writing by the Local Planning Authority. The access shall be a minimum width of 5 metres for a minimum distance of 5m from the junction of the carriageway of High Street. The works shall be carried out on accordance with the approved details prior to occupation of the dwellings hereby permitted.
(Reason - In the interests of highway safety).

13. No development shall take place on the application site until the implementation of a programme of archaeological work has been secured in accordance with a written scheme of investigation which has been submitted to and approved in writing by the Local Planning Authority.
(Reason - To secure the provision of archaeological excavation and the subsequent recording of the remains in accordance with Policy CH/2 of the adopted Local Development Framework 2007.)

14. Before development commences, a plan specifying the area and siting of land to be provided clear of the public highway for the parking, turning, loading and unloading of all vehicles visiting the site during the period of construction, and a scheme for the hours of deliveries to and collections from the site, shall be submitted to and approved in writing by the Local Planning Authority; such space shall be maintained for that purpose during the period of construction.
Reason – In the interest of highway safety and the amenity of the occupiers of adjacent properties in accordance with Policies DP/2 and DP/3 of the adopted Local Development Framework 2007.)

15. No development shall take place until a scheme for the provision of affordable housing, open space, community facilities infrastructure, and waste receptacles to meet the needs of the development in accordance with adopted Local Development Framework Policies DP/4, HG/3, SF/10 and SF/11 has been submitted to and approved in writing with the Local Planning Authority. The scheme shall include a timetable for the provision to be made and shall be carried out in accordance with the approved details
(Reason - To ensure that the development contributes towards affordable housing, open space, community facilities infrastructure and waste receptacle provision in accordance with Policies DP/4, HG/3, SF/10 and SF/11 of the Adopted Local Development Framework 2007).

16. The dwellings hereby permitted shall not exceed one storey in height and all accommodation contained within it shall be on the ground floor only.
(Reason - To ensure the development is satisfactorily assimilated into the area and does not have an adverse impact on the amenity currently enjoyed by the occupiers of adjacent dwellings in accordance with Policy DP/2 of the adopted Local Development Framework 2007.)

Reasons for Approval

1. The development is considered generally to accord with the Development Plan and particularly the following policies:

ST/6 - Group Villages
DP/1 - Sustainable Development
DP/2 - Design of New Development
DP/3 - Development Criteria
DP/4 - Infrastructure and New Developments
DP/7 - Development Frameworks
HG/1 - Housing Density

HG/2 - Housing Mix
HG/3 - Affordable Housing
SF/10 - Outdoor Playspace, Informal Open Space, and New Developments
SF/11 - Open Space Standards
NE/1 - Energy Efficiency
NE/11 - Flood Risk
TR/2 - Car and Cycle Parking Standards
Development Frameworks: Longstanton
Open Space in New Developments SPD
District Design Guide SPD - Adopted March 2010
Affordable Housing SPD - Adopted March 2010
National Planning Policy Framework

2. The proposal conditionally approved is not considered to be significantly detrimental to the following material considerations, which have been raised during the consultation exercise:
   Highway safety
   Drainage

3. All other material planning considerations have been taken into account. None is of such significance as to outweigh the reason for the decision to approve the planning application.

Informatives

1. Environment Agency

   All surface water from roofs shall be piped direct to an approved surface water system using sealed downpipes. Open gullies should not be used.

   The maximum acceptable depth for soakaways is 2.00 metres below existing ground level.

   Only clean, uncontaminated surface water should be discharged to any soakaway, watercourse or surface water sewer.

   An acceptable method of foul drainage disposal would be connection to the public foul sewer.

   Under the Flood Water Management Act 2010, since 6 April 2012 Cambridgeshire County Council has been responsible for Ordinary Watercourses Regulation in this area. If it is intended to do works to any ordinary watercourse prior written consent may be required from the County Council - contact
   http://www.cambridgeshire.gov.uk/environment/floodandwater/flooding/ordinarywatercourse.htm

2. Local Highway Authority

   The granting of planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that separate permission must be sought from the Highway Authority for such works.

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

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Decision Date: 25 March 2013

General

1. **Statement as to how the Local Planning Authority (LPA) has worked with the applicant in a positive and proactive manner on seeking solutions**

   The LPA positively encourages pre-application discussions. Details of this advice service can be found on the Planning pages of the Council's website www.scambs.gov.uk. If a proposed development requires revisions to make it acceptable the LPA will provide an opinion as to how this might be achieved. The LPA will work with the applicant to advise on what information is necessary for the submission of an application and what additional information might help to minimise the need for planning conditions. When an application is acceptable, but requires further details, conditions will be used to make a development acceptable. Joint Listed Building and Planning decisions will be issued together. Where applications are refused clear reasons for refusal will identify why a development is unacceptable and will help the applicant to determine whether and how the proposal might be revised to make it acceptable.

   In relation to this application, it was considered and the process managed in accordance with paragraphs 186 and 187 of the National Planning Policy Framework.

2. Circular 04/2008 (Planning Related Fees) states that where an application is made under Article 21 of the Town and Country Planning (General Development Procedure) Order 1995 [now superseded by Article 30 of the Town and Country Planning (Development Management Procedure)(England) Order 2010], a fee will be payable for any consent, agreement or approval required by condition or limitation attached to the grant of planning permission (or reserved matter consent).

3. The fee is £97 per request or £28 where the permission relates to an extension or alteration to a dwellinghouse or other development in the curtilage of a dwellinghouse. The request can be informal through the submission of a letter or plans, or formal through the completion of an application form and the submission of plans. Any number of conditions may be included on a single request. The form is available on the Council's website www.scambs.gov.uk (application forms - 1app forms-application for the approval of details - pack 25.)

4. It is important that all conditions, particularly pre-commencement conditions, are fully complied with, and where appropriate, discharged prior to the implementation of the development. Failure to discharge such conditions may invalidate the planning permission granted. The development must be carried out fully in accordance with the requirements of any details approved by condition.

5. All new buildings that are to be used by the public must, where reasonable and practicable, be accessible to disabled persons and provide facilities for them. The applicant's attention is therefore drawn to the requirements of Section 76 of the Town and Country Planning Act 1990 and the Building Regulations 2000 (as amended) with respect to access for disabled people.

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
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Decision Date: 25 March 2013

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6. The applicant's attention is drawn to the requirements of the Party Wall etc. Act 1996 if works are proposed to a party wall.

7. If you wish to amend the permitted scheme, and you consider the revisions raise no material issues, you should make an application for a Non Material Amendment. If agreed, the development can go ahead in accordance with this amendment although the revised details will not replace the original plans and any conditions attached to the originally approved development will still apply. If, however, you or the Council consider the revisions raise material issues you may be able to make an application for a Minor Material Amendment. If approved, this will result in a new planning permission and new conditions as necessary may be applied. Details for both procedures are available on the Council's website or on request.

8. If this development involves any works of a building or engineering nature, please note that before any such works are commenced it is the applicant's responsibility to ensure that, in addition to planning permission, any necessary consent under the Building Regulations is also obtained. Advice in respect of Buildings Regulations can be obtained from Building Control Services at South Cambridgeshire District Council. Their contact details are: tel. 03450 450 500 or building.control@scambs.gov.uk or via the website www.scambs.gov.uk.

9. A delegation report or committee report, setting out the basis of this decision, is available on the Council's website.

To help us enhance our service to you please click on the link and complete the customer service questionnaire: www.surveymonkey.com/s/2S522FZ

N Blazeby

Nigel Blazeby
Development Control Manager

South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

THIS PERMISSION DOES NOT CONSTITUTE APPROVAL UNDER BUILDING REGULATIONS AND IS NOT A LISTED BUILDING CONSENT OR CONSERVATION AREA CONSENT. IT DOES NOT CONVEY ANY APPROVAL OR CONSENT WHICH MAY BE REQUIRED UNDER ANY ENACTMENT, BYE-LAW, ORDER OR REGULATION OTHER THAN SECTION 57 OF THE TOWN AND COUNTRY PLANNING ACT 1990.

SEE NOTES OVERLEAF

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
SUBJECT TO CONDITIONS

Decision Date: 25 March 2013

NOTES

Appeals to the Secretary of State

If you are aggrieved by the decision of your Local Planning Authority to refuse permission for the proposed development or to grant it subject to conditions, then you can appeal to the Secretary of State for the Environment under Section 78 of the Town and Country Planning Act 1990.

If you want to appeal, then you must do so using a form which you can get from the Customer Support Unit, Planning Inspectorate, Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6PN.

Alternatively, an online appeals service is available through the Appeals area of the Planning Portal - see www.planningportal.gov.uk/pcs. The Planning Inspectorate will publish details of your appeal on the internet. This may include a copy of the original planning application form and relevant supporting documents supplied to the local authority, together with the completed appeal form and information you submit to the Planning Inspectorate. Please ensure that you only provide information you are happy will be made available to others in this way, including personal information belonging to you. If you supply personal information belonging to a third party please ensure you have their permission to do so. More detailed information about data protection and privacy matters is available on the Planning Portal.

Fully completed appeal forms must be received by the Planning Inspectorate within six months of the date of this decision notice.

The Secretary of State can allow a longer period for giving notice of an appeal, but he will not normally be prepared to use this power unless there are special circumstances which excuse the delay in giving the notice of appeal.

The Secretary of State need not consider an appeal if it seems to him that the Local Planning Authority could not have granted planning permission for the proposed development or could not have granted it without the conditions it imposed, having regard to the statutory requirements, to the provisions of any development order and to any directions given under a development order.

In practice, the Secretary of State does not refuse to consider appeals solely because the Local Planning Authority based its decision on a direction given by him.

Purchase Notices

If either the Local Planning Authority or the Secretary of State for the Environment refuses permission to develop land or grants it subject to conditions, the owner may claim that he can neither put the land to a reasonable beneficial use in its existing state nor render the land capable of a reasonably beneficial use by the carrying out of any development which has been or would be permitted.

In these circumstances, the owner may serve a purchase notice on the District Council in whose area the land is situated. This notice will require the Council to purchase his interest in the land in accordance with the provisions of Part VI of the Town and Country Planning Act 1990.

Section A.8
2016 Planning application / decision / appeal
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Cambridgeshire County Council

PLANNING CONSULTATION RESPONSE

To: SCDC Planning Team	**Highway Development Management** South and City Highways Station Road Whittlesford CB22 4NL
App Reference: S/2439/18	
Date: 17th July 2018	**Contact**: Vikki Keppey

Re: Land rear of The Retreat, Fews Lane, Longstanton

The Highway Authority requests that the application be refused in its present format on the grounds of highway safety for the following reason:

The proposed Traffic Management Plan is insufficient to substantially guarantee the safety of highway users.

This request can be overcome if the applicant undertakes the following amendments:

3.2.5 : Details of the parties that the contractor will contact should be provided.

3.2.2 – reinstatement Paragraph 2:
Details of the length/street names of where the condition survey is to take place should be provided. The contractor must contact the Local Highway Officer for Longstanton to arrange a suitable time for a joint inspection of the adopted public highway.
Paragraph 6 – Please could the applicant clarify where the proposed wheel wash will drain?

The Highway Authority would also require that no deliveries be made to the site/removals from site between the hours of 7.30-9.30 and 15.30-18.00.

No contractor/visitor motor vehicle parking will be permitted within the public adoptable highway at any time during the construction period

In accordance with the previous requests of the Highway Authority in connexion with the development of this land (application numbers S/2561/12/FL,S/1498/15/FL and S/2937/16), please add the following condition to any planning permission the Planning Authority is minded to grant in respect of this proposal.

The access to Fews Lane from High Street shall be widened to a minimum width of 5m fro a distance of not less than 5m from the boundary of the adopted public highway (in this case the back of the footway), to enable two domestic cars to pass each other with ease while both are off the adopted public highway.

Reason: For the safe and effective use of the public highway.

Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that the amended access way be constructed so that its falls and levels are such that no private water from the site drains across or onto the adopted public highway. The use of permeable paving does not provide sufficient long term surety of drainage and as such the Highway Authority will still seek positive measures to prevent private water entering the adopted public highway.

Reason: for the safe and effective operation of the highway

Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that the amended access be constructed using a bound material, for the first five metres from the boundary of the adopted public highway into the site, to prevent debris spreading onto the adopted public highway.

Reason: in the interests of highway safety

In the event that the Planning Authority is so minded as to grant permission to the proposal please add an informative to the effect that the granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

Vikki Keppey
Development Management Engineer

My ref:
Your ref:
Date: 12th December 2018
Contact:
Telephone: 0345 045 5212
E Mail: Victoria.keppey@cambridgeshire.gov.uk

Cambridgeshire County Council

Whittlesford Depot
Box No. ET1030
Station Road
Whittlesford
CB22 4NL

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

Dear Mr Fulton ,

Re: Planning Application S/2439/18/FL

Thank you for your letter of 3rd December, I have reviewed the same and have the following comments:

1,2, 3 and 4. From discussions with the Local Planning Authority the Local Highway Authority have provided a substantive response. However for clarity in this case the case officer has requested that the comments made by the Local Highway Authority via email dated 14th September 2018 will be formally submitted, prior to the determination of the application.

5. The Local Highway concurs with this statement.

6 and 7. Manual for Streets Volume I and II are guidance not policy and are written in such a manor to enable the Highway Authority to consider sites on a contextually based premises.

9. The situation that you describe in relationship to the width of the footpath and its use by motor vehicular traffic is not uncommon in a rural district such as South Cambridgeshire and there is no evidence that this conflict is significant in highway safety terms while you state that the public footpath is well used no empirical data is supplied to support this assertion.

10. According to SCDC planning website Few's Lane has a planning history dating back to 1961 and these applications include for the provision of residential dwellings which will have resulted in low level incremental increase in motor vehicular traffic over this timeframe, therefore the planning application approving two dwellings (S/1498/15/FL) including the one that you now occupy is only one in a reasonably long line of such applications. In terms of traffic generation on average each new dwelling will generate 4.5 motor vehicle movements per 12 hour period, which cannot

be considered sever as required under paragraph 109 of the NPPF to warrant a recommendation of refusal by the Local Highway Authority to the Local Planning Authority.

11. As stated previous above within the response to point 9 the situation that you describe in relationship to the width of the footpath and its use by motor vehicular traffic is not uncommon in a rural district such as South Cambridgeshire and there is no evidence that this conflict is significant in highway safety terms.

12. As Few's Lane is a public highway the water draining from Few's Lane to High Street is draining from one highway to another if the deposition of silt etc from Few's Lane is considered to be significant the Highway Authority may take any action that it deems necessary.

13. The Local Highway Authority believes that there is a slight possibility that this will occur, the Local highway Authority can request that the 2m width of the Public Right of Way be constructed in a bound material.

14, 15. The Local Highway Authority believes this statement to be incorrect and that the pedestrian visibility splays as required within Design Manual for Roads and Bridges of 1.5m x 1.5m could be achieved to the back of the footway when exiting Few's Lane.

16. All accesses are a point of conflict the existing bus stop and existing access are considered to be within the normal range of risks and hazards that a user of the highway should expect to meet and that any vehicle exiting onto the High Street should take into consideration.

17, 18 and 19 Cambridgeshire Fire and Rescue Service are statutory consultees and therefore if this consultee had concerns with regards to the access these should/would have been raised with the Local Planning Authority during the consultation period.

20. Following the lack of substantive empirical evidence and only relying on subjective information the Local Highway Authority has no reason to recommend a refusal of this application to the Local Planning Authority.

21. The Local Highway Authority can only request works within land that is within the ownership of the applicant or within the public highway.

1,2. as confirmed previously the applicant does not own the access and the public right of way is only approximately 2m in width in this location therefore the access cannot be widened to 5 metres in width, however it could be constructed in a bound material for 5m from the rear of the footway and the Local Highway Authority will seek a condition to reflect this.

3. as stated above within points 14,15 the Local Highway Authority believes that pedestrian visibility splays of 1.5m x 1.5m as per Design Manual for Roads and Bridges can be achieved at the junction of Few's Lane and the High Street.

4. As the access to the approved properties under planning application S/1498/15 shows radii kerbs it would be impractical to provide the requested pedestrian visibility splays.

5. This could be encompassed within the Local Planning Authority's normal requirement for a condition relating to surface water drainage.

6. This condition is being dealt with in the form of a traffic management plan which has been submitted as a part of application number S/2439/18, the Local Highway Authority request that the application be refused as the Traffic Management Plan is not satisfactory still stands.

7. The Local Highway Authority will request any conditions that it deems fit with regards to the submitted application as long as these comply with the community infrastructure levy requirements and this is a matter for the Local Planning Authority to review.

22. Comments made by the Local Highway Authority have been reviewed and highway comments will be formally submitted, prior to the determination of the application.

23. It is my understanding that this is true of all planning applications.

24. The Local Highway Authority only considers the application submitted before them and can confirm that no information from any previous applications has been considered.

I have forward a copy of your representation to the Local Planning Authority for their consideration.

Yours sincerely

Vikki Keppey
Development Management Engineer

Section A.9
2019 Planning application / decision
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South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge,
CB23 6EA
www.scambs.gov.uk
0345 045 5215

South Cambridgeshire District Council

Application for Planning Permission.
Town and Country Planning Act 1990

Publication of applications on planning authority websites.

Please note that the information provided on this application form and in supporting documents may be published on the Authority's website. If you require any further clarification, please contact the Authority's planning department.

1. Site Address

Number	
Suffix	
Property name	The Retreat
Address line 1	Fews Lane
Address line 2	
Address line 3	
Town/city	Longstanton
Postcode	CB24 3DP

Description of site location must be completed if postcode is not known:

Easting (x)	539436
Northing (y)	267228

Description

2. Applicant Details

Title	Mr
First name	Gerry
Surname	Caddoo
Company name	LANDBROOK HOMES LTD
Address line 1	The Retreat
Address line 2	Fews Lane
Address line 3	Longstanton
Town/city	Cambridge
Country	Cambs

2. Applicant Details

Postcode	CB24 3DP
Primary number	
Secondary number	
Fax number	
Email address	

Are you an agent acting on behalf of the applicant? ○ Yes ◉ No

3. Agent Details

No Agent details were submitted for this application

4. Site Area

What is the measurement of the site area? (numeric characters only).	0.07
Unit	hectares

5. Description of the Proposal

Please describe details of the proposed development or works including any change of use.

If you are applying for Technical Details Consent on a site that has been granted Permission In Principle, please include the relevant details in the description below.

Demolition of the existing bungalow and the construction of two 2 storey 3 bedroom houses including car parking and all associated hard and soft landscaping

Has the work or change of use already started? ○ Yes ◉ No

6. Existing Use

Please describe the current use of the site

Residential

Is the site currently vacant? ○ Yes ◉ No

Does the proposal involve any of the following? If Yes, you will need to submit an appropriate contamination assessment with your application.

Land which is known to be contaminated ○ Yes ◉ No

Land where contamination is suspected for all or part of the site ○ Yes ◉ No

A proposed use that would be particularly vulnerable to the presence of contamination ○ Yes ◉ No

7. Materials

Does the proposed development require any materials to be used in the build? ◉ Yes ○ No

Please provide a description of existing and proposed materials and finishes to be used in the build (including type, colour and name for each material):

Walls	
Description of existing materials and finishes (optional):	External walls in LBC Fletton
Description of proposed materials and finishes:	New external walls to be in Ibstock Cream Buff multi facing brick

7. Materials

Roof	
Description of existing materials and finishes (optional):	Red concrete interlocking tiles to main roof and built up felt roofing to rear extension
Description of proposed materials and finishes:	Marley Melodie Clay Single Pantile - Natural Red

Windows	
Description of existing materials and finishes (optional):	Combination of timber and UPVC windows
Description of proposed materials and finishes:	UPVC Windows in white

Doors	
Description of existing materials and finishes (optional):	Combination of aluminium and upvc doors
Description of proposed materials and finishes:	Front entrance door to be composite and rear bifolds to be aluminium

Boundary treatments (e.g. fences, walls)	
Description of existing materials and finishes (optional):	Combination of open style ranch fencing, close boarded fencing and mature hedging
Description of proposed materials and finishes:	Close boarded fencing and mature hedging

Vehicle access and hard standing	
Description of existing materials and finishes (optional):	Concrete
Description of proposed materials and finishes:	Combination of gravel and block paving

Lighting	
Description of existing materials and finishes (optional):	External Lighting with PIRs
Description of proposed materials and finishes:	External Lighting with PIRs

Other type of material (e.g. guttering) Fascias and soffites	
Description of existing materials and finishes (optional):	Stained timber
Description of proposed materials and finishes:	White UPVC

Are you supplying additional information on submitted plans, drawings or a design and access statement? (•) Yes ( ) No

If Yes, please state references for the plans, drawings and/or design and access statement

FLL-45-01

8. Pedestrian and Vehicle Access, Roads and Rights of Way

Is a new or altered vehicular access proposed to or from the public highway? ( ) Yes (•) No

8. Pedestrian and Vehicle Access, Roads and Rights of Way

Is a new or altered pedestrian access proposed to or from the public highway? ○ Yes ◉ No

Are there any new public roads to be provided within the site? ○ Yes ◉ No

Are there any new public rights of way to be provided within or adjacent to the site? ○ Yes ◉ No

Do the proposals require any diversions/extinguishments and/or creation of rights of way? ○ Yes ◉ No

9. Vehicle Parking

Is vehicle parking relevant to this proposal? ◉ Yes ○ No

Please provide information on the existing and proposed number of on-site parking spaces

Type of vehicle	Existing number of spaces	Total proposed (including spaces retained)	Difference in spaces
Cars	2	4	2

10. Trees and Hedges

Are there trees or hedges on the proposed development site? ◉ Yes ○ No

And/or: Are there trees or hedges on land adjacent to the proposed development site that could influence the development or might be important as part of the local landscape character? ○ Yes ◉ No

If Yes to either or both of the above, you may need to provide a full tree survey, at the discretion of your local planning authority. If a tree survey is required, this and the accompanying plan should be submitted alongside your application. Your local planning authority should make clear on its website what the survey should contain, in accordance with the current 'BS5837: Trees in relation to design, demolition and construction - Recommendations'.

11. Assessment of Flood Risk

Is the site within an area at risk of flooding? (Refer to the Environment Agency's Flood Map showing flood zones 2 and 3 and consult Environment Agency standing advice and your local planning authority requirements for information as necessary.) ○ Yes ◉ No

If Yes, you will need to submit a Flood Risk Assessment to consider the risk to the proposed site.

Is your proposal within 20 metres of a watercourse (e.g. river, stream or beck)? ◉ Yes ○ No

Will the proposal increase the flood risk elsewhere? ○ Yes ◉ No

How will surface water be disposed of?

☐ Sustainable drainage system

☐ Existing water course

☑ Soakaway

☐ Main sewer

☐ Pond/lake

12. Biodiversity and Geological Conservation

Is there a reasonable likelihood of the following being affected adversely or conserved and enhanced within the application site, or on land adjacent to or near the application site?

To assist in answering this question correctly, please refer to the help text which provides guidance on determining if any important biodiversity or geological conservation features may be present or nearby; and whether they are likely to be affected by the proposals.

12. Biodiversity and Geological Conservation

a) Protected and priority species:

- ○ Yes, on the development site
- ○ Yes, on land adjacent to or near the proposed development
- ◉ No

b) Designated sites, important habitats or other biodiversity features:

- ○ Yes, on the development site
- ○ Yes, on land adjacent to or near the proposed development
- ◉ No

c) Features of geological conservation importance:

- ○ Yes, on the development site
- ○ Yes, on land adjacent to or near the proposed development
- ◉ No

13. Foul Sewage

Please state how foul sewage is to be disposed of:

- [x] Mains Sewer
- [ ] Septic Tank
- [ ] Package Treatment plant
- [ ] Cess Pit
- [ ] Other
- [ ] Unknown

Are you proposing to connect to the existing drainage system? ◉ Yes ○ No ○ Unknown

If Yes, please include the details of the existing system on the application drawings. Please state the plan(s)/drawing(s) references.

FLL-45-02

14. Waste Storage and Collection

Do the plans incorporate areas to store and aid the collection of waste? ◉ Yes ○ No

If Yes, please provide details:

Wheelie bin storage areas are located to the rear of each property

Have arrangements been made for the separate storage and collection of recyclable waste? ◉ Yes ○ No

If Yes, please provide details:

Blue and green bins

15. Trade Effluent

Does the proposal involve the need to dispose of trade effluents or trade waste? ○ Yes ◉ No

16. Residential/Dwelling Units

Due to changes in the information requirements for this question that are not currently available on the system, if you need to supply details of Residential/Dwelling Units for your application please follow these steps:

1. Answer 'No' to the question below;
2. Download and complete this supplementary information template (PDF);
3. Upload it as a supporting document on this application, using the 'Supplementary information template' document type.

This will provide the local authority with the required information to validate and determine your application.

Does your proposal include the gain, loss or change of use of residential units? ◉ Yes ○ No

Please select the proposed housing categories that are relevant to your proposal.

16. Residential/Dwelling Units

- [x] Market
- [ ] Social
- [ ] Intermediate
- [ ] Key Worker

Add 'Market' residential units

Market: Proposed Housing						
	Number of bedrooms					
	1	2	3	4+	Unknown	Total
Houses	0	0	2	0	0	2
Total	0	0	2	0	0	2

Please select the existing housing categories that are relevant to your proposal.

- [x] Market
- [ ] Social
- [ ] Intermediate
- [ ] Key Worker

Add 'Market' residential units

Market: Existing Housing						
	Number of bedrooms					
	1	2	3	4+	Unknown	Total
Houses	0	1	0	0	0	1
Total	0	1	0	0	0	1

Total proposed residential units: 2

Total existing residential units: 1

17. All Types of Development: Non-Residential Floorspace

Does your proposal involve the loss, gain or change of use of non-residential floorspace? ○ Yes ◉ No

18. Employment

Will the proposed development require the employment of any staff? ○ Yes ◉ No

19. Hours of Opening

Are Hours of Opening relevant to this proposal? ○ Yes ◉ No

20. Industrial or Commercial Processes and Machinery

Please describe the activities and processes which would be carried out on the site and the end products including plant, ventilation or air conditioning. Please include the type of machinery which may be installed on site:

Is the proposal for a waste management development? ○ Yes ◉ No

20. Industrial or Commercial Processes and Machinery

If this is a landfill application you will need to provide further information before your application can be determined. Your waste planning authority should make it clear what information it requires on its website

21. Hazardous Substances

Does the proposal involve the use or storage of any hazardous substances? ○ Yes ◉ No

22. Site Visit

Can the site be seen from a public road, public footpath, bridleway or other public land? ○ Yes ◉ No

If the planning authority needs to make an appointment to carry out a site visit, whom should they contact? (Please select only one)

- ○ The agent
- ◉ The applicant
- ○ Other person

23. Pre-application Advice

Has assistance or prior advice been sought from the local authority about this application? ○ Yes ◉ No

24. Authority Employee/Member

With respect to the Authority, is the applicant and/or agent one of the following:
(a) a member of staff
(b) an elected member
(c) related to a member of staff
(d) related to an elected member

It is an important principle of decision-making that the process is open and transparent. ○ Yes ◉ No

For the purposes of this question, "related to" means related, by birth or otherwise, closely enough that a fair-minded and informed observer, having considered the facts, would conclude that there was bias on the part of the decision-maker in the Local Planning Authority.

Do any of the above statements apply?

25. Ownership Certificates and Agricultural Land Declaration

CERTIFICATE OF OWNERSHIP - CERTIFICATE D - Town and Country Planning (Development Management Procedure) (England) Order 2015 Certificate under Article 14

I certify/The applicant certifies that: - Certificate A cannot be issued for this application - All reasonable steps have been taken to find out the names and addresses of everyone else who, on the day 21 days before the date of this application, was the owner* and/or agricultural tenant of any part of the land to which this application relates, but I have/the applicant has been unable to do so.**

*** 'Owner' is a person with a freehold interest or leasehold interest with at least 7 years left to run. ** 'agricultural tenant' has the meaning given in section 65(8) of the Town and Country Planning Act 1990**

The steps taken were:

Search in Land Registry and advertising in local newspaper

Notice of the application has been published in the following newspaper (circulating in the area where the land is situated): Cambridge Independent

On the following date (which must not be earlier than 21 days before the date of the application) (DD/MM/YYYY): 23/01/2019

Person role

- ◉ The applicant
- ○ The agent

Title: Mr

25. Ownership Certificates and Agricultural Land Declaration

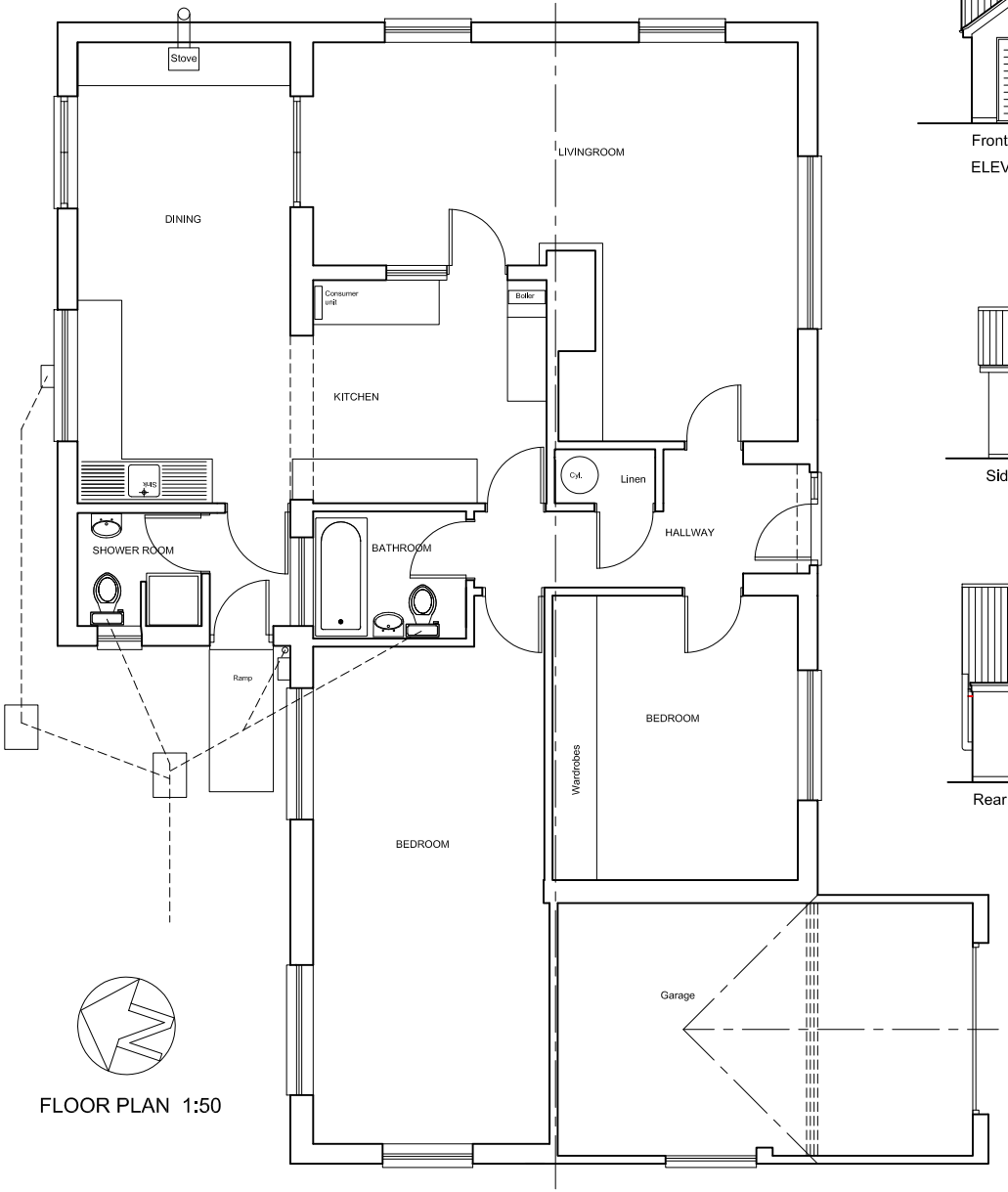
First name	Gerry
Surname	Caddoo
Declaration date (DD/MM/YYYY)	18/01/2019

☑ Declaration made

26. Declaration

I/we hereby apply for planning permission/consent as described in this form and the accompanying plans/drawings and additional information. I/we confirm that, to the best of my/our knowledge, any facts stated are true and accurate and any opinions given are the genuine opinions of the person(s) giving them. ☑

Date (cannot be pre-application)	18/01/2019



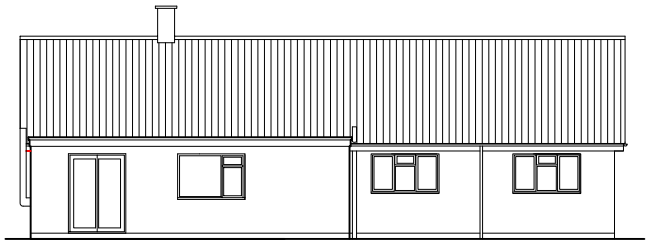
FLOOR PLAN 1:50

Front Elevation [South]

ELEVATIONS 1:100

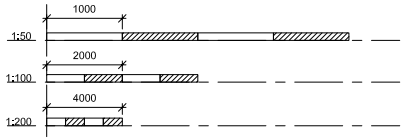
Side Elevation [East]

Side Elevation [West]



Rear Elevation [North]

SCALE BARS



Ensure that drawing is printed to paper size as stated in title block [See 'Scale']

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Rev.	Date	Int.	Amendment
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SIMON WARD ARCHITECTURAL DESIGN
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LANDBROOK HOMES

2 DWELLINGS, THE RETREAT
FEW'S LANE, LONGSTANTON

DWELLING
AS EXISTING

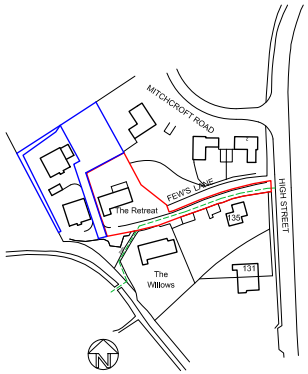
Drawn by: SRW	Date: Jan '19
Scale: As Shown [A2 Sheet]	File No.
Drg. No.: FFL- 45 - 03	Rev.

SCALE BARS

1:50 — 1000
1:100 — 2000
1:200 — 4000

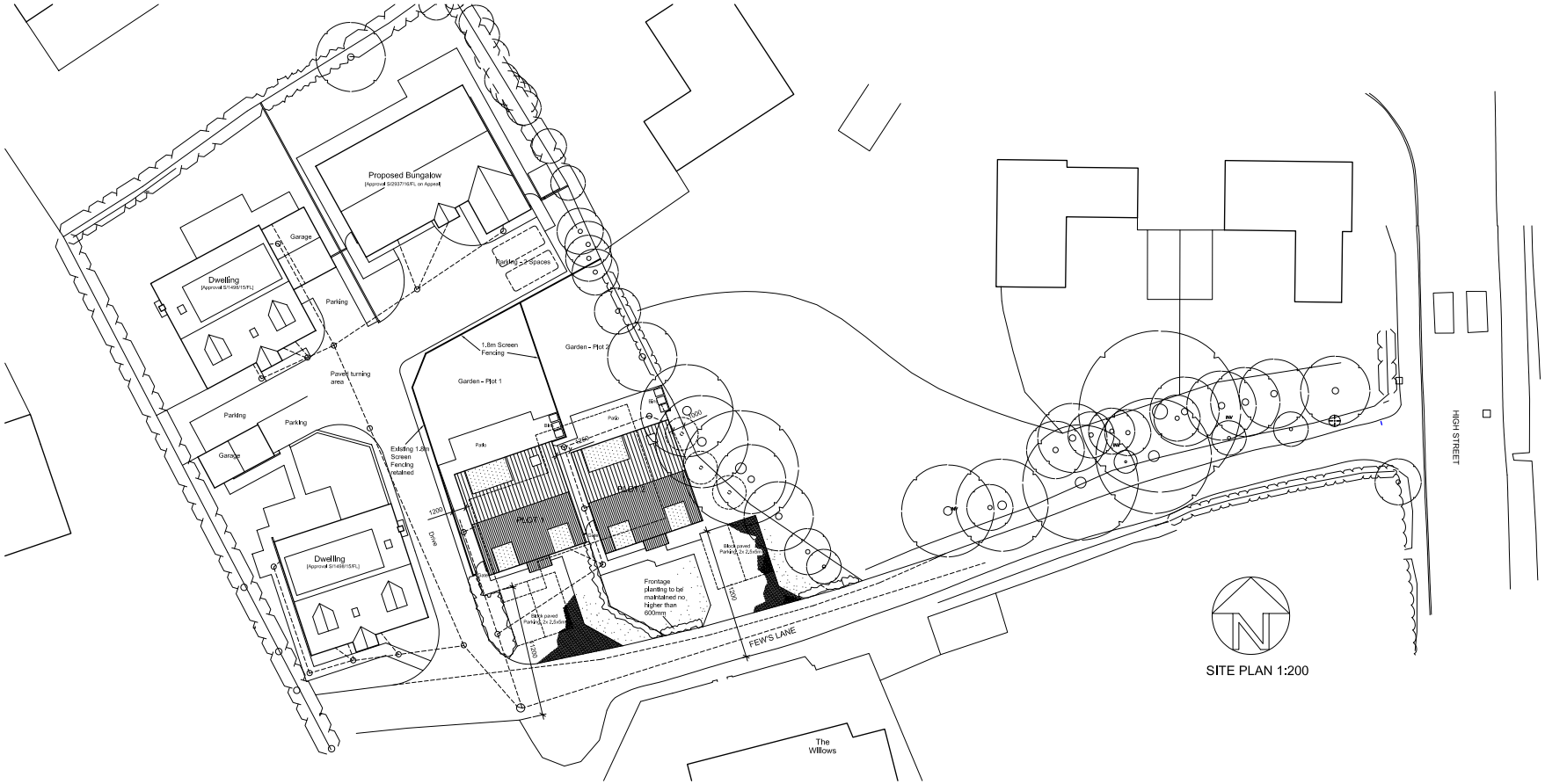
Ensure that drawing is printed to paper size as stated in title block [See 'Scale']

STREET ELEVATION - Facing Few's lane 1:100



Location Plan 1:1250

Note: Red and Blue line areas frame land in ownership of applicant plus 'Few's Lane' access route to Highway [High St.].
Dashed green line denotes line of Footpath



SITE PLAN 1:200

Notes relating to transport entering the site during the construction phase:

Deliveries:
No deliveries are to be made to site between the times 7.30-9.30 and 15.30-18.00 during the working day.

Street Cleaning:
A roadsweeper will be commissioned at the reasonable request of the local highway authority if deemed necessary by that authority.

Parking and loading area:
Site compound area and parking/turning space can be provided in due course as required.
The swept path analysis provided for recent approved schemes in Few's Lane shown at the site entrance would also be applicable to this application. It illustrated a two-axle commercial vehicle with 4m axle length typical of a refuse freighter or 4-wheel tipper requiring a 9.0m turning radius + overhang allowances.

Rev.	Date	Int.	Amendment

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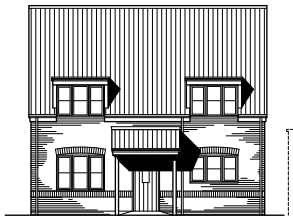
LANDBROOK HOMES

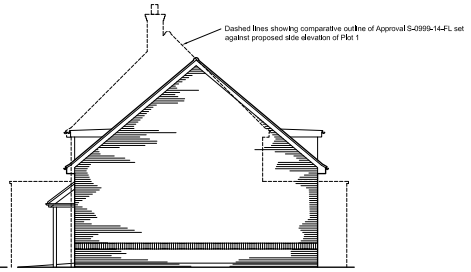
2 DWELLINGS, THE RETREAT
FEW'S LANE, LONGSTANTON

Location Plan, Site Plan &
Street Elevation, Few's lane

Drawn by SRW	Date Dec' 18
Scale As Shown [A1 Sheet]	File No.
Drg. No. FLL - 45 - 02	Rev.



FRONT [South]
ELEVATIONS 1:100 [Plots 1 & 2 Similar]



SIDE [East]

Materials:

Walls: Ivanhoe cream buff multi facing brick

Roof: Marley Melodie Clay Single Pantile - Natural Red

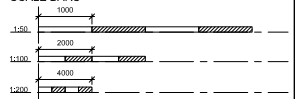
Eaves, Fascia and Bargeboards: White Upvc

Rainwater goods: Round-section White Upvc

Windows: White Upvc frames

Doors: White Aluminium framed patio doors, front door to have white frame and to be Jeldwen Cottage Composite Door.

SCALE BARS



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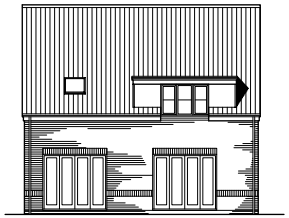
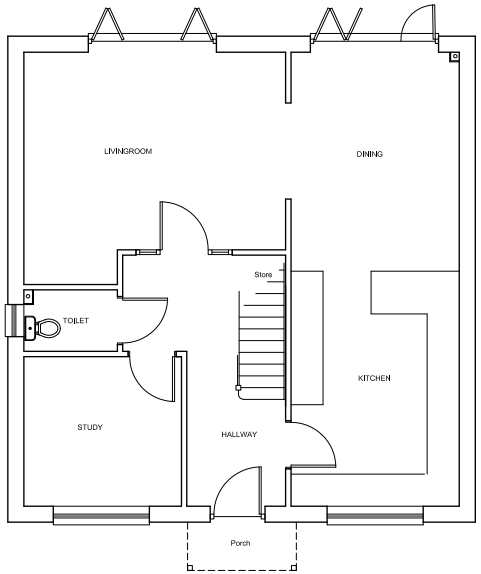
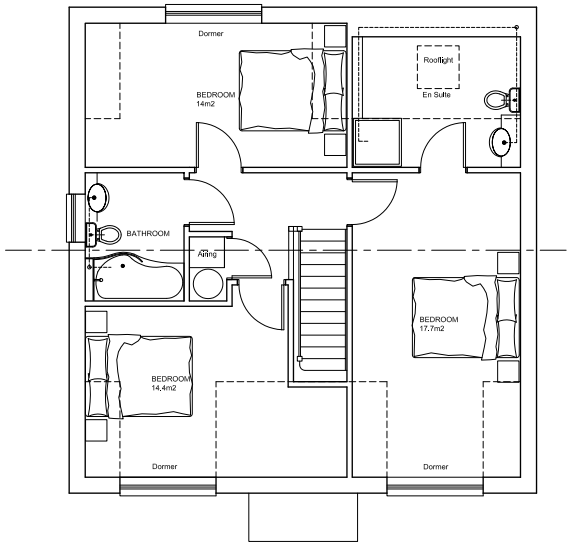


REAR [North]

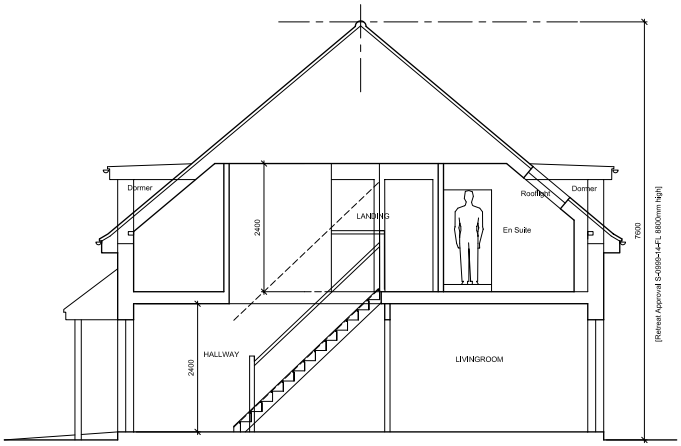
SIDE [West]



GROUND FLOOR PLAN 1:50 [69m2]



FIRST FLOOR PLAN 1:50



TYPICAL SECTION 1:50

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Rev.	Date	Int.	Amendment

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LANDBROOK HOMES

2 DWELLINGS, THE RETREAT
FEW'S LANE, LONGSTANTON

Floor Plans, Section and Elevations, Plots 1 & 2

Drawn by: SRW	Date: Dec' 18
Scale: As Shown [A1 Sheet]	File No.
Drg. No.: FLL - 45 - 01	Rev.

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

REPORT TO:	Planning Committee	8 May 2019
AUTHOR/S:	Joint Director of Planning and Economic Development	

Application Number:	S/0277/19/FL
Parish(es):	Longstanton
Proposal:	Demolition of the existing bungalow and construction of two dwellings including car parking and landscaping
Site address:	The Retreat, Fews Lane, Longstanton, CB24 3DP
Applicant(s):	Landbrook Homes Ltd
Recommendation:	Approval
Key material considerations:	Principle of Development Character and appearance of the local area Residential Amenity Highway safety
Committee Site Visit:	7 May 2019
Departure Application:	No
Presenting Officer:	John Koch, Team Leader
Application brought to Committee because:	At the request of the Local Member
Date by which decision due:	9 May 2019

Executive Summary

1. The application proposes the addition of one new dwelling on land within the village framework and is acceptable in principle subject to the details in respect of scale, layout, appearance, landscaping and the means of access.

2. Residents and one of the local members have raised various concerns, although no material objections have been received from consultees, which cannot be mitigated through the use of appropriate conditions.

3. Officers consider that the details of the proposal are acceptable and subject to various safeguarding conditions, the development will not have an adverse impact in terms of the character and appearance of the local area, residential amenity and highway safety.

Relevant Planning History

4. S/2439/18/FL – Erection of a 3 bedroom bungalow with parking (land rear of The

Retreat) – Approved

S/2937/16/FL- Proposed erection of a 3-bedroomed bungalow with parking (land rear of The Retreat) – Refused but appeal allowed and decision attached as appendix 1.

S/1498/15/FL- Erection of 2 dwellings (The Oaks and The Beeches) – Approved

S/0999/14/FL – Extension and alteration to existing bungalow to provide a house (The Retreat) – Approved

S/0791/88/O – One Bungalow – Refused and appeal dismissed. Decision attached as appendix 2

National Guidance

5. National Planning Policy Framework (NPPF) 2019
National Planning Practice Guidance

Development Plan Policies

6. **South Cambridgeshire Local Plan 2018**
S/1 Vision
S/2 Objectives of the Local Plan
S/3 Presumption in Favour of Sustainable Development
S/7 Development Framework
S/10 Group Villages
CC/3 Renewable and Low Carbon Energy
CC/4 Water Efficiency
CC/6 Construction Methods
CC/7 Water Quality
CC/8 Sustainable Drainage Systems
CC/9 Managing Flood Risk
HQ/1 Design Principles
NH/4 Biodiversity
H/8 Housing Density
H/12 Residential space Standards
SC/11 Land Contamination
TI/2 Planning for Sustainable Travel
TI/3 Parking Provision
TI/10 Broadband

7. **South Cambridgeshire LDF Supplementary Planning Documents (SPD):**
District Design Guide SPD - Adopted March 2010

Consultation

8. **Longstanton Parish Council** – Object on the grounds the development would be overdevelopment of the site in both density and layout. Considering the original number of dwellings that were located in Fews Lane prior to the incremental applications received since 2016 (2 bungalows up to 2016) these dwellings replacing the bungalow will increase dwellings to 7 (considering the other approved application, completed builds and vehicular access for the house on the corner of Fews Lane). In addition, Longstanton Parish council have raised concerns with all applications received for this site about highway safety, in particular that of pedestrians using the lane as a public footpath and the increase in traffic these dwellings will produce and

the visibility from the lane onto the High Street.

9. **Local Highway Authority** – Originally objected as the application was not supported by sufficient pedestrian/cycle information to demonstrate that the proposed incremental development would not be prejudicial to the satisfactory functioning of the highway as concerns have been raised by the District Councillor and Parish Council with regards to the number of pedestrians and cyclist using Fews Lane.

10. Following the submission of the requested pedestrian/cycle information the Local Highway Authority's request for refusal has now been overcome.

11. Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that the existing Public Right of Way be constructed using a bound material, for the first ten metres from the back of the footway along High Street. Reason: in the interests of highway safety.

12. No demolition or construction works shall commence on site until a traffic management plan has been agreed with the Local Planning Authority in consultation with the Highway Authority. The principle areas of concern that should be addressed are:
(i) Movements and control of muck away lorries (all loading and unloading shall be undertaken off the adopted highway)
(ii) Contractor parking, for both phases all such parking shall be within the curtilage of the site and not on the street.
(iii) Movements and control of all deliveries (all loading and unloading shall be undertaken off the adopted public highway.
(iv) Control of dust, mud and debris, in relationship to the functioning of the adopted public highway.
Reason: in the interests of highway safety

13. In the event that the Planning Authority is so minded as to grant permission to the proposal please add an informative to the effect that the granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

14. **Drainage Officer** – No objections in principle. However, the proposals have not demonstrated a suitable surface water and foul water drainage provision and there is extensive surface water flooding indicated on the Environment Agency's Surface Water Maps. Conditions are requested requiring further details of foul and surface water drainage and all finished floor levels shall be a minimum of 300 mm above the existing ground level.

15. **Environmental Health Officer** – No objections subject to conditions requiring limitations on the hours of use for construction site machinery and plant and construction related deliveries and no burning of waste or materials on site without prior consent.

16. **Contaminated Land** – There are no immediately evident environmental constraints at this site, however the development is for residential which is a sensitive end use. Therefore I recommend the following informative be attached to the consent to cover the eventuality of any unforeseen contamination:

17. If during the development contamination not previously identified is found to be present at the site, such as putrescible waste, visual or physical evidence of

contamination of fuels/oils, backfill or asbestos containing materials, then no further development (unless otherwise agreed in writing with the Local Planning Authority) shall be carried out until the developer has submitted, and obtained written approval from the Local Planning Authority for, a remediation strategy detailing how this unsuspected contamination shall be dealt with. The remediation strategy shall be implemented as approved to the satisfaction of the Local Planning Authority.

Representations

18. **Cllr Cheung Johnson** - Objects on the following grounds:

- Overlooking of existing properties because of additional height of new dwellings, potential impact of light onto lower bungalows

- Highways authority concerns on safety, this is a heavily used footpath for residents and Few Lane itself is unsuited for increased vehicular access, in particular at the junction of the High Street

19. **Third parties** - Objections have been received on behalf of two neighbouring properties as well as from the Fews Lane Consortium Ltd raising the following points:

- Density of development not in keeping

- Bulky and overbearing mass out of context creating an undesirable visual impact

- Would violate the 45 degree rule and reduce daylight

- Loss of sunlight on neighbouring properties. Impact should be considered cumulatively with other developments on the site

- Overlooking private amenity space of the property and other neighbouring dwellings

- No provision for safe access for vehicles or pedestrians along Fews Lane

- Vehicles would not be able to enter and exit the parking spaces shown in forward gear. Furthermore, vehicles would have to reverse into or across the public footpath either when entering the parking area or exiting the parking area. This poses a severe and unacceptable risk to the safety of users of the public footpath and to motorists and cyclists making use of Fews Lane.

- Insufficient visibility onto High Street. Too close to the Mitchcroft Road opening on a blind corner next to bus stops

- Fews Lane is of substandard design and construction. Dangerous due to inadequate junction design and inability of highway users along High Street and vehicles exiting Fews Lane to see each other.

- No proposal to mitigate the unsafe impacts on traffic safety. Need to widen Fews Lane to 5 m for first 5 m with a suitable bound material if approved

- The Council has previously misdirected itself in not considering the total additive effects on highway safety resulting from the increased level of traffic due to the total cumulative development of the original curtilage of The Retreat, all of which uses

Fews Lane for all access.

- Residual cumulative impact should have due regard to impacts on the wider road network to include access, economy, safety and the environment .
- Loss of obscuring foliage
- Need to remove permitted development rights if approved
- The previous approval for a dwelling under planning permission ref S/0999/14/FL has expired and is no longer relevant as other permissions have been granted since within the rear garden of The Retreat. Will lead to significant overcrowding in the area.
- The officer's report should explicitly make clear to the committee that the impacts of the wider development of the site can be material planning considerations.
- Piecemeal development in the area by the same developer is against the spirit of the planning process and all of the applications should be considered as s single application
- The application is not valid as the red line plan does not take account of necessary visibility splays

Site and Surroundings

20. The Retreat comprises a single-storey dwelling off an unadopted road known as Fews Lane. The Lane currently serves as an access for 5 existing dwellings and a sixth recently approved behind The Retreat, but not yet constructed. The Lane also serves as a footpath linking the Home Farm residential development to the south and west of Fews Lane with High Street.

21. The site lies within the designated village framework and is otherwise unconstrained.

Proposal

22. The proposal is to demolish the existing dwelling and replace it with two, two-storey dwellings of similar scale, layout and appearance to each other. The upper storey would be contained within the roofspace. The properties would be roughly aligned with The Beeches to the west, each with their own parking areas to meet adopted standards and access off Fews Lane. The proposed external materials would comprise Ibstock Cream Buff multi facing brickwork under a natural red-coloured Marley Melodie Clay single pantile roof.

Planning Assessment

23. The key considerations in this case relate to the principle of development, the impact on the character and appearance of the area; residential amenity of existing and future occupiers; and highway safety.

Principle of Development

24. Policy S/2 of the Local Plan sets out the Plan objectives based on principles of sustainable development. Policy S/3 provides a presumption in favour of sustainable development. In locating new residential development, policy S/6 sets out the development strategy based on a sequential approach to development.

25. Policy S/10 classifies Longstanton as a Group Village where residential development will be permitted of up to an indicative maximum scheme size of 8 dwellings. Therefore the principle of a new dwelling within the village framework as proposed is considered acceptable subject to other material planning considerations.

26. The existing site density will be increased from approximately 14 dph to 29 dph. The overall density of development off and to the north of Fews Lane will be increased from 15 dph to 18 dph. This is consistent with Policy H/8 which primarily requires housing developments to achieve an average net density of 30 dph in Group Villages. This density may vary from the above when justified by the character of the locality, and given the size of the site and its relationship to other properties, the proposed density is not considered to be excessive within its wider context.

Character and Appearance

27. Policy S/7 states that development and redevelopment of unallocated land and buildings within development frameworks will be permitted provided that:
"a. Development is of a scale, density and character appropriate to the location, and is consistent with other policies in the Local Plan; and
b. Retention of the site in its present state does not form an essential part of the local character, and development would protect and enhance local features of green space, landscape, ecological or historic importance; and
c. There is the necessary infrastructure capacity to support the development;"

28. Policy HQ/1 of the adopted Local Plan states that all new development should preserve or enhance the character of the local area and be compatible with its location and appropriate in terms of scale, mass, form, siting, design, proportions and materials. Policy HQ/1 also states that planning permission will not be granted where the proposed development would, amongst other criteria, have an unacceptable adverse on village character.

29. Representations have been submitted which state the proposal is not in keeping with the character of the area. The previous approval for a dwelling under planning permission ref S/0999/14/FL has expired and has not been used as a basis in considering the merits of this application.

30. The surrounding area has a mix of styles and designs of residential properties but is characterised by mainly two storey residential properties which generally sit within modest plots. While of modest scale and appearance, the existing single-storey dwelling on the site has a somewhat dated appearance and does not particularly enhance its surroundings.

31. The new dwellings utilise similar materials to other recently constructed dwellings and are generally of a similar modest form and appearance. The buildings are most clearly seen in conjunction with The Beeches which lies to the west. This dwelling is of two storeys albeit the upper accommodation is contained entirely within the roofspace. It has an eaves and ridge height of 2.4 and 6.9 m respectively. The two new dwellings also contain the upper accommodation within the roofspace but have eaves and ridge heights of 3.7 and 7.8 m respectively. They are separated from The Beeches by a gap of 6 m and by an open area of more than 28 m to the east and dwellings in Mitchcroft Road.

32. While they have a greater scale than The Beeches as well as the other newer properties also served off Fews Lane, the two new dwellings are reasonably divorced

from other development such that their overall scale will not appear over-dominant or out of place in the street scene. Views from the High Street will also be mitigated by the presence of existing screening along Fews Lane and along part of the site boundary to the east.

33. Unlike The Beeches, parking provision will be at the front of the properties, but the residual garden area is not inconsistent with the front of other properties nearby. An agreed landscaping scheme can be secured to allow for softening of the frontage to help reduce the impact of car parking.

34. There may be some impact from the siting of Plot 2 on the canopies of the tree screen along the eastern boundary, most of which are within the curtilage of the adjoining property. Their protection during construction works can be controlled by way of a safeguarding condition. Details of the proposed landscaping and boundary treatments are also required to help assimilate the development into its surroundings.

35. The proposed dwellings are therefore considered to preserve the character of the surrounding area and are compatible with their location and appropriate in terms of scale, mass, form, siting, design, proportions and materials. They therefore comply with Policies S/7 and HQ/1 in this respect.

Residential Amenity

36. For the proposed occupiers, the gross internal floor areas accord with space standards as set out in Policy H/12 and will thus ensure a reasonable level of residential amenity and quality of life for future occupants as well as long term sustainability and usability of the new homes. The rear gardens also have areas which comply with the minimum requirements set out in the District Design Guide.

37. The size and siting of the new dwellings and their set back from the road are such that there will be no harmful loss of privacy for the properties opposite. The properties have rear garden depths of approximately 11 m (Plot 1) and 14 m which comply with amenity area standards set out in the District Design Guide. There are two windows at first floor level and one of these serves an en-suite room served by a rooflight with a cill height 1.7 m above floor level. There is a distance of over 20 m between the rear elevations and the front of the recently approved bungalow and this is acceptable given that the private amenity space of that property will be unaffected.

38. Any overlooking of The Beeches from Plot 1 will be oblique and is no different from many domestic situations. The 6 m wide gap between the two properties will further help mitigate this impact. The property behind known as The Elms also has its private amenity area to the north (i.e. out of view from the new dwellings) such that it will be unaffected. There is also an oblique distance of 19 m between the rear bedroom window in Plot 1 (the nearest property) and the front of The Elms. Given that any overlooking will be towards the front of this property this distance is sufficient such as to not to result in unreasonable loss of privacy. 6 Mitchcroft Road lies to the north-east and the distance from the rear of the house on Plot 2 is approximately 19 m to its nearest boundary. When combined with the existing tree screen in between, this means that the existing privacy enjoyed by this property will be maintained.

39. Any adverse impact on daylight and from overshadowing would mainly be felt by The Beeches. This property lies to the west of Plot 1 and any possible overshadowing would be very early in the morning leaving its private amenity space otherwise largely unaffected. There is no violation of the 45 degree rule and the relative position and orientation of neighbouring dwellings means that any impact will not be significant

such as to warrant refusal.

40. The development will therefore comply with Policy HQ/1.

41. Respondents have requested that permitted development rights be removed in the event the application is approved. Government advice is that this measure should be used sparingly, but nonetheless the addition of some permitted development under Classes A and B could have an unacceptable impact on the amenity of other residential properties. A condition is therefore necessary in this regard.

42. The Environmental Health Officer has requested conditions to ameliorate the impact on residential amenity during construction. Given the restricted nature of Fews Lane these are justified in accordance with policy CC/6 and will be worded to echo those attached to the recent planning permission reference S/2439/18/FL for consistency. An informative can be added requiring no burning of waste or materials on site without prior consent.

Highway Safety

43. Paragraph 109 of the NPPF states developments should only be prevented or refused on highways grounds if there would be an '*unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe'*.

44. The local highway authority (LHA) initially objected as the application was not supported by sufficient pedestrian/cycle information to demonstrate that the proposed incremental development would not be prejudicial to the satisfactory functioning of the highway. The LHA requested that the pedestrian/cycle surveys be carried out, for the duration of 5 days Monday – Friday (not during the school holidays), between the hours of 7.30 – 9.30 and 15.00 – 17.00, along with details of weather on these days.

45. The applicant has since undertaken a survey for the use of Fews Lane by cycles and pedestrians. This was carried out between 27 March and 2 April. The survey results indicate that on average there were 10 pedestrian movements per hour up and down Fews Lane with a cluster of secondary school children during the a.m. and p.m. peaks representing almost 50% of all pedestrian movements. There was a record of just one cyclist during the week long survey. Full details of the survey are available to view on the Council's website.

46. Following the submission of the requested pedestrian/cycle information the LHA has withdrawn its request for refusal. As such, the LHA has not identified any unacceptable impact on highway safety. This is notwithstanding the survey information excludes highway users who pass the entrance to Fews Lane as suggested by an objector.

47. The LHA's approval is subject to conditions that the existing Public Right of Way (PROW) be constructed using a bound material, for the first ten metres from the back of the footway along High Street; the submission of a traffic management plan and an informative to the effect that the granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

48. The requested works requiring the surface of Fews Lane to be constructed using a bound material will be within the public highway (PROW) and therefore can be carried out under a Short Form Section 278 Agreement between the applicant and

Cambridgeshire County Council.

49. The above conditions are considered necessary in this instance. No conditions are sought in respect of the width of the Lane at its junction with High Street or for pedestrian visibility splays to be provided as recommended by some local residents. Objections that the application is not valid as the red line plan does not take account of the necessary visibility splays are not relevant as no requirement for such splays to be provided is considered necessary.

50. In considering the residual cumulative impact on the road network, account is taken of the increased level of traffic due to the total cumulative development of the original curtilage of The Retreat, and the two other properties (built in the 1960's) which use Fews Lane for vehicular access. With the recent approval for a dwelling under reference S/2439/18/FL, the former curtilage of The Retreat will have been subdivided into a total of 5 separate residential plots with the two additional houses opposite.

51. So far as the residual cumulative impacts on the road network are concerned, there would typically be around 4.5 vehicular movements per dwelling over a 12-hour period. This means that with the two new dwellings the total number of vehicular movements would increase to approximately 31.5. The local highway authority has not raised any concerns that the existing free flow of traffic along the High Street will be materially affected. Significantly, the LHA has not considered the residual cumulative impact on the road network arising from a total of seven dwellings to be "severe" as per the wording in paragraph 109 of the NPPF.

52. Attention is drawn to the two appeal decisions attached as appendix 1 and 2. In the former appeal (from 1989), the inspector noted that Fews Lane served three dwellings and the appeal proposal would increase this to 4. He considered the junction of Fews Lane and High Street (then the route of the B1050 through the village) to be unsafe given visibility to the south was considerable impeded by vegetation. As the road is straight, it was anticipated that vehicles would be travelling close to the maximum permitted speed and this would have a harmful effect on traffic safety. No such overriding harm was found in respect of traffic travelling from a northerly direction.

53. In the subsequent 2018 decision, the appeal inspector was aware that the B1050 had ran through the centre of Longstanton, but that the village by-pass now has a signposted route that skirts its western edge. He observed that traffic now has no need to take the old route to by-pass the village and that the time of his 9 a.m. visit on a school day, the level of traffic in the High Street appeared to be quite low. He opined there was no evidence to suggest these conditions were unusual. His conclusion was that although Fews Lane does not meet modern highway standards in terms of both it geometry and construction, the development would provide safe and appropriate access.

54. Officers conclude that there has clearly been a material change of circumstances in highway conditions between 1989 and 2018, namely the construction of the village by-pass. This has had a material impact on traffic flows. The current application for an additional dwelling is also to be determined in accordance with the same road conditions that prevailed at the time of the second appeal.

55. Having had due regard to the matters already discussed, officers have no reason to dispute the conclusion of the LHA in respect of any highway related matters. The proposal therefore complies with policies TI/2 and TI/3.

Other Matters

56. In view of the consultation response from the Drainage Officer, conditions in respect of foul and surface water drainage and finished floor levels should be imposed in accordance with policies CC/8 and CC/9. An informative will also be added in respect of contamination as requested by the consultee.

57. Conditions are also required in respect of a scheme for renewable energy, water efficiency measures and broadband provisions to accord with newly adopted Plan policies CC/3, CC/4 and TI/10 respectively.

58. The objection that piecemeal development in the area by the same developer is against the spirit of the planning process is not a material planning consideration.

59. The representation that the impacts of the wider development of the site can be material planning considerations has been acknowledged in the drafting of this report.

Recommendation

60. Approval subject to:

Planning conditions and Informatives as set out below, with the final wording of any amendments to these to be agreed in consultation with the Chair and Vice Chair prior to the issuing of planning permission.

Conditions

a) The development hereby permitted shall be begun before the expiration of 3 years from the date of this permission.
(Reason - To ensure that consideration of any future application for development in the area will not be prejudiced by permissions for development, which have not been acted upon.)

b) The development hereby permitted shall be carried out in accordance with the following approved plans: FLL-45-01, FLL-45-02
(Reason - To facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990).

c) The materials to be used in the construction of the external surfaces of the dwellings hereby permitted shall be as described in the application form or shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of development. Where materials are approved by the Local Planning Authority, the development shall be carried out in accordance with the approved details.
(Reason - To ensure the appearance of the development is satisfactory in accordance with Policy HQ/1 of the South Cambridgeshire Local Plan 2018).

d) Prior to the first occupation of the development, full details of both hard and soft landscape works shall be submitted to and approved in writing by the Local Planning Authority. The details shall also include specification of all proposed trees, hedges and shrub planting, which shall include details of species, density and size of stock.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NH/6 of the adopted South Cambridgeshire Local Plan 2018).

e) All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NH/6 of the adopted South Cambridgeshire Local Plan 2018.)

f) Prior to the first occupation of the development a plan indicating the positions, design, materials and type of boundary treatment to be erected shall be submitted to and approved in writing by the Local Planning Authority. The boundary treatment for each dwelling shall be completed before that/the dwelling is occupied in accordance with the approved details and shall thereafter be retained.
(Reason - To ensure that the appearance of the site does not detract from the character of the area in accordance with Policy HQ/1 of the adopted South Cambridgeshire Local Plan 2018.)

g) No demolition or construction works shall commence on site until a traffic management plan has been agreed with the Local Planning Authority in consultation with the Highway Authority. The principle areas of concern that should be addressed are:
(i) Movements and control of muck away lorries (all loading and unloading shall be undertaken off the adopted highway)
(ii) Contractor parking shall be within the curtilage of the site and not on the street.
(iii) Movements and control of all deliveries (all loading and unloading shall be undertaken off the adopted public highway.
(iv) Control of dust, mud and debris, in relationship to the functioning of the adopted public highway.
(Reason: In the interests of highway safety).

h) No development above slab level shall occur until schemes for the provision and implementation of foul and surface water drainage have been submitted to and approved in writing by the Local Planning Authority. The schemes shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with an implementation programme agreed in writing with the Local Planning Authority.
(Reason - To reduce the risk of pollution to the water environment, to ensure a satisfactory method of foul water drainage and to reduce the risk of flooding in accordance with Policies CC/7, CC/8 and CC/9 of the South Cambridgeshire Local Plan 2018).

i) All finished floor levels shall be a minimum of 300 mm above the existing ground level.
(Reason – To reduce the risk of flooding in accordance with policy CC/9 of the South Cambridgeshire Local Plan 2018).

j) No development above slab level shall take place until a scheme has been submitted that demonstrates a minimum of 10% of carbon emissions (to be

calculated by reference to a baseline for the anticipated carbon emissions for the property as defined by Building Regulations) can be reduced through the use of on-site renewable energy and low carbon technologies. The scheme shall be implemented and maintained in accordance with the approved details prior to the occupation of the development.
(Reason – In accordance with policy CC/3 of the South Cambridgeshire Local Plan 2018 and paragraphs 148, 151 and 153 of the National Planning Policy Framework 2018 that seek to improve the sustainability of the development, support the transition to a low carbon future and promote a decentralised, renewable form of energy generation.)

k) The development hereby approved shall not be occupied a water conservation strategy, which demonstrates a minimum water efficiency standard equivalent to the BREEAM standard for 2 credits for water use levels unless demonstrated not practicable, has been submitted to and approved in writing by the local planning authority. Works shall be carried out in accordance with the approved details.
(Reason – To improve the sustainability of the development and reduce the usage of a finite and reducing key resource, in accordance with policy CC/4 of the south Cambridgeshire Local Plan 2018.)

l) The dwellings hereby approved shall not be occupied until they have been made capable of accommodating Wi-Fi and suitable ducting (in accordance with the Data Ducting Infrastructure for New Homes Guidance Note) has been provided to the public highway that can accommodate fibre optic cabling or other emerging technology, unless otherwise agreed in writing with the Local Planning Authority.
(Reason – To ensure sufficient infrastructure is provided that would be able to accommodate a range of persons within the development, in accordance with policy TI/10 of the South Cambridgeshire Local Plan 2018.)

m) During the period of demolition and construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays, or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.
(Reason - To minimise noise disturbance for adjoining residents in accordance with Policy CC/6 of the South Cambridgeshire Local Plan 2018).

n) During the period of demolition and construction, no deliveries shall be made to and from the site between 0730 and 0930 hours and between 1500 and 1800 hours on weekdays or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.
(Reason - To minimise noise disturbance for adjoining residents and to reduce potential conflicts with pedestrians, particular schoolchildren using Fews Lane and High Street in accordance with Policy CC/6 and HQ/1 of the South Cambridgeshire Local Plan 2018).

o) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no development within Classes A and B of Part 1 of Schedule 2 of the Order shall take place unless expressly authorised by planning permission granted by the Local Planning Authority in that behalf.

(Reason - In the interests of protection of residential amenity and the character of the area in accordance with policy HQ/1 of the South Cambridgeshire Local Plan 2018).

Informatives

a) If during the development contamination not previously identified is found to be present at the site, such as putrescible waste, visual or physical evidence of contamination of fuels/oils, backfill or asbestos containing materials, then no further development (unless otherwise agreed in writing with the Local Planning Authority) shall be carried out until the developer has submitted, and obtained written approval from the Local Planning Authority for, a remediation strategy detailing how this unsuspected contamination shall be dealt with. The remediation strategy shall be implemented as approved to the satisfaction of the Local Planning Authority.

b) The granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

c) There shall be no burning of waste or materials on site without the prior consent of the Council's Environmental Health Officer.

Background Papers:

The following list contains links to the documents on the Council's website and / or an indication as to where hard copies can be inspected.

- South Cambridgeshire Local Plan 2018
- South Cambridgeshire Local Development Framework Supplementary Planning Documents (SPD's)
- Planning File Reference: S/277/19/FL

Report Author: John Koch Team Leader
Telephone Number: 01954 713268

Form 4

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL **Ref. S/0277/19/FL**
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
SUBJECT TO CONDITIONS **Decision Date: 09 May 2019**

Mr Gerry Caddoo,
LANDBROOK HOMES LTD
The Retreat
Fews Lane
Longstanton
Cambridge
Cambridgeshire
CB24 3DP

The Council hereby grants permission for Demolition of the existing bungalow and construction of two dwellings including car parking and landscaping

At: The Retreat, Fews Lane, Longstanton, Cambridge, Cambridgeshire, CB24 3DP
For: Mr Gerry Caddoo, LANDBROOK HOMES LTD

In accordance with your application dated 18 January 2019 and the plans, drawings and documents which form part of the application, subject to conditions set out below.

1. The development hereby permitted shall be begun before the expiration of 3 years from the date of this permission.
   (Reason - To ensure that consideration of any future application for development in the area will not be prejudiced by permissions for development, which have not been acted upon).

2. The development hereby permitted shall be carried out in accordance with the following approved plans: FLL-45-01, FLL-45-02
   (Reason - To facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990).

3. The materials to be used in the construction of the external surfaces of the dwellings hereby permitted shall be as described in the application form or shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of development. Where materials are approved by the Local Planning Authority, the development shall be carried out in accordance with the approved details.
   (Reason - To ensure the appearance of the development is satisfactory in accordance with Policy HQ/1 of the South Cambridgeshire Local Plan 2018).

4. Prior to the first occupation of the development, full details of both hard and soft landscape works shall be submitted to and approved in writing by the Local Planning Authority. The details shall also include specification of all proposed trees, hedges and shrub planting, which shall include details of species, density and size of stock.
   (Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NH/6 of the adopted South Cambridgeshire Local Plan 2018).

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5. All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NE/6 of the South Cambridgeshire Local Plan 2018).

6. Prior to the first occupation of the development a plan indicating the positions, design, materials and type of boundary treatment to be erected shall be submitted to and approved in writing by the Local Planning Authority. The boundary treatment for each dwelling shall be completed before that/the dwelling is occupied in accordance with the approved details and shall thereafter be retained.
(Reason - To ensure that the appearance of the site does not detract from the character of the area in accordance with Policy HQ/1 of the adopted South Cambridgeshire Local Plan 2018.)

7. g) No demolition or construction works shall commence on site until a traffic management plan has been agreed with the Local Planning Authority in consultation with the Highway Authority. The principle areas of concern that should be addressed are:
(i) Movements and control of muck away lorries (all loading and unloading shall be undertaken off the adopted highway)
(ii) Contractor parking shall be within the curtilage of the site and not on the street.
(iii) Movements and control of all deliveries (all loading and unloading shall be undertaken off the adopted public highway.
(iv) Control of dust, mud and debris, in relationship to the functioning of the adopted public highway.
(Reason: In the interests of highway safety).

8. ..

9. No development above slab level shall occur until schemes for the provision and implementation of foul and surface water drainage have been submitted to and approved in writing by the Local Planning Authority. The schemes shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with an implementation programme agreed in writing with the Local Planning Authority.
(Reason - To reduce the risk of pollution to the water environment, to ensure a satisfactory method of foul water drainage and to reduce the risk of flooding in accordance with Policies CC/7, CC/8 and CC/9 of the South Cambridgeshire Local Plan 2018).

10. All finished floor levels shall be a minimum of 300 mm above the existing ground level.
(Reason – To reduce the risk of flooding in accordance with policy CC/9 of the South Cambridgeshire Local Plan 2018).

11. j) No development above slab level shall take place until a scheme has been submitted that demonstrates a minimum of 10% of carbon emissions (to be calculated by reference to a baseline for the anticipated carbon emissions for the property as defined by Building Regulations) can be reduced through the use of on-site renewable energy and low carbon technologies. The scheme shall be implemented and maintained in accordance with the approved details prior to the occupation of the development.
(Reason – In accordance with policy CC/3 of the South Cambridgeshire Local Plan 2018 and paragraphs 148, 151 and 153 of the National Planning Policy Framework 2018 that seek to improve the sustainability of the development, support the transition to a low carbon future and promote a decentralised, renewable form of energy generation.)

12. The development hereby approved shall not be occupied a water conservation strategy, which demonstrates a minimum water efficiency standard equivalent to the BREEAM standard for 2 credits for water use levels unless demonstrated not practicable, has been submitted to and approved in writing by the local planning authority. Works shall be carried out in accordance with the approved details.
(Reason – To improve the sustainability of the development and reduce the usage of a finite and reducing key resource, in accordance with policy CC/4 of the south Cambridgeshire Local Plan 2018.)

13. The dwellings hereby approved shall not be occupied until they have been made capable of accommodating Wi-Fi and suitable ducting (in accordance with the Data Ducting Infrastructure for New Homes Guidance Note) has been provided to the public highway that can accommodate fibre optic cabling or other emerging technology, unless otherwise agreed in writing with the Local Planning Authority.
(Reason – To ensure sufficient infrastructure is provided that would be able to accommodate a range of persons within the development, in accordance with policy TI/10 of the South Cambridgeshire Local Plan 2018.)

14. During the period of demolition and construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays, or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.
(Reason - To minimise noise disturbance for adjoining residents in accordance with Policy CC/6 of the South Cambridgeshire Local Plan 2018).

15. During the period of demolition and construction, no deliveries shall be made to and from the site between 0730 and 0930 hours and between 1500 and 1800 hours on weekdays or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.
(Reason - To minimise noise disturbance for adjoining residents and to reduce potential conflicts with pedestrians, particular schoolchildren using Fews Lane and High Street in accordance with Policy CC/6 and HQ/1 of the South Cambridgeshire Local Plan 2018).

16. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no development within Classes A and B of Part 1 of Schedule 2 of the

Order shall take place unless expressly authorised by planning permission granted by the Local Planning Authority in that behalf.
(Reason - In the interests of protection of residential amenity and the character of the area in accordance with policy HQ/1 of the South Cambridgeshire Local Plan 2018).

Informatives

1. a) If during the development contamination not previously identified is found to be present at the site, such as putrescible waste, visual or physical evidence of contamination of fuels/oils, backfill or asbestos containing materials, then no further development (unless otherwise agreed in writing with the Local Planning Authority) shall be carried out until the developer has submitted, and obtained written approval from the Local Planning Authority for, a remediation strategy detailing how this unsuspected contamination shall be dealt with. The remediation strategy shall be implemented as approved to the satisfaction of the Local Planning Authority.

   b) The granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

   c) There shall be no burning of waste or materials on site without the prior consent of the Council's Environmental Health Officer.

General

1. **Statement as to how the Local Planning Authority (LPA) has worked with the applicant in a positive and proactive manner on seeking solutions**

   The LPA positively encourages pre-application discussions. Details of this advice service can be found on the Planning pages of the Council's website www.scambs.gov.uk. If a proposed development requires revisions to make it acceptable the LPA will provide an opinion as to how this might be achieved. The LPA will work with the applicant to advise on what information is necessary for the submission of an application and what additional information might help to minimise the need for planning conditions. When an application is acceptable, but requires further details, conditions will be used to make a development acceptable. Joint Listed Building and Planning decisions will be issued together. Where applications are refused clear reasons for refusal will identify why a development is unacceptable and will help the applicant to determine whether and how the proposal might be revised to make it acceptable.

   In relation to this application, it was considered and the process managed in accordance with paragraphs 186 and 187 of the National Planning Policy Framework.

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2. Circular 04/2008 (Planning Related Fees) states that where an application is made under Article 21 of the Town and Country Planning (General Development Procedure) Order 1995 [now superseded by Article 30 of the Town and Country Planning (Development Management Procedure)(England) Order 2010], a fee will be payable for any consent, agreement or approval required by condition or limitation attached to the grant of planning permission (or reserved matter consent).

   The fee is £116 per request or £34 where the permission relates to an extension or alteration to a dwellinghouse or other development in the curtilage of a dwellinghouse. The request can be informal through the submission of a letter or plans, or formal through the completion of an application form and the submission of plans. Any number of conditions may be included on a single request. The form is available on the Council's website www.scambs.gov.uk (application forms - 1app forms-application for the approval of details - pack 25.)

3. It is important that all conditions, particularly pre-commencement conditions, are fully complied with, and where appropriate, discharged prior to the implementation of the development. Failure to discharge such conditions may invalidate the planning permission granted. The development must be carried out fully in accordance with the requirements of any details approved by condition.

4. All new buildings that are to be used by the public must, where reasonable and practicable, be accessible to disabled persons and provide facilities for them. The applicant's attention is therefore drawn to the requirements of Section 76 of the Town and Country Planning Act 1990 and the Building Regulations 2000 (as amended) with respect to access for disabled people.

5. In order to obtain an official postal address, any new buildings should be formally registered with South Cambridgeshire District Council. Unregistered addresses cannot be passed to Royal Mail for allocation of postcodes. Applicants can find additional information, a scale of charges and an application form at www.scambs.gov.uk/snn. Alternatively, applicants can contact the Address Management Team: call 08450 450 500 or email address.management@scambs.gov.uk. Please note new addresses cannot be assigned by the Council until the footings of any new buildings are in place.

6. The applicant's attention is drawn to the requirements of the Party Wall etc. Act 1996 if works are proposed to a party wall.

7. If you wish to amend the permitted scheme, and you consider the revisions raise no material issues, you should make an application for a Non Material Amendment. If agreed, the development can go ahead in accordance with this amendment although the revised details will not replace the original plans and any conditions attached to the originally approved development will still apply. If, however, you or the Council consider the revisions raise material issues you may be able to make an application for a Minor Material Amendment. If approved, this will result in a new planning permission and new conditions as necessary may be applied. Details for both procedures are available on the Council's website or on request.

8. If this development involves any works of a building or engineering nature, please note that before any such works are commenced it is the applicant's responsibility to ensure that, in

addition to planning permission, any necessary consent under the Building Regulations is also obtained. Advice in respect of Buildings Regulations can be obtained from Building Control Services at South Cambridgeshire District Council. Their contact details are: tel. 03450 450 500 or building.control@scambs.gov.uk or via the website www.scambs.gov.uk.

9. A delegation report or committee report, setting out the basis of this decision, is available on the Council's website.

To help us enhance our service to you please complete our Customer Service Questionnaire

SJ Kelly

Stephen Kelly
Joint Director for Planning and Economic Development for Cambridge and South Cambridgeshire

South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

THIS PERMISSION DOES NOT CONSTITUTE APPROVAL UNDER BUILDING REGULATIONS AND IS NOT A LISTED BUILDING CONSENT OR CONSERVATION AREA CONSENT. IT DOES NOT CONVEY ANY APPROVAL OR CONSENT WHICH MAY BE REQUIRED UNDER ANY ENACTMENT, BYE-LAW, ORDER OR REGULATION OTHER THAN SECTION 57 OF THE TOWN AND COUNTRY PLANNING ACT 1990.

SEE NOTES OVERLEAF

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
SUBJECT TO CONDITIONS

Decision Date: 09 May 2019

NOTES

Appeals to the Secretary of State

If you are aggrieved by the decision of your Local Planning Authority to refuse permission for the proposed development or to grant it subject to conditions, then you can appeal to the Secretary of State for the Environment under Section 78 of the Town and Country Planning Act 1990.

If you want to appeal, then you must do so using a form which you can get from the Customer Support Unit, Planning Inspectorate, Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6PN.

Alternatively, an online appeals service is available through the Appeals area of the Planning Portal - see www.planningportal.gov.uk/pcs. The Planning Inspectorate will publish details of your appeal on the internet. This may include a copy of the original planning application form and relevant supporting documents supplied to the local authority, together with the completed appeal form and information you submit to the Planning Inspectorate. Please ensure that you only provide information you are happy will be made available to others in this way, including personal information belonging to you. If you supply personal information belonging to a third party please ensure you have their permission to do so. More detailed information about data protection and privacy matters is available on the Planning Portal.

Fully completed appeal forms must be received by the Planning Inspectorate within six months of the date of this decision notice except where the property is subject to an enforcement notice, where an appeal must be received within 28 days.

The Secretary of State can allow a longer period for giving notice of an appeal, but he will not normally be prepared to use this power unless there are special circumstances which excuse the delay in giving the notice of appeal.

The Secretary of State need not consider an appeal if it seems to him that the Local Planning Authority could not have granted planning permission for the proposed development or could not have granted it without the conditions it imposed, having regard to the statutory requirements, to the provisions of any development order and to any directions given under a development order.

In practice, the Secretary of State does not refuse to consider appeals solely because the Local Planning Authority based its decision on a direction given by him.

Purchase Notices

If either the Local Planning Authority or the Secretary of State for the Environment refuses permission to develop land or grants it subject to conditions, the owner may claim that he can neither put the land to a reasonable beneficial use in its existing state nor render the land capable of a reasonably beneficial use by the carrying out of any development which has been or would be permitted.

In these circumstances, the owner may serve a purchase notice on the District Council in whose area the land is situated. This notice will require the Council to purchase his interest in the land in accordance with the provisions of Part VI of the Town and Country Planning Act 1990.

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
CAMBRIDGESHIRE

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING PERMISSION
SUBJECT TO CONDITIONS

Decision Date: 09 May 2019

IMPORTANT INFORMATION REGARDING CONDITIONS

If you have been granted Planning Permission and/or Listed Building Consent you may wish to get started immediately, however it is always important to carefully read the decision notice in full before any work begins.

The majority of Planning Permissions and Listed Building Consents have conditions attached. Some conditions request further information that requires approval by the Local Planning Authority before any development takes place ('pre-commencement'). All conditions are set out on the decision notice.

Under Section 7 of the Planning (Listed Buildings and Conservation Areas) Act 1990, it is a criminal offence to carry out unauthorised works to a listed building. Under Section 9 of the Act, a person shall be guilty of an offence should they fail to comply with any condition attached to the consent.

HOW DO I DISCHARGE THE CONDITIONS

Please note that the process takes up to eight weeks from the date the Local Planning Authority receives a valid application. Therefore it important to plan ahead and allow plenty of time before work is due to commence.

You need to fill in a form to submit your request to discharge conditions, and accompany the relevant details/samples. You can download the necessary form by using the following link: https://www.scambs.gov.uk/content/apply-planning-permission. This form can be emailed directly to planning@scambs.gov.uk or submitted by post to South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

Alternatively you can submit an application to discharge the conditions through the Government's Planning Portal website: https://www.planningportal.co.uk/applications. Please note, The Planning Portal refers to it as 'Approval of details reserved by a condition'.

When the required information has been submitted you will receive a reference and an acknowledgement letter. Once the Local Planning Authority is satisfied that the requirement of the condition have been met you will receive a formal notification that the conditions have been discharged.

FEES

£0 – for all Listed Building Consent 'Discharge of Conditions' applications;

£34 – for all householder 'Discharge of Conditions' applications;

£116 – for all other types 'Discharge of Conditions' applications.

Please contact your Case Officer with any queries.

Section A.10
Application 20/02453/S73
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South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge,
CB23 6EA
www.scambs.gov.uk
0345 045 5215

South Cambridgeshire District Council

Application for removal or variation of a condition following grant of planning permission. Town and Country Planning Act 1990. Planning (Listed Buildings and Conservation Areas) Act 1990

Publication of applications on planning authority websites.

Please note that the information provided on this application form and in supporting documents may be published on the Authority's website. If you require any further clarification, please contact the Authority's planning department.

1. Site Address

Number	
Suffix	
Property name	The Retreat
Address line 1	Fews Lane
Address line 2	
Address line 3	
Town/city	Longstanton
Postcode	CB24 3DP

Description of site location must be completed if postcode is not known:

Easting (x)	539436
Northing (y)	267228

Description

2. Applicant Details

Title	Mr
First name	Gerry
Surname	Caddoo
Company name	Landbrook Homes Ltd
Address line 1	The Retreat, Fews Lane
Address line 2	Fews Lane
Address line 3	Longstanton
Town/city	Cambridge

2. Applicant Details

Country	Cambridgeshire
Postcode	CB24 3DP

Are you an agent acting on behalf of the applicant? ○ Yes ◉ No

Primary number	
Secondary number	
Fax number	
Email address	

3. Agent Details

No Agent details were submitted for this application

4. Description of the Proposal

Please provide a description of the approved development as shown on the decision letter

Demolition of the existing bungalow and construction of two dwellings including car parking and landscaping

Reference number

S/0277/19/FL

Date of decision (date must be pre-application submission)	09/05/2019

Please state the condition number(s) to which this application relates

Condition number(s)

7

Has the development already started? ○ Yes ◉ No

5. Condition(s) - Removal/Variation

Please state why you wish the condition(s) to be removed or changed

To reflect the proposals in the Traffic Management Plan

If you wish the existing condition to be changed, please state how you wish the condition to be varied

Substitute the current wording in Condition 7 with
"The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019"

6. Site Visit

Can the site be seen from a public road, public footpath, bridleway or other public land? ◉ Yes ○ No

If the planning authority needs to make an appointment to carry out a site visit, whom should they contact?

- ○ The agent
- ◉ The applicant
- ○ Other person

7. Pre-application Advice

Has assistance or prior advice been sought from the local authority about this application? ◉ Yes ○ No

If Yes, please complete the following information about the advice you were given (this will help the authority to deal with this application more efficiently):

Officer name:

Title	
First name	
Surname	
Reference	

Date (Must be pre-application submission)

Details of the pre-application advice received

8. Ownership Certificates and Agricultural Land Declaration

CERTIFICATE OF OWNERSHIP - CERTIFICATE D - Town and Country Planning (Development Management Procedure) (England) Order 2015 Certificate under Article 14

I certify/The applicant certifies that: - Certificate A cannot be issued for this application - All reasonable steps have been taken to find out the names and addresses of everyone else who, on the day 21 days before the date of this application, was the owner* and/or agricultural tenant of any part of the land to which this application relates, but I have/the applicant has been unable to do so.**

*** 'Owner' is a person with a freehold interest or leasehold interest with at least 7 years left to run. ** 'agricultural tenant' has the meaning given in section 65(8) of the Town and Country Planning Act 1990**

The steps taken were:

Searches in Land Registry and advertising in local newspaper

Notice of the application has been published in the following newspaper (circulating in the area where the land is situated)	Cambridge Independent
On the following date (which must not be earlier than 21 days before the date of the application) (DD/MM/YYYY)	20/05/2020

Person role

◉ The applicant
○ The agent

Title	Mr
First name	Gerry
Surname	Caddoo
Declaration date (DD/MM/YYYY)	21/05/2020

☑ Declaration made

9. Declaration

I/we hereby apply for planning permission/consent as described in this form and the accompanying plans/drawings and additional information. I/we confirm that, to the best of my/our knowledge, any facts stated are true and accurate and any opinions given are the genuine opinions of the person(s) giving them. ☑

Date (cannot be pre-application)	21/05/2020

LAND AT THE RETREAT, FEWS LANE, LONGSTANTON, CAMBRIDGESHIRE

Proposed Residential Development

Traffic Management Plan

Prepared for: Landbrook Homes Ltd

SLR Ref: 406.08106.00002
Version No: Final_1
December 2019

BASIS OF REPORT

This document has been prepared by SLR Consulting Limited with reasonable skill, care and diligence, and taking account of the manpower, timescales and resources devoted to it by agreement with Landbrook Homes Ltd (the Client) as part or all of the services it has been appointed by the Client to carry out. It is subject to the terms and conditions of that appointment.

SLR shall not be liable for the use of or reliance on any information, advice, recommendations and opinions in this document for any purpose by any person other than the Client. Reliance may be granted to a third party only in the event that SLR and the third party have executed a reliance agreement or collateral warranty.

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Appendix 01: Drawing 11 - TMP Layout Drawing
Appendix 02: Site Parking Policy Document

1.0 Introduction

This Traffic Management Plan (TMP) is prepared on behalf of Landbrook Homes Ltd (the applicant) relating to the proposed residential development of land at The Retreat, Fews Lane, Longstanton, Cambridgeshire.

The development comprises the demolition of an existing bungalow and the erection of 2 x 3 bedroomed dwellings with associated parking.

A planning application for the development (application reference S/0277/19/FL) was approved in May 2019.

The permission was subject to conditions, one of which relates to the preparation of a Traffic Management Plan. This condition (condition 7) is as follows:

> *No demolition or construction works shall commence on site until a traffic management plan has been agreed with the Local Planning Authority in consultation with the Local Highway Authority.*

The condition states that:-

> *The principle areas of concern that should be addressed are:*
>
> *i. Movements and control of muck away lorries (all loading and unloading should be undertaken off the adopted public highway).*
>
> *ii. Contractor parking should be within the curtilage of the site and not on the street.*
>
> *iii. Movements and control of all deliveries (all loading and unloading should be undertaken off the adopted public highway).*
>
> *iv. Control of dust, mud and debris.*

To address the above comments, the applicant proposes a Traffic Management Plan (TMP) which will be introduced to control traffic activity associated with the on-site ground and construction works, importation of construction materials and parking associated with the contractors' vehicles.

This statement, and the attached drawing, is therefore submitted to discharge condition 7 of the above planning permission.

2.0 The Proposed Development

2.1 Existing Site

The site comprises a rectangular area of land presently occupied by an existing bungalow known as The Retreat, at Fews Lane in Longstanton, Cambridgeshire.

The development site is occupied by the existing bungalow known as The Retreat. The site is enclosed by established hedges to the east whilst the northern boundary will be eventually enclosed by a close boarded fence once construction of the development is complete. To the west is a private drive serving the new dwellings to the rear of the site, whilst the southern boundary itself comprises Fews Lane itself.

2.2 Proposed Development and Access Arrangements

The development comprises the demolition of an existing bungalow and the erection of 2 x 3 bedroomed dwellings with associated parking.

Access to the development site will be taken from High Street, Longstanton by way of Fews Lane, an access road which fronts 'The Retreat'. A public footpath runs along a section of Fews Lane and despite being in private ownership, this section which remains is a public highway over which the public at large have the right to pass and repass on foot.

Direct access to the parking spaces for the 2 dwellings will be taken from Fews Lane.

3.0 The Traffic Management Plan

3.1 Introduction

This Traffic Management Plan (TMP) is the first stage of the requirement to manage and control all related traffic activity during the construction phase of the approved development.

The purpose of the TMP is to control the operation and use of construction traffic accessing a construction site in relationship to the operation of the adopted public highway. The TMP therefore outlines the areas for consideration when preparing the programme of works and undertaking the site operation, with updating as necessary.

3.2 Principal Areas of Investigation

As set out above, the TMP therefore proposes to implement the works as follows:

1. Securing a suitable means of access to the site and provision of a compound within the site to accommodate all traffic movements associated with the works; and
2. Determining an appropriate route to and from the site and hours of operation for the purposes of controlling and managing the impact of construction traffic associated with the development works.

The principal areas that the TMP will cover may therefore be summarised as follows:

- Physical measures at the site entrance;
- Internal layout of compound, allocation of space within site to enable turning and loading, material storage and workforce rest facilities;
- Management and control of hours of traffic activity and movements;
- Fencing and security;
- Parking arrangements for workforce; and
- Publicity and information.

3.2.1 Physical measures at construction site entrance

As part of the works, vehicles will approach from High Street and turn onto Fews Lane, from which vehicles will then turn northwards to access the site. A temporary turning area will be provided within the curtilage of the site to ensure all vehicles enter and leave in forward gear.

The security gates to be provided on the construction site access shall be installed prior to the commencement of the use of the compound, and operated in accordance with the hours of operation set out within this TMP. The security gates will comprise Heras gates as indicated in the following link:

https://www.heras-mobile.co.uk/uploads/documents/UK-technische-tekeningen/vehicle-gate-round-top.pdf

These gates will open into the site to ensure they do not interfere with the use of the public highway.

The gates will be secured with a chain and padlock at the end of each working day.

3.2.2 Internal layout of compound, allocation of space within site to enable turning and loading, material storage and workforce rest facilities.

Prior to, and for the duration of, the construction works comprising the site landscaping and construction of the dwelling, a site materials compound shall be constructed within the garden to the rear of 'The Retreat', and car parking for the workforce, contractors and visitors will be laid out within the development site along the eastern boundary. All operational areas of the compound will be provided with a hard surface.

The compound and associated areas will be laid out as shown on Drawing 11 and will comprise dedicated areas for:

- Staff, contractor and visitor parking;
- a site office and staff welfare facilities;
- a dedicated area for storage of construction and materials delivered to the site; and
- a turning, parking, loading and unloading area with associated wheel-wash facilities for the accommodation of all construction importation vehicles.

All deliveries will be accommodated and stored within the on-site compound shown on the Drawing 11. For all deliveries, drivers must report directly to the site office immediately upon arrival. The access to the site from Fews Lane and the private drive will otherwise be securely closed. The hours of operation are as set out in Section 4.2.3.

Within the site a dedicated area will be provided, as shown on Drawing 11, for vehicles making deliveries, enabling them to park, turn and unload or load clear of the public highway. This area will be cleared to ensure the area is available prior to construction commencing, and thereafter maintained clear of any material storage or other obstruction, specifically to enable all vehicles to enter and leave in forward gear with sufficient space for turning.

Materials and goods delivered to the site that are not for immediate use shall be stored within the area designated for construction and materials delivered to the site. Such long-term storage shall not be accommodated within the area designated for turning, parking loading and unloading to ensure this area has sufficient capacity for all manoeuvring functions.

The area to be reserved for staff and contractor/visitor parking will be reserved for car and light van parking only and not for storage or parking of HGV.

A wheel wash system will be operational whereby all vehicles leaving the site will be inspected and any mud or debris will be cleaned off. This facility will be operational at all times during the construction and importation phase as required. The wheel washing facilities will be provided at the exit from the site and will be in the form of an operative with a jet-wash washing the vehicles. The water run-off will be captured on site in a sump or containment tank to prevent pollution of water course and silting of drainage.

All mud and debris will be removed from the access / egress and adopted public highway on a regular basis and at the reasonable request of any officer of the Local Highway Authority.

During the construction phase, if the surface of Fews Lane is damaged such that it can be considered unduly hazardous, such damage will be repaired ASAP or within 24hrs at a maximum. Prior to the repair being completed, the area of the damage will be protected.

The level of proposed contractor parking is based upon the previous phase of the development completed in 2018, and includes a parking space for the site manager, contractor passenger transport (minibus) and 2 visitor parking spaces. A reciprocal arrangement is already in place with a key supplier for additional parking and off site storage at Digital Park, Station Road, Longstanton.

All contractors' employees will be required to park their vehicles at that facility and employees will be collected and dropped off at appropriate times. Alternatively they can walk or cycle to and from the site.

Reinstatement

Upon completion of the construction works, the compound and parking areas will be reinstated to reflect the layouts shown on the proposed site layout plans.

Prior to commencement of the construction works a road condition survey will be undertaken to include recording and photographing the length of Fews Lane from the junction with High Street up to the site access, and 100m both north and south along High Street from the Fews Lane Junction.

Inspections will also be undertaken at monthly intervals during the construction phase and upon completion to inspect for any damage caused within the extent of the survey area. Any damage will be repaired through a scheme which shall be submitted to and approved in writing by the Local Highway Authority within 10 working days of the damage being brought to the developer's attention.

Prior to any condition survey and inspection undertaken contact will be made with the Local Highway Officer to arrange suitable times for the joint inspections.

3.2.3 Management and Control of hours of traffic activity and movements

Construction works will be undertaken across 6 day weeks, comprising weekdays and Saturday mornings.

To accord with condition 15 of the planning permission, unless otherwise agreed with the Local Planning Authority, no deliveries will be made to or received by the site, or muck away vehicles arrive or depart the site, between 07.30 and 09.30 and between 15.00 and 18.00 on weekdays or before 08.00 and after 13:00 on Saturdays, and no deliveries made to or received by the site at all on Sundays and Bank Holidays.

All contractors, sub-contractors etc. will be formally notified of these restrictions. Any vehicle approaching the site during these restricted times must park up elsewhere, in an appropriate off-site location, excluding High Street or surrounding residential estate roads, and wait the appropriate operating times for delivery. Details of suitable locations are included within the site's parking policy, a copy of which is attached at Appendix 02.

Sub-contractors will be required to provide a procurement and delivery schedule for their own materials to the site during regular monitoring and progress updates.

All traffic associated with the importation, exportation and construction of the new site will approach and depart from the site solely by way of Fews Lane and High Street. All vehicles will be required to leave the site by way of Fews Lane and turn left onto High Street heading towards Willingham and thereafter the Longstanton By-pass.

The forecast type and anticipated frequency of commercial vehicle movements per month, associated with the construction phase is as follows:

Month	Low loader	8-wheeler	Lorry	Van	Concrete Lorry
1	2	3	6	40	6
2	2	3	6	40	2
3	2	3	6	40	0
4	2	3	6	40	0
5	2	3	6	40	2
6	2	3	6	40	0

As determined by the table of forecast type and anticipated frequency of commercial vehicle movements per month, and the compound and associated turning areas as shown on Drawing 11, the majority of vehicles, and particularly all vans and cars, will be able to turn within the site to exit in a forward gear. The very occasional need for larger vehicles to deliver to the site on the occasions set out above may require these vehicles to reverse along Fews Lane into the site and drive out in a forward gear. Suitably (LANTRA or similar) qualified banksmen will be provided and be in attendance at all times when these vehicles are manoeuvring.

No workforce or construction traffic shall, during any of the construction phases, approach the site by any other route other than via Fews Lane and High Street to the north, or attempt to park on surrounding residential roads or on the public highway. This routing will be further enforced by the provision of signing within the site and the site's parking policy, a copy of which is attached at Appendix 02.

Consultation and communication are the foundation of a fair and effective parking policy. They help to ensure that individuals engaged in the various construction activities understand and respect the need for enforcement. The contractor and his employees and subcontractors will have a clear idea of what the parking policy is and how the contractor intends to enforce it. They will appraise their policy and its objectives regularly.

Any individual engaged on the site will be required to park their vehicles at Digital Park as set out above, and either be collected by the contractor's personnel transport (minibus), walk or cycle to Fews Lane. The owner or driver of any contractor's vehicle found to be parked on a public highway in the vicinity of the site will be reprimanded and will be requested to leave the site with immediate effect. Persistent offenders will not be permitted to return to work on the site.

It is important that these individuals understand why these parking restrictions are in place and that parking enforcement is about supporting road safety and keeping traffic moving and pedestrians safe.

Clear access is to be provided and maintained for the existing residents to gain access to their properties, and to ensure access for emergency vehicles is provided for surrounding properties, at all times.

A clear, unobstructed, right of way for pedestrians shall be maintained along Fews Lane and the public footways along High Street at all times.

All loading and unloading shall be undertaken off the adopted Public Highway and all drivers must report to the site office and adhere to instructions.

A 5mph speed limit will be in operation along the site access and egress at all times, this will be backed up by suitable signage where appropriate.

3.2.4 Workforce Parking

Prior to, and for the duration of, the construction works comprising the site construction of the dwelling, parking within the site for contractors' vehicles, clear of the welfare facilities and development areas as shown on Drawing 11 attached at Appendix 01, will be made available. Workforce parking will otherwise be in accordance with the site's parking policy, a copy of which is attached at Appendix 02.

All vehicles must enter and leave the site in forward gear.

During the construction phase, no delivery vehicles will park on High Street, Mitchcroft Road or Fews Lane, to maintain the access way to the site and keep existing properties clear.

4.0 Summary and Conclusions

This Traffic Management Plan (TMP) is prepared on behalf of Landbrook Homes Ltd (the applicant) relating to the proposed residential redevelopment of The Retreat, Fews Lane, Longstanton.

The development comprises the demolition of an existing bungalow and the erection of 2 x 3 bedroomed dwellings with associated parking.

The principal areas that the TMP will cover may be summarised as follows:

- Internal layout and allocation of space within site to enable material storage and workforce rest facilities;
- Controlling the deposition of mud or debris onto the adopted public highway;
- Management and control of hours of traffic activity and movements; and
- Parking arrangements for workforce.

It is therefore concluded that the proposed measures are appropriate during the construction phase to minimise the impact on High Street and Fews Lane and to manage the impact of the construction-related traffic movements.

APPENDIX 01

Drawing 11 – TMP Arrangements

NOTES

LEGEND

- Site office and welfare facilities
- Materials storage area
- Car parking spaces
- Car parking turning area
- Vehicle turning area
- Pedestrian route
- Vehicle route

Landbrook Homes Ltd

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LAND AT AND TO THE REAR OF THE REATREAT, FEWS LANE, LONGSTANTON

TRANSPORT

CONSTRUCTION TRAFFIC MANAGEMENT PLAN

11

Scale	Date
1:500 @ A3	JANUARY 2019

406.08106.00001.14.11.2_CTMP.dwg

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APPENDIX 02

Site Parking Policy

Fews Lane, Longstanton

Contractor Parking Policy

Policy brief & purpose

This company parking policy outlines our parking provisions for employees and visitors. This policy will be included in a ‘toolbox talk’ presented to all individuals associated with the site including permanent, temporary and contract employees along with other relevant aspects of Health and Safety.

Scope

This policy applies to all employees who operate company or personal vehicles in the course of business, including permanent, temporary and contract employees.

The parking policy covers the following users:

a) site-based staff
b) staff visiting from head office and other sites
c) visitors

Policy elements

Our parking policy revolves around:

a) Criteria and procedure for onsite parking spaces
b) Preserving a safe and designated parking facility offsite
c) Rules for discouraging parking on the public highway

<u>Onsite Parking Spaces</u>

Parking bays onsite will be specially allocated to the Site Manager and site transport (passenger transport). A parking bay will be allocated for site visitors including staff visiting from head office and other sites.

Drivers parking vehicles onsite must respect other users of Fews Lane and in particular pedestrians making use of the public footpath to and from the High St.

A speed limit of 5mph will apply along Fews Lane at all times and although this speed limit is not legally enforceable, all drivers will be encouraged to monitor their speed. Any offenders will be reported.

<u>Offsite Parking Facility</u>

All employees other than site management will be required to use the secure parking facility at nearby Digital Park in Station Road, Longstanton. Arrangements will be in place to transport all employees from this facility to and from the site.

Parking on the public highway

No employees will be permitted to park on a public highway including the High St and Mitchcroft Road.

The site manager will ultimately be responsible for policing this policy.

Any employee who is found parking in unauthorized or prohibited areas including the public highway or in other ways disregards this policy will receive a warning and a written reprimand. Repeat offences will result in their removal from site. If the employee continues to disrespect this policy they will face disciplinary procedures.

HCV Offsite Parking

Any suppliers of plant or materials or waste removal companies utilising HCV's will be advised well in advance of the restrictions with regards to the timings of deliveries to and collections from site. These restrictions on timings will be clearly included in any order placed with a supplier or subcontractor and the supplier or subcontractor will be required to provide written acknowledgement that this restriction has been noted.

Any vehicle arriving in the vicinity of the site before 9.30am will be required to park up in a suitable location, contact the site manager to advise of their impending arrival and wait until the site can be accessed after the designated time. Any vehicle arriving after 3pm will be refused entry to site and will be advised to return the next working day.

In terms of HCV Offsite Parking we have identified a section of Stirling Road in Northstowe which is currently utilised by various companies delivering materials including ready mix concrete, bricks and roof tiles to various sites in and around Northstowe. This location will avoid construction vehicles travelling through the village as it is easily accessible from the upgraded A14 via the Longstanton Western Bypass. This location will also minimise disruption to local road users and in turn minimise safety risks.

These arrangements will be conveyed in writing to all suppliers and subcontractors.

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Consultee Comments for Planning Application 20/02453/S73

Application Summary

Application Number: 20/02453/S73
Address: The Retreat Fews Lane Longstanton CB24 3DP
Proposal: Variation of condition 7 (Traffic Management plan) pursuant to planning permission S/0277/19/FL to reflect the proposals in the Traffic Management Plan to substitute the current wording in Condition 7 with "The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019" (Re-submission of 20/01547/S73)
Case Officer: Emma Ousbey

Consultee Details

Name: Dr Jon Finney
Address: Cambridgeshire County Council, Shire Hall, Castle Street Cambridge, Cambridgeshire CB3 0AP
Email: jon.finney@cambridgeshire.gov.uk
On Behalf Of: Cambridgeshire Highways

Comments

From the perspective of the Highway Authority the proposed wording of Condition 7 is acceptable

Cambridgeshire County Council

PLANNING CONSULTATION RESPONSE

To: Greater Cambridge Planning Partnership	**Place and Economy** **Highway Development Management** PO Box ET1029 Stirling Way Witchford Cambs. CB6 3NR
App Reference: 20/02453/S73 Date: 6th August 2020	**Contact**: Dr. Jon Finney

RE: The Retreat Fews Lane Longstanton CB24 3DP

The submission of revised wording for condition 7 of planning application S/0277/19/FL makes no material changes to the scheme as approved. Therefore, the Highway Authority's original assessment of the proposals impact on the operation of the adopted public highway is consistent with the application that has now been made and no additional conditions are required.

From the perspective of the Highway Authority the proposed changes to the wording of Condition 7 are acceptable and will negate the need for a further condition requesting a Traffic Management Plan, as this will be complied with via the reworded Condition 7.

Within the original consultation response the Highway Authority sought the following:

Please add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that the existing Public Right of Way be constructed using a bound material, for the first ten metres from the back of the footway along High Street.

Reason: in the interests of highway safety

This request is reiterated to the Planning Authority.

Jon Finney (Dr.)
Principal Development Management Engineer

Emma Ousbey

From: [redacted]
Sent: 21 August 2020 08:44
To: Emma Ousbey
Subject: Re: Response to claim for judicial review in relation to prospective planning permission 20/02453/s73

Follow Up Flag: Follow up
Flag Status: Completed

Dear Emma

In response to your recent email, I would ask the Council to please accept this email as confirmation on behalf of the applicant, Landbrook Homes Ltd , that the S.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL.

Kind regards

On Wed, 19 Aug 2020 at 22:54, Emma Ousbey <emma.ousbey@greatercambridgeplanning.org> wrote:

[redacted]

Please find attached copy of a letter sent earlier today to the Fews Lane Consortium for your information. You will see that in para number 3 of the attached response the following has been said on behalf of the Council:

"....3 .Subject to the applicant submitting a red line location plan identical to that submitted under planning reference S/0277/19/FL and/or the applicant confirming the s.73 application is in relation to the same red line location plan submitted under planning reference S/0277/19/FL any claim challenging a planning permission because the red line location plan does not show vehicular visibility splays will be considered to be without merit and will be resisted..."

In these circumstances I trust that you will have no objection to sending an email back to me along the following lines:

"The Council should please accept this email as confirmation on behalf of the applicant, Landbrook Homes Ltd , that the s.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL."

Kind regards,

Emma Ousbey | Principal Planning Officer

GREATER CAMBRIDGE
SHARED PLANNING

m: 07394 572822 **e:** emma.ousbey@greatercambridgeplanning.org

https://www.scambs.gov.uk/planning/

https://www.cambridge.gov.uk/planning

Greater Cambridge Shared Planning: a strategic partnership between Cambridge City and South Cambridgeshire District Councils

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Gerry Caddoo (07878 128669)

Director

Landbrook Homes Ltd

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Opinions, conclusions and other information in this e-mail and any attachments that do not relate to the business of Landbrook Homes Ltd. are neither given nor endorsed by it.

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South Cambridgeshire District Council

South Cambridgeshire Local Plan

Adopted

Published by South Cambridgeshire District Council

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SCDC/LP/27.09.2018

Development of Residential Gardens

Policy H/16: Development of Residential Gardens

The development of land used or last used as residential gardens for new dwellings will only be permitted where:

a. The development is for a one-to one replacement of a dwelling in the countryside under Policy H/14 and/or:
b. There would be no significant harm to the local area taking account of:
   i. The character of the local area;
   ii. Any direct and on-going impacts on the residential amenity of nearby properties;
   iii. The proposed siting, design, scale, and materials of construction of the buildings;
   iv. The existence of or ability to create a safe vehicular access;
   v. The provision of adequate on-site parking or the existence of safe, convenient and adequate existing on-street parking;
   vi. Any adverse impacts on the setting of a listed building, or the character of a conservation area, or other heritage asset;
   vii. Any impacts on biodiversity and important trees;
   viii. Ensuring that the form of development would not prevent the development of adjoining sites.

7.61 Over the years there has been a trend for development to take place in residential gardens as one of the only means available to provide new housing in villages and as a means whereby property owners can gain value from their land. Such developments include where an existing house or houses are demolished for redevelopment, and where an existing house is retained and new dwellings are erected in the garden. It is recognized that there are limited opportunities for new development in many villages and that there can be some situations where there can be development in residential gardens without harm to the local area.

7.62 The development of residential gardens has in the past led to concerns about impacts on residential amenity, local character, heritage, and from increased traffic. Gardens represent an important part of the character and amenity value of many villages which can be harmed by inappropriate development. The NPPF (2012) asks us to consider the case for including policies in our Local Plan to resist the inappropriate development of residential gardens.

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STATEMENT OF COMMUNITY INVOLVEMENT

GREATER CAMBRIDGE SHARED PLANNING

2019

CAMBRIDGE CITY COUNCIL
Po Box 700, Cambridge, CB1 0JH

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
South Cambridgeshire Hall, Cambourne Business Park, Cambridge, CB23 6EA

Date of Adoption

Cambridge City Council – June 2019

South Cambridgeshire District Council – July 2019

advice to the applicant and in no way predetermine the outcome of the application.

4.6 Whilst some pre-application discussions can be confidential for commercial reasons, developers are strongly encouraged to undertake community engagement at this stage of the planning process, particularly where development is likely to have significant impacts on local communities or where the site is particularly sensitive. It is however not compulsory.

4.7 Section 122 of the Localism Act 2011 introduced a duty for developers to consult local communities before submitting planning applications for certain developments. For development proposals that fall outside of the requirements of the Localism Act, the LPA encourage pre-application consultation with local communities and key stakeholders. This allows those likely to be affected by the development to raise potential issues and to make suggestions. This in turn might reduce local opposition, increase the chances of a timely and positive decision from the LPA and improve the resulting quality of development.

4.8 Further information about the pre-application process can be found on the councils' websites[25]. Additionally, both LPAs also offer a Duty Planning Officer service where members of the public can obtain advice and guidance on largely householder applications. More information on the Duty Planning Officer service can be found on the councils' websites. There is also further general information and advice on the councils' websites about the planning application process.

The Planning Application Process

4.9 The Town and Country Planning (Development Management Procedure) Order 2015 requires that at any time before a decision is made on a planning application, stakeholders and the local community should have the opportunity to comment on any aspect of the proposal. The level and extent of consultation will vary depending on the size, scale, location and nature of the proposed development. Planning applications, supporting information and key dates are available for public inspection online[26].

4.10 The comments, known as representations, that are received during the consultation period will be considered in decisions made by and on behalf of

[25] South Cambridgeshire: www.scambs.gov.uk/content/pre-application-advice
Cambridge City: www.cambridge.gov.uk/pre-application-advice
[26] South Cambridgeshire: https://www.scambs.gov.uk/planning/view-or-comment-on-a-planning-application/
Cambridge City: https://www.cambridge.gov.uk/planning-applications

the councils'. Representations must be in writing and can only be taken into account if they relate to material planning considerations[27]. Representations will be added to the application file and made publicly available online alongside the planning application documents. These will be published in accordance with the Council's Privacy Notice.

4.11 It is current practice to take into account late representations received up to the point of determination of the application. Nevertheless, it is strongly recommended that representations are received by the LPA during the time period indicated in the LPAs publicity.

4.12 When a planning application is registered by the LPA, there is a statutory period during which anyone can comment on the proposal, as set out in Table 4. It is the LPAs responsibility to publicise planning applications. The approach to notification of planning applications will be to:

- Publish details of planning applications online (Public Access), including which applications have been registered, digital copies of plans and supporting information. Our websites include a search function to help find specific planning applications.
- Undertake appropriate notification as shown in Table 4. In some instances, the LPA can go beyond the minimum statutory requirements where the development would potentially have a wider impact and may make use of additional methods of publicity such as articles in Council magazines. Such wider consultation is carried out at the discretion of the planning officer.
- Parish Councils in South Cambridgeshire as well as Neighbourhood Forums in Cambridge City are consulted on all appropriate planning applications as statutory consultees.
- Consult with both statutory and non-statutory consultees. All consultees have 21 days (30 days for applications accompanied by an Environmental Statement) from the issue of the consultation notice to make representations (extended as appropriate where the period extends over public or bank holidays). It is highly recommended that representations are submitted prior to the published consultation deadline. The list of statutory and non-statutory consultees related to planning application consultations is set out in Appendix 2.

4.13 Where neighbour notification letters/emails are sent out, this will usually be sent to properties directly adjoining the application site. The planning officer may sometimes determine that neighbour notification letters/emails should be sent beyond this where a development could potentially have an impact on a wider

[27] www.gov.uk/guidance/determining-a-planning-application

From: **Daniel Fulton** dgf@fewslane.co.uk
Subject: For today's meeting
Date: 20 April 2021 at 7:05am
To: Stephen Reid stephen.reid@3csharedservices.org
Cc: Kelly Stephen Stephen.Kelly@greatercambridgeplanning.org, Toby Williams Toby.Williams@greatercambridgeplanning.org, Lewis Tomlinson Lewis.Tomlinson@greatercambridgeplanning.org

DF

Dear Mr Reid,

In advance of today's meeting, I thought it might be helpful for me to share the attached table summarising the planning history for the site.

I also thought it might be helpful for me to set out my position a little more fully on the statutory consultation responses of the local highway authority in regards to applications 20/02453/S73 and 20/05101/FUL.

The ownership or control of land to which a planning application relates is not ordinarily a material planning consideration.

The foremost reason for this is that under section 75 of the Town and Country Planning Act 1990, planning permission ordinarily enures for the benefit of the land to which the permission relates.

There are limited circumstances where the ownership or control of land may be material to a planning decision. An application for a personal planning permission is one such example.

Pursuant to section 72(1)(a) of the 1990 Act, ownership or control of land may also be material where the applicant controls land other than the land in respect of which an application has been made when the local planning authority is of the view that a condition regulating the use or development of that land is necessary in connection with the permission being granted.

When explaining its reasoning for its statutory consultation responses in regards to development in Fews Lane, the local highway authority has stated that its view is that planning conditions can only be attached to a planning permission when the land required for the implementation of the condition is within the ownership or control of the applicant.

I do not think that either the local highway authority or the local planning authority have thought through the implications of applying the local highway authority's view.

Take, for instance, an application where the applicant does not own or control any of the land to which the application relates. Applying the view of the local highway authority, it would not be possible to attach any conditions at all.

Logical inconsistencies of this scale simply can not exist within the current legal planning framework.

In any event, the position expressed by the local highway authority has no basis in law and is completely unsupported by any statutory or common law authority.

Looking forward to speaking at noon today.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

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The Fews Lane Consortium Ltd is registered in England and Wales. Company No. 11688336

Planning History

Application Reference	Description	Location	Approved?	Implemented?	Application valid?	Provides fallback position for either pending application?
S/0791/88/O	One dwelling	Adjacent to The Retreat	No (Appeal dismissed due to highway safety considerations.)	n/a	presumably yes	n/a
S/2561/12/FL*	Two dwellings	Adjacent to The Retreat	Yes (outline permission with all matters reserved)	No	No	No (expired)
S/0999/14/FL	Extension	The Retreat	Yes	No	No	No (expired)
S/1498/15/FL	Two dwellings	Adjacent to The Retreat	Yes	Yes	No	n/a
S/2937/16/FL	One dwelling	Rear of The Retreat	Allowed on appeal.	No	No	Only if capable of implementation.
S/2439/18/FL	One dwelling	Rear of The Retreat	Yes	No	Validity disputed.	Only if capable of implementation.
S/0277/19/FL	Two dwellings	The Retreat	Yes	No	Validity disputed.	No (Not capable of implementation.)
20/02453/S73	Two dwellings	The Retreat	Pending	n/a	Validity disputed.	n/a
20/05101/FUL	One dwelling	Rear of The Retreat	Pending	n/a	Validity disputed.	n/a

* Ref S/2561/12/FL appears on application form, but Ref S/2461/12/OL appears on decision notice. Decision notice indicates that all matters were reserved, including access.

Agenda Item 5

South Cambridgeshire District Council

26 May 2021

Report to: South Cambridgeshire District Council Planning Committee

Lead Officer: Joint Director of Planning and Economic Development

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20/02453/S73– The Retreat, Fews Lane, Longstanton, CB24 3DP

Proposal: Variation of condition 7 (Traffic Management plan) pursuant to planning permission S/0277/19/FL to reflect the proposals in the Traffic Management Plan to substitute the current wording in Condition 7 with "The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019" (Re-submission of 20/01547/S73)

Applicant: Mr Gerry Caddoo, Landbrook Homes Ltd

Key material considerations:

- The appropriateness of the amended Traffic Management Plan

- Highway Safety including the safety of all users of the adopted and unadopted highways in the vicinity of the site.

- Green Infrastructure policy NH/6 and additional third-party representations

Date of Member site visit: None

Is it a Departure Application?: No

Decision due by: 16th July 2020

Application brought to Committee because: Matters have arisen following Members' earlier endorsement to approve the S73 submission at the 13 January 2021 Planning Committee meeting which require a further assessment / clarification from officers. The officer recommendation remains to approve the S73.

Presenting officer: Lewis Tomlinson

Update - 26 May 2021

1. Members will recall originally considering this application at the 13 January 2021 Planning Committee meeting. The Committee resolved to approve the application subject to:
    - The revision of paragraph 3.2.4 of the Traffic Management Plan to state, during the construction stage, delivery vehicles shall not park on any street within the village of Longstanton.
    - Addition of an Informative urging the establishment of a liaison mechanism between residents, the Site Manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes; and
    - The Conditions and Informatives set out in the report from the Joint Director of Planning and Economic Development.

2. However, the S73 planning permission was not issued following the 13 January 21 Planning Committee because of incorrect officer advice given with the meeting on the necessity of advertising the application as affecting a Public Right of Way (PROW) - which in fact had been carried out appropriately - and in relation to a late representation sent to Democratic services from 6 Mitchcroft Road on the evening of the 12th January 21 which had not been passed to planning officers and not reported to Members. The S73 application was subsequently reported back to the 13 April 21 Planning Committee with updates including in respect of the PROW issue, the representation from 6 Mitchcroft Road and with respect to a further late representation from Few Lane Consortium Limited (FLCL) received on 1 April 21 in relation to policy NH/6 and Green Infrastructure.

3. Members will therefore recall considering this application again at the 13TH April 2021 Planning Committee meeting where Mr Fulton, on behalf of FLCL, raised further concern that his representations were not wholly assessed within the officer reports. Officers recommended to members that the application be deferred again so the representations could be examined and addressed in full as necessary. Members resolved to defer the application to allow this to take place.

4. The representations from Mr Fulton on behalf of Fews Lane Consortium Limited ("FLCL") on the 1st March 21 and 14th March 21 can be summarised as follows:

    - Objects on highway safety grounds – no safe access for the site and adverse impacts upon the safety of users of the public highway
    - The Local Highway Authority originally objected but changed its mind as the 'local highway authority has unlawfully taken into consideration an immaterial consideration, namely, the identity of the owner of land within the application site and the identify of owner of land outside the application site that is not owned by the applicant.'
    - Recommends conditions regarding the lane to be widened to 5m, insertion of 2m by 2m pedestrian visibility splays and the maintenance of such splays
    - The development to erect 5 houses has been divided amongst multiple planning applications for 1 or 2 houses at a time. The LPA should not consider these developments in isolation.

5. Subsequent to the 13 April 2021 Planning Committee, a judicial review pre-action protocol letter of 30 April 21 has also now been received from Mr Fulton on behalf of Fews Lane Consortium Limited ("FLCL") for this application and another

application (20/05101/FUL) related to the adjacent site to the rear. The pre-action protocol letter can be summarised as follows:

- Article 7(I) of the 2015 Order states that an application form for planning permission specifies that a location plan must be submitted that complies with the following instructions: "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."
- In the case of application S/0277/19/FL, the area outlined in red on the location plan, which is relied upon also by purported application 20/02453/S73, failed to include all the land necessary to carry out the proposed development contrary to Article 7 (I) of the 2015 Order. Specifically, the land outlined in red failed to include the land required for visibility splays.
- The LPA has no jurisdiction to entertain, much less approve, either application

Assessment

6. Many of the matters raised in the FLCL representations of 1st and 14th March 21 are similar to those raised and dealt with within the S73 planning committee report of 13 January 21, summarised at paragraph 24 and assessed at paragraphs 40-44 of that report (see below).

7. That notwithstanding and because FLCL representations are that these matters have not been addressed fully, officers have further examined the original committee report to S/0277/19/FL. Paragraphs 43 – 55 of that report (author John Koch) deal with the planning merits of the suggested improvements to Fews Lane, the extent of the red line and visibility splays, issues which have been raised again under this S73 application. The relevant paragraphs from the original committee report are set out below:

'43: Paragraph 109 of the NPPF states developments should only be prevented or refused on highways grounds if there would be an 'unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe'.

44: The local highway authority (LHA) initially objected as the application was not supported by sufficient pedestrian/cycle information to demonstrate that the proposed incremental development would not be prejudicial to the satisfactory functioning of the highway. The LHA requested that the pedestrian/cycle surveys be carried out, for the duration of 5 days Monday – Friday (not during the school holidays), between the hours of 7.30 – 9.30 and 15.00 – 17.00, along with details of weather on these days.

45: The applicant has since undertaken a survey for the use of Fews Lane by cycles and pedestrians. This was carried out between 27 March and 2 April. The survey results indicate that on average there were 10 pedestrian movements per hour up and down Fews Lane with a cluster of secondary school children during the a.m. and p.m. peaks representing almost 50% of all pedestrian movements. There was a record of just one cyclist during the week long survey. Full details of the survey are available to view on the Council's website.

46: Following the submission of the requested pedestrian/cycle information the LHA has withdrawn its request for refusal. As such, the LHA has not identified any unacceptable impact on highway safety. This is notwithstanding the survey information excludes highway users who pass the entrance to Fews Lane as suggested by an objector.

47: The LHA's approval is subject to conditions that the existing Public Right of Way (PROW) be constructed using a bound material, for the first ten metres from the back of the footway along High Street; the submission of a traffic management plan and an informative to the effect that the granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

48: The requested works requiring the surface of Fews Lane to be constructed using a bound material will be within the public highway (PROW) and therefore can be carried out under a Short Form Section 278 Agreement between the applicant and Cambridgeshire County Council.

49: The above conditions are considered necessary in this instance. No conditions are sought in respect of the width of the Lane at its junction with High Street or for pedestrian visibility splays to be provided as recommended by some local residents. Objections that the application is not valid as the red line plan does not take account of the necessary visibility splays are not relevant as no requirement for such splays to be provided is considered necessary.

50: In considering the residual cumulative impact on the road network, account is taken of the increased level of traffic due to the total cumulative development of the original curtilage of The Retreat, and the two other properties (built in the 1960's) which use Fews Lane for vehicular access. With the recent approval for a dwelling under reference S/2439/18/FL, the former curtilage of The Retreat will have been subdivided into a total of 5 separate residential plots with the two additional houses opposite.

51: So far as the residual cumulative impacts on the road network are concerned, there would typically be around 4.5 vehicular movements per dwelling over a 12-hour period. This means that with the two new dwellings the total number of vehicular movements would increase to approximately 31.5. The local highway authority has not raised any concerns that the existing free flow of traffic along the High Street will be materially affected. Significantly, the LHA has not considered the residual cumulative impact on the road network arising from a total of seven dwellings to be "severe" as per the wording in paragraph 109 of the NPPF.

52: Attention is drawn to the two appeal decisions attached as appendix 1 and 2. In the former appeal (from 1989), the inspector noted that Fews Lane served three dwellings and the appeal proposal would increase this to 4. He considered the junction of Fews Lane and High Street (then the route of the B1050 through the village) to be unsafe given visibility to the south was considerable impeded by vegetation. As the road is straight, it was anticipated that vehicles would be travelling close to the maximum permitted speed and this would have a harmful effect on traffic safety. No such overriding harm was found in respect of traffic travelling from a northerly direction.

53: In the subsequent 2018 decision, the appeal inspector was aware that the B1050 had ran through the centre of Longstanton, but that the village by-pass now has a signposted route that skirts its western edge. He observed that traffic now has no need to take the old route to by-pass the village and that the time of his 9 a.m. visit on a school day, the level of traffic in the High Street appeared to be quite low. He opined there was no evidence to suggest these conditions were unusual. His conclusion was that although Fews Lane does not meet modern highway standards in terms of both it geometry and construction, the development would provide safe and appropriate access.

54: Officers conclude that there has clearly been a material change of circumstances in highway conditions between 1989 and 2018, namely the construction of the village bypass. This has had a material impact on traffic flows. The current application for an additional dwelling is also to be determined in accordance with the same road conditions that prevailed at the time of the second appeal.

55: Having had due regard to the matters already discussed, officers have no reason to dispute the conclusion of the LHA in respect of any highway related matters. The proposal therefore complies with policies TI/2 and TI/3.'

8. It is clear from the above extract from the original application committee report (S/0277/19/FL) that the Inspector, for the related appeals on Fews Lane and officers robustly considered the Fews Lane highway safety issues. Officers considered the cumulative impact of the total amount of properties along Fews Lane. The proposed conditions by FLCL in relation to the upgrade of Fews Lane and visibility splays were not imposed on the original planning consent nor has the Highway Authority requested visibility splay conditions on the current application.

9. Neither members nor officers are bound to follow the advice of the Local Highway Authority. In relation to this S73 application and for purposes of clarity, the officer advice is that the ownership of Fews Lane is immaterial in the consideration of the necessity of upgrades to it, including those sought by FLCL.

10. Officer advice is that it is not necessary to seek to apply additional conditions as part of this S73 application to upgrade Fews Lane or provide or maintain pedestrian visibility splays through the imposition of a Grampian condition because the splays required are contained within the adopted highway. Material circumstances have not altered to suggest an alternative conclusion that improvements to Fews Lane are now necessary in order to grant planning permission. Officers are also of the view that given S/0277/19/FL did not impose the requirements to upgrade Fews Lane as sought by FLCL, that to impose additional requirements now under this S73 application - which is to amend the wording of the Traffic Management Plan - would not be reasonable, particularly in light of the fact that S/0277/19/FL could itself be implemented without such requirements (expiry date of permission 9 May 22).

11. It is to be noted that the current S73 application only seeks to amend the wording of the Traffic Management Plan condition and does not seek to change the design or layout of the approved dwellings. There also has been no material change in the surrounding context or planning policy to warrant forming an alternative view. The representations from FLCL do not raise any new material considerations to warrant a change to the officer recommendation.

12. The current application 20/02453/S73 is submitted pursuant to section 73 of the 1990 Act. Pursuant to article 7(1)(c)(i) of the 2015 Order, no location plan is required and therefore no location plan containing a red line and associated visibility splays has been submitted with this application as the location plan from the original consent is relied upon. Application S/0277/19/FL and the associated committee report considered representations concerning the adequacy of the access to the plot, proposed improvements including the widening of the Fews Lane access, visibility splays and the extent of the red line. That permission can no longer be judicially challenged. The Council does not agree that it has no lawful authority to entertain the S73 application pursuant to s. 327A of the 1990 Act and article 7 of the DMPO 2015.

13. Notwithstanding that neither the S73 application nor S/0277/19/FL include a site location plan which extend to the adopted highway and include visibility splays, 1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street. The Highway Authority has a duty to maintain the highway which includes the verge in this case. If the Highway Authority fails in this duty and an accident were to occur as a result of this failure, then that would be a matter for the Highway Authority to deal with. The pedestrian visibility splays available accord with the minimum recommendation of a 1.5m splay which is understood to be derived from a previous version of The Design Manual for Road and Bridges. The splay includes grass verge that forms part of the adopted public highway.

14. Officers have considered all third party representations which includes all the letters from FLCL. All substantive points have been addressed in this report and previous reports. This also includes a letter from FLCL dated 29th October 2020 which is contained within the bundle that forms an appendix to this report.

15. The remainder of this report is unedited from the reports that were presented previously.

Recommendation

16. Officers recommend that the planning committee **APPROVE** this application subject to:

- The revision of paragraph 3.2.4 of the Traffic Management Plan to state, during the construction stage, delivery vehicles shall not park on any street within the village of Longstanton.
- Addition of an Informative urging the establishment of a liaison mechanism between residents, the Site Manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes; and
- The Conditions and Informatives set out in the 13 January 21 report from the Joint Director of Planning and Economic Development.

Further UPDATE - 13 April Planning Committee

1. A further representation has been received from Fews Lane Consortium on the 1st April. The following concerns have been raised (as summarised):
    - Fews Lane constitutes an important east-west link in the existing green infrastructure of Longstanton and provides a connection to Northstowe.
    - The proposal would result in the removal of a hedge that run along the front of The Retreat which would impact upon wildlife and the character of the lane.
    - The proposal is therefore Contrary to policy NH/6 (Green Infrastructure) and HQ/1 (Design Principles) as it would the proposal does not preserve or enhance the character of the local area, damages the public amenity value of the public footpath, impinges upon the safety of users of the footpath and would result in Fews Lane being dominated with car parking.

2. The original planning permission S/0277/19/FL was issued in May 2019 and therefore was assessed against the current Local Plan. This S73 application does not seek to alter the design of the proposal but seeks to amend the wording of condition 7 (Traffic Management Plan). Officers are satisfied that there has been no material change in policy or the surrounding context that requires a re-assessment of any other conditions attached to the approved development. Issues regarding the surrounding character of the area, car parking and the safety of users have been considered under S/0277/19/FL and adequately assessed against the requirements of Policy HQ/1.

3. Officers accept that the removal of the hedge along the front of The Retreat would result in a degree of harm and would raise some conflict with Policy NH/6. However, given that the hedge is only one part of the green infrastructure of the lane, this loss is not considered to be significant in comparison and therefore would not warrant a refusal of the application on these grounds. Especially when taking into consideration the fall-back position of the extant planning permission and the fact that this S73 does not seek to alter the design of the proposal. The officer recommendation remains one of approval.

Update Report - 13April 2021 Planning Committee

4. Members will recall considering this application at the 13 January 2021 Planning Committee meeting. The Committee resolved to approve the application subject to:
    - The revision of paragraph 3.2.4 of the Traffic Management Plan to state, during the construction stage, delivery vehicles shall not park on any street within the village of Longstanton.
    - Addition of an Informative urging the establishment of a liaison mechanism between residents, the Site Manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes; and
    - The Conditions and Informatives set out in the report from the Joint Director of Planning and Economic Development.

5. At the Planning Committee meeting, in response to a point specifically raised at the meeting by Mr Fulton on behalf of Fews Lane Consortium Limited ("FLCL"), officers advised that Article 15 of the Town and Country Planning Development Management Procedure (England) Order 2015 (publicity requirements for planning applications) did not apply to the S73 application because it was not an application for planning permission but an application to vary the wording of a condition. This was an error because a S73 application is still an application for planning permission.

6. However, the context within which this point was raised at the Committee related to whether the application had been advertised as affecting a Public Right of Way (PROW). Officers confirm that in fact the application was advertised as affecting a PROW and therefore Article 15 was satisfied in this case. Whether a proposal affects a PROW is a matter of judgement and this issue was covered in the officer report. A copy of the advertisement is attached as Appendix 1 to this report.

7. A representation had been sent to Democratic services from 6 Mitchcroft Road on the evening of the 12th January (the day before the planning committee). Due to human error, this representation not passed onto planning officers and therefore was not reported to members.

8. The representation from 6 Mitchcroft Road can be summarised as follows:

    - Objects on highway safety grounds
    - Recommends conditions regarding the lane to be widened to 5m, insertion of 2m by 2m pedestrian visibility splays and the maintenance of such splays

9. As the conditions were not imposed on the original planning consent nor did the Highway Authority request such conditions on the current application, officers do not consider it reasonable to apply such conditions now. This late representation does not raise any new material considerations and as such would not have changed the officer recommendation.

10. The remainder of this report is unedited from the report that was presented to the October Planning Committee meeting as set out below.

    Recommendation

11. Officers recommend that the planning committee **APPROVE** this application subject to:

- The revision of paragraph 3.2.4 of the Traffic Management Plan to state, during the construction stage, delivery vehicles shall not park on any street within the village of Longstanton.
- Addition of an Informative urging the establishment of a liaison mechanism between residents, the Site Manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes; and
- The Conditions and Informatives set out in the 13 January 21 report from the Joint Director of Planning and Economic Development.

13 January 2021, Planning Report 20/02453/S73

Executive Summary

12. Planning permission was granted at planning committee in May 2019 for the erection of 2 dwellings and ancillary parking. This application has been submitted to amend the proposed wording of condition 7 to respond to the specific circumstances on the site and the implications for the traffic management plan with respect to parking.

Relevant planning history

13. Applications relating to the adjacent application site:

    S/2439/18/FL – The erection of a 3-bedroom bungalow with parking - Approved
    S/2937/16/FL – Proposed erection of a 3-bedroomed bungalow and parking – Allowed on appeal
    S/0999/14/FL – Extension and alteration to existing bungalow to provide a house with ground, first and second floors (second floor attic rooms) – Approved
    S/2561/12/FL – Erection of two bungalows - Approved

14. Applications relating to the application site:

    S/0277/19/COND9 – Condition 9 – foul and surface water drainage – pending consideration
    S/0277/19/CONDA – Submission of details required by condition 11 (scheme that demonstrates a minimum of 10% carbon emissions) and 12 (water conservation strategy) of planning permission S/0277/19/FL – Discharged in full
    S/4471/19/DC – Discharge of condition 7 (traffic management plan) pursuant to planning permission S/0277/19/FL – pending consideration. This application will replace the need for this.
    S/3875/19/DC – Discharge of conditions 4 (hard and soft landscaping), 6 (boundary treatment), 9 (foul and surface water drainage), 11 (renewable energy) and 12 (water conservation) pursuant to planning permission S/0277/19/FL - Refused
    S/2508/19/DC – Discharge of condition 7 (traffic management plan) pursuant to planning permission S/0277/19/FL - Refused
    S/0277/19/FL – Demolition of the existing bungalow and construction of two dwellings including car parking and landscaping - Approved
    S/1059/16/DC – Discharge of condition 3 (materials), 4 (boundary treatment), 5 (hard and soft landscaping), 7 (surface water drainage), 8 (finished floor levels), 13 (traffic management plan) and 14 (archaeology) of S/1498/15/FL - Approved
    S/1498/15/FL – Erection of two dwellings – Approved

Planning policies

15. **National Guidance**
    National Planning Policy Framework 2019 (NPPF)
    Planning Practice Guidance
    National Design Guide 2019

16. **South Cambridgeshire Local Plan 2018**
S/1 Vision
S/2 Objectives of the Local Plan
S/3 Presumption in Favour of Sustainable Development
S/7 Development Framework
S/10 Group Villages
CC/3 Renewable and Low Carbon Energy
CC/6 Construction Methods
CC/8 Sustainable Drainage Systems
CC/9 Managing Flood Risk
HQ/1 Design Principles
NH/4 Biodiversity
H/8 Housing Density
H/12 Residential space Standards
SC/11 Land Contamination
TI/2 Planning for Sustainable Travel
TI/3 Parking Provision
TI/10 Broadband

17. **South Cambridgeshire Supplementary Planning Documents (SPD)**
Trees & Development Sites SPD - Adopted January 2009
District Design Guide SPD - Adopted March 2010
Sustainable Design and Construction SPD 2020

Consultation

Cambridgeshire County Council (Highways Development Control)

18. From the perspective of the Highway Authority the proposed wording of condition 7 is acceptable. (Original comments received 11th June 2020)

"The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019"… please accept this Email as confirmation that the contents of the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019 are acceptable to the Highway Authority. (Further comments received 13th July 2020)

The submission of revised wording for condition 7 of planning application S/0277/19/FL makes no material changes to the scheme as approved. Therefore, the Highway Authority's original assessment of the proposals impact on the operation of the adopted public highway is consistent with the application that has now been made and no additional conditions are required. From the perspective of the Highway Authority the proposed changes to the wording of Condition 7 are acceptable and will negate the need for a further condition requesting a Traffic Management Plan, as this will be complied with via the reworded Condition 7. Within the original consultation response, the Highway Authority sought the following: Please

add a condition to any permission that the Planning Authority is minded to issue in regard to this proposal requiring that the existing Public Right of Way be constructed using a bound material, for the first ten metres from the back of the footway along High Street. Reason: in the interests of highway safety. This request is reiterated to the Planning Authority. (Revised comments received 6th August 2020)

Contaminated Land Officer

19. This variation application does not relate to contaminated land and therefore I have no comments to make.

Drainage

20. Drainage has no comments to this variation

Environmental Health Officer

21. I can confirm that I have no objections from an environmental health standpoint in respect of the above condition variation. (13th June 2020)

    Previous comments of 13.06.20 did refer to the substitution of wording and also the content of the Traffic Management Plan (TMP) itself. It is apparent that there is a proposal for a wheel wash system, and I acknowledge that the TMP states all vehicles leaving the site will be inspected and any mud or debris will be cleaned off. The content of the report itself satisfies the requirements of this particular service. I should however add that the granting of planning consent and submission of a suitable and sufficient TMP wouldn't indemnify against statutory nuisance action being taken should this service receive a substantiated dust complaint subsequent to works commencing. Concerning vehicle movement times, I have observed from the decision notice for S/0277/19/FL that restrictions are in place and therefore fully expect this to be complied with as part of the TMP. (23rd June 2020)

Longstanton Parish Council

22. Having considered this application at their meeting on 13th July 2020, Longstanton Parish Council request that the application be put to Planning Committee and Longstanton Parish Council reiterate their objection to the development. Longstanton Parish Council have expressed concerns at every point of this planning application on the grounds of Highway Safety. It is noted that with this specific application, the applicant proposes to reverse construction lorries down a single lane track which leads to the development site and other dwellings, which also forms part of the public footpath. Longstanton Parish Council have already detailed in previous comments that pedestrians have to stand in the undergrowth for a small vehicle to pass.

23. The above responses are a summary of the comments that have been received. Full details of the consultation responses can be inspected on the application file.

Representations from members of the public

24. Representations have been received from The Elms, Fews Lane (The Fews Lane Consortium Ltd) dated 10th July 2020, 27th July 2020, 20th August 2020, 23rd August 2020, 3rd September 2020, 8th September 2020 and the 28th September 2020 in relation to the application. The following concerns have been raised (as summarised):
    - The CCC's response to the statutory consultation only addressed the changes to the existing planning permission sought by the applicant. This approach commits a straightforward error of law because in considering an application submitted under section 73 of the 1990 Act, the whole scheme now applied for must be considered in accordance with the relevant policy tests.
    - Where the CCC has published highways development policies, members of the public may legitimately expect that the CCC will apply those relevant policies in regard to matters of highways development. In the case of this application, the CCC acted unlawfully by responding to the statutory consultation in a manner that failed to apply its published highways development policies in breach of the prospective claimant's legitimate expectation that it would do so.
    - No location plan has been submitted for this application. Accordingly, the application relies on the location plan comprised within the application for the extant planning permission (S/0277/19/FL). That location plan fails to identify the land to which the application relates as is required under article 7(1)(c)(i) of the 2015 Order. Application 20/02453/S73 is therefore invalid and can not be determined pursuant to sections 65 and 327A of the 1990 Act.
    - The land outlined in red on the location plan submitted for the extant permission (S/0277/19/FL) fails to include all the land necessary to carry out the proposed development as it does not include all of the land required for visibility splays, and no updated location plan was submitted as part of application 20/02453/S73.
    - The land required for pedestrian visibility splays is not situated within the adopted public highway and is not included within the red line boundaries of the application site as show on the location plan.
    - The location plan, which misidentifies the land to which the application relates, can not, in this instance, serve as the basis of a lawful public consultation as it fails to provide sufficient information to consultees as to the extent of the land to which the application, and therefore the consultation, relates. This information is essential in order to allow statutory consultees and members of the public to intelligently consider and respond to the consultation.
    - There is no evidence that the required notices have been sent to the owners of the land to which the application relates as is required

under article 13 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

Officers of local highway authorities should be able to rely on the fact that application documents that have been validated by the local planning authority and published for consultation correctly depict the land to which the application relates by outlining that land in red on the location plan, as is required under article 7. Whilst in an ideal world, local highway authority officers might be well versed in the nuances of planning law, this is usually not the case, and both statutory consultees and members of the public rely on the validation opinion of the local planning authority to establish that the land to which the planning application relates has been correctly identified on the location plan in accordance with the relevant legal standards. A local planning authority that consults on an application with an invalid location plan not only violates section 327A of the 1990 Act, but also potentially renders the consultation on the application unlawful on grounds of procedural impropriety. (See R v North and East Devon Health Authority ex p Coughlan [1999] EWCA Civ 1871, [2001] Q.B. 213 at [112].)

The site and its surroundings

25. The property known and The Retreat comprises a single-storey dwelling off an unadopted road known as Fews Lane. The single storey dwelling is to be demolished and replaced with 2 two storey dwellings. Parking for these 2 new houses will take place from the site frontage onto Fews Lane. A further single storey dwelling is permitted to be erected in the former garden area to the rear of the two new properties and would complete the "build out of the site which began with the two existing new homes constructed to the west and north west of The Retreat.

26. Fews Lane is not an adopted highway and comprises a single vehicle width gravel/surfaced track. The lane currently serves as an access to a double garage serving 135 High Street and to 3 other dwellings (The Willows and the two other recently constructed dwellings to the west of the Retreat) as well as to development plots at The Retreat. The Lane varies in width and the hard surfaced track runs alongside a tree'd and vegetated area (to the north) with boundaries to No 135 and The Willows to the south side. A footpath (Public Right of Way) linking the Home Farm residential development to the south and west of Fews Lane with High Street emerges onto the south side of Fews Lane at a point to the immediate west of The Willows (and before the existing informal turning area beyond). The site lies within the designated village framework and is otherwise unconstrained.

The proposal

27. The application seeks consent for the variation of condition 7 (traffic management plan) of planning permission S/0277/19/FL to amend the wording of the condition from a pre-commencement submission to a compliance through the approval of a traffic management plan.

28. The current wording of condition 7 of planning permission S/0277/19/FL is:

No demolition or construction works shall commence on site until a traffic management plan has been agreed with the Local Planning Authority in consultation with the Highway Authority. The principle areas of concern that should be addressed are:
(i) Movements and control of muck away lorries (all loading and unloading shall be undertaken off the adopted highway)
(ii) Contractor parking shall be within the curtilage of the site and not on the street.
(iii) Movements and control of all deliveries (all loading and unloading shall be
undertaken off the adopted public highway.
(iv) Control of dust, mud and debris, in relationship to the functioning of the adopted public highway.
The reason given for the imposition of this condition was "In the interests of highway safety."

29. The application seeks to amend the wording of condition 7 to:

The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019

30. The application is accompanied by the following supporting information:

- Traffic Management Plan prepared SLR dated December 2019

31. The applicant claims that the submitted Traffic Management Plan (TMP) is informed by lessons learnt during the construction in 2018 of the two existing new homes on the site. The TMP includes details of the arrangements for the delivery of materials, turning movements, enclosure of the site and contractor parking during the construction phase, as well as detailing areas for materials storage (keeping the on-site turning area clear) and the site office. The site circumstances in this case, notably the size of the development plot itself however, mean that space for parking within the site is limited. Accordingly, the Traffic Management Plan refers to provision for contractor parking at Digital Park in Station Road, Longstanton (noting that Fews Lane itself is of inadequate width to accommodate parking adjacent to the site). The Plan also proposes arrangements for addressing condition 15 (control of hours) in respect of vehicles arriving early. The provision of off-site contractor parking has meant however that the terms of part ii of the original planning condition (above) cannot be met and it is this departure from the original condition that has prompted this application.

Planning assessment

32. The application is for the variation of a planning condition and is made under S73 of the Town and Country Planning Act 1990. National Planning Practice Guidance in respect of such applications states:

    "*In deciding an application under section 73, the local planning authority must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application. A local planning authority decision to refuse an application under section 73 can be appealed to the Secretary of State, who will also only consider the condition/s in question."* [Paragraph: 031 Reference ID: 21a-031-20180615]

33. The principle of development of the dwellings on the site has already been established through the granting of the original application (S/0277/19/FL). Officers are satisfied that there has been no material change in policy or the surrounding context that requires a re-assessment of any other conditions attached to the approved development. The assessment for this application focuses on the proposed variation of condition 7, including consideration of the reasons for the condition and the acceptability of the proposed changes to the condition that are being sought. This centres upon the assessment of the acceptability of the submitted Traffic Management Plan having regard to highway safety.

34. Having regard to the representations received, officers have interpreted "highway safety" in this context to mean the safety of all users of the highway, including users of the PROW along the unadopted Fews Lane and the existing users of the unadopted road that comprises Fews Lane as well as pedestrian and vehicle users of the High Street passing the entrance to Fews Lane.

Highway Safety – Traffic Management Plan

<u>Traffic Management Plan Assessment</u>

35. The construction of any development gives rise to additional movements during the construction phase – including contractor vans and larger delivery vehicles (and some HGV) such as building suppliers delivery vehicles and concrete trucks etc. During the construction phase therefore, existing residents of Few Lane and users of the public right of way, together with those passing by the access will at certain times experience an increase in the number of vehicles, including delivery vehicles attending the site. The TMP estimates construction traffic trips each month to be in the order of approximately 40 van movements, 6 concrete lorries (in month 1 plus 4 more trips in total over the following 5 months), 3 X 8 wheelers, 2 low loaders and 6 lorry movements. The TMP provides details of the sites layout seeking to accommodate these movements, including an indication of the swept path and a turning area within the site – but reflecting its restricted size.

36. The Council has consulted the Local Highway Authority as the consultee for matters regarding highway safety. The Local Highway Authority, originally expressed concerns about the earlier TMP submission which resulted in the refusal of the earlier application S/2508/19/DC, for the following reasons:

1. The title page states that the document is a Transport Management Plan this should be amended to read Traffic Management Plan.
2. Page 2. Para. 2.2: Fews Lane is a public footpath and as such is adopted public highway, this means that the public at large have the right to pass and repass. This should be made explicit.
3. Page 3 Para. 3.3: the purpose of the TMP is to control the operation and use of construction traffic accessing a construction site in relationship to the operation of the adopted public highway.
4. Page 3 Para. 3.2.1: details of any gates must be supplied within the TMP to ensure that they do not interfere with the use of the adopted public highway.
5. Page 4 para. 3.2.2.:
i. Justification for the level of proposed contractor parking must be provided.
ii. A swept path diagram showing how the bays as shown on Dwg. 11 must be provided as the bays seem to be impractical at present.
6 Page 5 para 3.2.3.:
i. The restriction on times of operation must also apply to any muck away vehicles and not just deliveries.
ii. Please request the applicant to provide details of how the proposed ban on parking in the surrounding residential streets will be enforced.
iii. The table showing the forecast of commercial vehicles that will visits the site,
demonstrates that the swept path diagram on Drawing 11 is inadequate to show that all delivery/muck away lorries can enter and leave in a forward gear. A swept path analysis for the largest commercial vehicle to visit the site must be provided.
iv. Details of how commercial vehicles exiting and entering Fews Lane will be
controlled must be provided.
7. Page 6 para 3.2.5 this should not form part of the TMP.

37. Officers have noted the earlier response of the Highway Authority and its more recent consideration (reported above) of the revised submission. Officers accept the conclusions of the Local Highway Authority to the more recent submissions. Having specific regard to the relatively short length of Fews Lane, its character, variable width and surface material, officers consider that vehicle movements along it are likely to take place with care - so that both drivers of vehicles and pedestrians would be able to appreciate and address any potential for conflict. For larger vehicle movements (where the turning area is insufficient - because of the size of the site itself) officers have noted that the TMP proposes that vehicles would reverse into the site with the assistance of a “banksman” to maintain safety along Fews Lane during these manouvers. The Parish Council and third parties have expressed concern about this approach, but officers

consider there to be few practical or safer alternatives to this approach for a development of this scale – where the number of large vehicle movements will be limited. The TMP commits to keep clear access to the existing homes along Fews Lane throughout the construction phase and to maintain the right of way clear of obstructions for pedestrians.

38. The third-party representations and Parish comments highlight a number of concerns surrounding access and movements of vehicles into and along Fews Lane. Insofar as any TMP can address these issues when the application site is of this size, officers are satisfied with the Highway Authority conclusions that the measures outlined in the TMP are appropriate. Vehicle speeds along Fews Lane itself are in officers view likely to be low (a 5mph limit is proposed in the TMP) and subject to normal care and consideration, the risk to pedestrians and vehicle drivers using and entering/leaving Fews Lane is accordingly considered to be satisfactorily addressed by the TMP. At the access point into Fews Lane, intervisibility between vehicles or pedestrians on the High Street and Fews Lane, noting the existing footway width along High Street and the position of hedges and boundaries, has been judged to be appropriate. The Local Highway Authority officers are familiar with this site and have made it clear that they now find the TMP to be acceptable as it overcomes the concerns raised in S/2508/19/DC.

39. The Local Highway Authority has recommended an additional condition regarding the existing Public Right of Way to be constructed using bound material. Paragraph 48 of the officer committee report for S/0277/19/FL states that 'the requested works requiring the surface of Fews Lane to be constructed using a bound material' will be within the public highway (PROW) and therefore can be carried out under a Short Form Section 278 Agreement between the applicant and Cambridge shire County Council. Therefore, no condition is imposed in line with S/0277/19/FL.

40. There have also been substantial third-party representations in respect of the application concerning its validity, the details provided and the application by the County Council of its Highway Policies. Officers have considered these matters and remain satisfied that the application is valid, notwithstanding the representations submitted, and can therefore be determined by the Committee. The assessment of the proposals by County Highway officers reported above is also considered to be satisfactory – noting that the application of County Council polices are matters of judgment based upon the specific site circumstances. Officers have no reason to disagree with the conclusions of the County Highway officers in this matter, including on the matter of the need for an explicit visibility splay to be shown for pedestrians at the site entrance.

41. In relation to the point raised by the third party that there is no evidence that the required notices have been sent to the owners of the land to which the application relates as is required under article 13 of the Town and Country Planning (Development Management Procedure) (England) Order

2015. The applicant has signed certificate D and supplied the necessary documentation to evidence this.

42. Over the last six months or more a number of letters and emails between the Council and Fews Lane Consortium Limited ("FLCL") have been submitted in connection with the red line shown on the Location Plan for planning permission S/0277/19/FL – the original planning permission for this site.

43. On 13th November 2020 Fews Lane Consortium Ltd sent an email to the Council's legal officer which included the following:

    "…In regards to the prospective judicial review claims concerning the proposed developments at [separate site identified], and The Retreat, Fews Lane, Longstanton, the Consortium would like to thank the Council pre-action protocol responses. The Consortium disagrees with the positions asserted in the Council's pre-action protocol responses and continues to maintain that the Council has no lawful authority to entertain these applications pursuant to S. 327A of the 1990 Act and article 7 of the DMPO 2015. The Consortium is likely to issue proceedings in regard to both applications as the pre-action protocol has now been completed…."

44. Proceedings have not to date been issued and the Council is waiting to hear from FLCL as to its intentions as to any proceedings. The Council does not agree that it has no lawful authority to entertain these applications pursuant to s. 327A of the 1990 Act and article 7 of the DMPO 2015. An extensive bundle of correspondence between FLCL and the Council (together with an index) is attached to this report. In the event that any further submissions are received that are material to the Committee's consideration of this matter, officers will provide an update to the meeting. It remains the Council position however that the Committee are entitled to determine the application before them.

Planning balance and conclusion

45. Taking into consideration the above points, including the site history, Parish Council comments, the third party representations and the advice from the Local Highway Authority, officers consider that the proposed rewording of condition 7, which has the effect of agreeing the measures in the submitted Traffic Management Plan, is acceptable. It is therefore recommended that planning permission is granted subject to conditions (with the revised wording to condition 7) imposed on planning permission S/0277/19/FL

Recommendation

Officers recommend that the Planning Committee Approve the application subject to the following conditions and informative:

1 Conditions 3-6 and 8-16 of planning permission S/0277/19/FL (set out below as conditions 3-6 and 8-16) shall continue to apply to this permission. Where such conditions pertaining to 1S/0277/19/FL have been discharged, the development of 20/02453/S73 shall be carried out in accordance with the terms of discharge and those conditions shall be deemed to be discharged for this permission also.
Reason To define the terms of the application.

2 The development hereby permitted shall be carried out in accordance with the approved plans as listed on this decision notice.

Reason: In the interests of good planning, for the avoidance of doubt and to facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990.

3 The materials to be used in the construction of the external surfaces of the dwellings hereby permitted shall be as described in the application form or shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of development. Where materials are approved by the Local Planning Authority, the development shall be carried out in accordance with the approved details.
(Reason - To ensure the appearance of the development is satisfactory in accordance with Policy HQ/1 of the South Cambridgeshire Local Plan 2018)

4 Prior to the first occupation of the development, full details of both hard and soft landscape works shall be submitted to and approved in writing by the Local Planning Authority. The details shall also include specification of all proposed trees, hedges and shrub planting, which shall include details of species, density and size of stock.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NH/6 of the adopted South Cambridgeshire Local Plan 2018)

5 All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NE/6 of the South Cambridgeshire Local Plan 2018)

6 Prior to the first occupation of the development a plan indicating the positions, design, materials and type of boundary treatment to be erected shall be submitted to and approved in writing by the Local Planning Authority. The boundary treatment for each dwelling shall be completed

before that/the dwelling is occupied in accordance with the approved details and shall thereafter be retained.
(Reason - To ensure that the appearance of the site does not detract from the character of the area in accordance with Policy HQ/1 of the adopted South Cambridgeshire Local Plan 2018.)

7 The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019 unless otherwise agreed in writing with the Local Planning Authority.

Reason: In the interest of highway safety

9 No development above slab level shall occur until schemes for the provision and implementation of foul and surface water drainage have been submitted to and approved in writing by the Local Planning Authority. The schemes shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with an implementation programme agreed in writing with the Local Planning Authority.
(Reason - To reduce the risk of pollution to the water environment, to ensure a satisfactory method of foul water drainage and to reduce the risk of flooding in accordance with Policies CC/7, CC/8 and CC/9 of the South Cambridgeshire Local Plan 2018).

10 All finished floor levels shall be a minimum of 300 mm above the existing ground level.
(Reason - To reduce the risk of flooding in accordance with policy CC/9 of the South Cambridgeshire Local Plan 2018)

11 No development above slab level shall take place until a scheme has been submitted that demonstrates a minimum of 10% of carbon emissions (to be calculated by reference to a baseline for the anticipated carbon emissions for the property as defined by Building Regulations) can be reduced through the use of on-site renewable energy and low carbon technologies. The scheme shall be implemented and maintained in accordance with the approved details prior to the occupation of the development.
(Reason - In accordance with policy CC/3 of the South Cambridgeshire Local Plan 2018 and paragraphs 148, 151 and 153 of the National Planning Policy Framework 2018 that seek to improve the sustainability of the development, support the transition to a low carbon future and promote a decentralised, renewable form of energy generation.).

12 The development hereby approved shall not be occupied a water conservation strategy, which demonstrates a minimum water efficiency standard equivalent to the BREEAM standard for 2 credits for water use levels unless demonstrated not practicable, has been submitted to and approved in writing by the local planning authority. Works shall be carried out in accordance with the approved details.

(Reason - To improve the sustainability of the development and reduce the usage of a finite and reducing key resource, in accordance with policy CC/4 of the south Cambridgeshire Local Plan 2018.).

13 The dwellings hereby approved shall not be occupied until they have been made capable of accommodating Wi-Fi and suitable ducting (in accordance with the Data Ducting Infrastructure for New Homes Guidance Note) has been provided to the public highway that can accommodate fibre optic cabling or other emerging technology, unless otherwise agreed in writing with the Local Planning Authority.(Reason - To ensure sufficient infrastructure is provided that would be able to accommodate a range of persons within the development, in accordance with policy TI/10 of the South Cambridgeshire Local Plan 2018.).

14 During the period of demolition and construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays, or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority. (Reason - To minimise noise disturbance for adjoining residents in accordance with Policy CC/6 of the South Cambridgeshire Local Plan 2018).

15 During the period of demolition and construction, no deliveries shall be made to and from the site between 0730 and 0930 hours and between 1500 and 1800 hours on weekdays or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority. .(Reason - To minimise noise disturbance for adjoining residents and to reduce potential conflicts with pedestrians, particular schoolchildren using Fews Lane and High Street in accordance with Policy CC/6 and HQ/1 of the South Cambridgeshire Local Plan 2018)..

16 Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no development within Classes A and B of Part 1 of Schedule 2 of the Order shall take place unless expressly authorised by planning permission granted by the Local Planning Authority in that behalf.
(Reason - In the interests of protection of residential amenity and the character of the area in accordance with policy HQ/1 of the South Cambridgeshire Local Plan 2018).

Our Ref: 20/02453/S73
Your Ref: Demolition of the existing bu...

27 May 2021

GREATER CAMBRIDGE
SHARED PLANNING

Mr Gerry Caddoo
Landbrook Homes Ltd
The Retreat, Fews Lane
Fews Lane
Longstanton
Cambridge
CB24 3DP
Cambridgeshire

South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge
CB23 6EA

www.scambs.gov.uk | www.cambridge.gov.uk

Dear Mr Caddoo

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL
Application under Section 73 to Remove or Variation of a Condition

Proposal: Variation of condition 7 (Traffic Management plan) pursuant to planning permission S/0277/19/FL to reflect the proposals in the Traffic Management Plan to substitute the current wording in Condition 7 with "The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019 as amended by planning committee on the 26th May 2021 in relation to paragraph 3.2.4" (Re-submission of 20/01547/S73)

Site address: The Retreat Fews Lane Longstanton CB24 3DP

We are pleased to enclose your formal notice of planning permission for the above development. Please ensure that work is carried out in line with the approved plans referred to on the decision notice. This will avoid the need for any enforcement action.

Making changes to the approved plans

In the event that you wish to change your proposal, please contact your case officer who will advise you on whether the change can be dealt with as a “non-material” or “material” amendment. In either case you will have to complete a form and provide fresh drawings.

Important information regarding conditions

If you have been granted Planning Permission / Listed Building Consent / Advertisement Consent you may wish to get started immediately, however it is always important to carefully read the decision notice in full before any work begins.

The majority of planning decisions have conditions attached. Some conditions request further information that requires approval by the Local Planning Authority before any development takes place (‘pre-commencement’). All conditions are set out on the decision notice.

Under Section 7 of the Planning (Listed Buildings and Conservation Areas) Act 1990, it is a criminal offence to carry out unauthorised works to a listed building. Under Section 9 of the Act, a

person shall be guilty of an offence should they fail to comply with any condition attached to the consent.

How do I discharge the conditions

Please note that the process takes up to eight weeks from the date the Local Planning Authority receives a valid application. Therefore it important to plan ahead and allow plenty of time before work is due to commence.

You need to fill in a form to submit your request to discharge conditions, and accompany the relevant details/samples. You can download the necessary form by using the following link: https://www.greatercambridgeplanning.org

Alternatively you can submit an application to discharge the conditions through the Government's Planning Portal website: https://www.planningportal.co.uk/applications. Please note, The Planning Portal refers to it as 'Approval of details reserved by a condition'.

When the required information has been submitted you will receive a reference and an acknowledgement letter. Once the Local Planning Authority is satisfied that the requirement of the condition have been met you will receive a formal notification that the conditions have been discharged.

Appeals against conditions

You should also be aware that the applicant has the right to appeal against any conditions attached to this Notice, please see https://www.gov.uk/planning-inspectorate for details. If you are concerned about any condition you should contact the case officer in the first instance for advice.

Yours sincerely

SJ Kelly

SJ Kelly
Joint Director For Planning & Economic Development For
Cambridge & South Cambridgeshire

South Cambridgeshire District Council
Town & Country Planning Act 1990

Notice of Planning Permission
Subject to conditions

Reference 20/02453/S73
Date of Decision 27 May 2021

Mr Gerry Caddoo
Landbrook Homes Ltd
The Retreat, Fews Lane
Fews Lane
Longstanton
Cambridge
CB24 3DP
Cambridgeshire

The Council hereby GRANTS Planning Permission for:

Variation of condition 7 (Traffic Management plan) pursuant to planning permission S/0277/19/FL to reflect the proposals in the Traffic Management Plan to substitute the current wording in Condition 7 with "The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019 as amended by planning committee on the 26th May 2021 in relation to paragraph 3.2.4" (Re-submission of 20/01547/S73)

at

The Retreat Fews Lane Longstanton CB24 3DP

In accordance with your application received on 21 May 2020 and the plans, drawings and documents which form part of the application.

Conditions

1 Conditions 3-6 and 9 -16 of planning permission S/0277/19/FL (set out below as conditions 3-6 and 9 -16) shall continue to apply to this permission. Where such conditions pertaining to S/0277/19/FL have been discharged, the development of 20/02453/S73 shall be carried out in accordance with the terms of discharge and those conditions shall be deemed to be discharged for this permission also. The development hereby permitted shall be begun before the expiration of 3 years from the date of permission S/0277/19/FL being 9 May 2019.

Reason To define the terms of the application.

2 The development hereby permitted shall be carried out in accordance with the approved plans as listed on this decision notice.

Reason: In the interests of good planning, for the avoidance of doubt and to facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990.

3 The materials to be used in the construction of the external surfaces of the dwellings hereby permitted shall be as described in the application form or shall be submitted to and

approved in writing by the Local Planning Authority prior to the commencement of development. Where materials are approved by the Local Planning Authority, the development shall be carried out in accordance with the approved details.

(Reason - To ensure the appearance of the development is satisfactory in accordance with Policy HQ/1 of the South Cambridgeshire Local Plan 2018)

4 Prior to the first occupation of the development, full details of both hard and soft landscape works shall be submitted to and approved in writing by the Local Planning Authority. The details shall also include specification of all proposed trees, hedges and shrub planting, which shall include details of species, density and size of stock.

(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NH/6 of the adopted South Cambridgeshire Local Plan 2018)

5 All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.

(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies HQ/1 and NE/6 of the South Cambridgeshire Local Plan 2018)

6 Prior to the first occupation of the development a plan indicating the positions, design, materials and type of boundary treatment to be erected shall be submitted to and approved in writing by the Local Planning Authority. The boundary treatment for each dwelling shall be completed before that/the dwelling is occupied in accordance with the approved details and shall thereafter be retained.

(Reason - To ensure that the appearance of the site does not detract from the character of the area in accordance with Policy HQ/1 of the adopted South Cambridgeshire Local Plan 2018.)

7 The development hereby permitted shall be carried out in accordance with the 'Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019, as amended by planning committee on the 26th May 2021 in relation to paragraph 3.2.4' unless otherwise agreed in writing with the Local Planning Authority.

Reason: In the interests of highway safety

8 (Not Applicable)

9 No development above slab level shall occur until schemes for the provision and implementation of foul and surface water drainage have been submitted to and approved in writing by the Local Planning Authority. The schemes shall be constructed and completed in accordance with the approved plans prior to the occupation of any part of the development or in accordance with an implementation programme agreed in writing with the Local Planning Authority.

(Reason - To reduce the risk of pollution to the water environment, to ensure a satisfactory method of foul water drainage and to reduce the risk of flooding in accordance with Policies CC/7, CC/8 and CC/9 of the South Cambridgeshire Local Plan 2018).

10 All finished floor levels shall be a minimum of 300 mm above the existing ground level.

(Reason - To reduce the risk of flooding in accordance with policy CC/9 of the South Cambridgeshire Local Plan 2018)

11 No development above slab level shall take place until a scheme has been submitted that demonstrates a minimum of 10% of carbon emissions (to be calculated by reference to a baseline for the anticipated carbon emissions for the property as defined by Building Regulations) can be reduced through the use of on-site renewable energy and low carbon technologies. The scheme shall be implemented and maintained in accordance with the approved details prior to the occupation of the development.

(Reason - In accordance with policy CC/3 of the South Cambridgeshire Local Plan 2018 and paragraphs 148, 151 and 153 of the National Planning Policy Framework 2018 that seek to improve the sustainability of the development, support the transition to a low carbon future and promote a decentralised, renewable form of energy generation.).

12 The development hereby approved shall not be occupied until a water conservation strategy, which demonstrates a minimum water efficiency standard equivalent to the BREEAM standard for 2 credits for water use levels, unless demonstrated not practicable, has been submitted to and approved in writing by the local planning authority. Works shall be carried out in accordance with the approved details.

(Reason - To improve the sustainability of the development and reduce the usage of a finite and reducing key resource, in accordance with policy CC/4 of the south Cambridgeshire Local Plan 2018.).

13 The dwellings hereby approved shall not be occupied until they have been made capable of accommodating Wi-Fi and suitable ducting (in accordance with the Data Ducting Infrastructure for New Homes Guidance Note) has been provided to the public highway that can accommodate fibre optic cabling or other emerging technology, unless otherwise agreed in writing with the Local Planning Authority.
(Reason - To ensure sufficient infrastructure is provided that would be able to accommodate a range of persons within the development, in accordance with policy TI/10 of the South Cambridgeshire Local Plan 2018.).

14 During the period of demolition and construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays, or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.

(Reason - To minimise noise disturbance for adjoining residents in accordance with Policy CC/6 of the South Cambridgeshire Local Plan 2018).

15 During the period of demolition and construction, no deliveries shall be made to and from the site between 0730 and 0930 hours and between 1500 and 1800 hours on weekdays or before 0800 hours and after 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.

(Reason - To minimise noise disturbance for adjoining residents and to reduce potential conflicts with pedestrians, particular schoolchildren using Fews Lane and High Street in accordance with Policy CC/6 and HQ/1 of the South Cambridgeshire Local Plan 2018)..

16 Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no development within Classes A and B of Part 1 of Schedule 2 of the Order shall take place unless expressly authorised by planning permission granted by the Local Planning Authority in that behalf.

(Reason - In the interests of protection of residential amenity and the character of the area in accordance with policy HQ/1 of the South Cambridgeshire Local Plan 2018).

Informatives

1 The Council urges the applicant to establish a liaison mechanism between residents, the site manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes.

2 If during the development contamination not previously identified is found to be present at the site, such as putrescible waste, visual or physical evidence of contamination of fuels/oils, backfill or asbestos containing materials, then no further development (unless otherwise agreed in writing with the Local Planning Authority) shall be carried out until the developer has submitted, and obtained written approval from the Local Planning Authority for, a remediation strategy detailing how this unsuspected contamination shall be dealt with. The remediation strategy shall be implemented as approved to the satisfaction of the Local Planning Authority.

3 The granting of a planning permission does not constitute a permission or licence to a developer to carry out any works within, or disturbance of, or interference with, the Public Highway, and that a separate permission must be sought from the Highway Authority for such works.

4 There shall be no burning of waste or materials on site without the prior consent of the Council's Environmental Health Officer.

Plans and drawings

This decision notice relates to the following drawings:

Reference/Document/Drawing Title	Date Received
FLL-45-01	28.01.2019
FLL-45-02	28.01.2019

It is important the development is carried out fully in accordance with these plans. If you are an agent, please ensure that your client has a copy of them and that they are also passed to the contractor carrying out the development. A copy of the approved plan(s) is/are kept on the planning application file.

Authorisation

Authorised by:

SJ Kelly
Joint Director For Planning & Economic Development For
Cambridge & South Cambridgeshire

South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge
CB23 6EA

Date the decision was made: 27 May 2021

Working with the applicant

The LPA positively encourages pre-application discussions. Details of this advice service can be found at https://www.greatercambridgeplanning.org. If a proposed development requires revisions to make it acceptable the LPA will provide an opinion as to how this might be achieved. The LPA will work with the applicant to advise on what information is necessary for the submission of an application and what additional information might help to minimise the need for planning conditions. When an application is acceptable, but requires further details, conditions will be used to make a development acceptable. Joint Listed Building and Planning decisions will be issued together. Where applications are refused clear reasons for refusal will identify why a development is unacceptable and will help the applicant to determine whether and how the proposal might be revised to make it acceptable.

In relation to this application, it was considered and the process managed in accordance with paragraph 38 of the National Planning Policy Framework.

General Notes

This decision notice does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than Section 57 of the Town and Country Planning Act 1990.

Your attention is specifically drawn to the requirements of the Equality Act 2010 and the Equality Act (Disability) regulations 2010, the British Standards Institution BS8300:2009 “Design of Buildings and their approaches to meet the needs of disabled people – Code of Practice” and to Approved Document ‘M’ “Access to and use of buildings”, volumes 1 and 2 of the Building Regulations 2010 and to Approved Document ‘B’ “Fire Safety”, volumes 1 and 2 of the Building Regulations 2010, in request of guidance on means of escape for disabled people. The development should comply with these requirements as applicable

It is an offence under Section 171 of the Highways Act 1980 to temporarily deposit building materials, rubbish or other things on the public highway or make a temporary excavation on it without the written consent of the Highway Authority. The Highway Authority may give its consent subject to such conditions as it thinks fit.

The applicant is reminded that under the Wildlife and Countryside Act 1981(Section 1) (as amended) it is an offence to take, damage or destroy the nest of any wild bird while that nest is in use or being built. Trees and scrub are likely to contain nesting birds between 1 March and 31 August. Trees within the application should be assumed to contain nesting birds between the above dates unless a survey has shown it is absolutely certain that nesting birds are not present.

Building Regulations 2010

The project may be subject to the requirements of the Building regulations 2010.

Advice and assistance can be obtained from our Building Control Team, 3C Building Control on 0300 7729622 or buildingcontrol@3csharedservices.org link to website at www.3csharedservices.org

They will work with you offering competitive fee quotations and pre-application advice upon request.

Appeals to the Secretary of State

The applicant has a right to appeal to the Secretary of State against any conditions of this planning permission, under Section 78 of the Town & Country Planning Act 1990. The appeal must be made on a form which may be obtained from:

The Planning Inspectorate,
Temple Quay House, 2 The Square, Temple Quay, Bristol. BS1 6PN
Telephone 0303 444 5000 or visit
https://www.gov.uk/planning-inspectorate

If an enforcement notice is or has been served relating to the same or substantially the same land and development as in your application and if you want to appeal against your local planning authority's decision on your application, then you must do so within: **28 days** of the date of service of the enforcement notice, **OR** within **6 months** (12 weeks in the case of a householder or minor commercial appeal) of the date of this notice, whichever period expires earlier.

The Secretary of State can allow a longer period for giving notice of an appeal, but he will not normally be prepared to use this power unless there are special circumstances which excuse the delay in giving notice of appeal.

The Secretary of State need not consider an appeal if it seems to him that the Local Planning Authority could not have granted planning permission for the proposed development or could not have granted it without the conditions they imposed, having regard to the statutory requirements, to the provisions of any development order and to any directions given under a development order.

In practice, the Secretary of State does not refuse to consider appeals solely because the Local Planning Authority based their decision on a direction given by him.

Purchase Notices

If the Local Planning Authority or the Secretary of State grants permission subject to conditions the owner may claim that he/she can neither put the land to a reasonably beneficial use in its existing state nor render the land capable of a reasonably beneficial use by the carrying out of any development which has been or would be permitted. In these circumstances the owner may serve a purchase notice on the Council to purchase his interest in the land in accordance with the provisions of Part VI of the Town and Country Planning Act 1990.

Before starting work

It is important that all conditions, particularly pre-commencement conditions, are fully complied with, and where appropriate, discharged prior to the implementation of the development. Failure to discharge such conditions may invalidate the planning permission granted. The development must be carried out fully in accordance with the requirements of any details approved by condition.

Street Naming and Numbering

In order to obtain an official postal address, any new buildings should be formally registered with South Cambridgeshire District Council. Unregistered addresses cannot be passed to Royal Mail for allocation of postcodes.

Applicants can find additional information, a scale of charges and an application form at www.scambs.gov.uk/snn. Alternatively, applicants can contact the Address Management Team: call 08450 450 500 or email address.management@scambs.gov.uk.

Please note new addresses cannot be assigned by the Council until the footings of any new buildings are in place.

Third Party Rights to challenge a planning decision

Currently there are no third party rights of appeal through the planning system against a decision of

a Local Planning Authority. Therefore, if you have concerns about a planning application and permission is granted, you cannot appeal that decision.

Any challenge under current legislation would have to be made outside the planning system through a process called Judicial Review.

A ‘claim for judicial review’ includes a claim to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function, in this case, a planning decision. The court’s permission to proceed is required in a claim for Judicial Review. A claim for Judicial Review is dealt with by the Administrative Court and if leave to judicially review a planning decision is granted, the Judicial Review will be decided by a judge at the High Court.

An application to Judicial Review a decision must be made within **6 weeks** of the decision about which you have a grievance being made. For further information on judicial review and the contact details for the Administrative Courts, please go to http://www.justice.gov.uk/

Fews
Lane
Consortium
Ltd

Daniel Fulton
DIRECTOR

T: 01954 789237
E: dgf@fewslane.co.uk

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

21 June 2021

South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

Dear Sir/Madam,

Judicial review pre-action protocol letter: Planning application 20/02453/S73

(1) South Cambridgeshire District Council (the "**Council**"), South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge CB23 6EA, is the prospective defendant in a claim for judicial review. In light of the Council's current remote working arrangements, this correspondence has been sent to the Council by email only.

(2) The prospective claimant is the Fews Lane Consortium Ltd (the "**Consortium**"), The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium represents the interests of local residents in regards to issues of planning and development.

(3) The prospective claimant considers the applicant for planning permission, Landbrook Homes Ltd, to be an interested party. A copy of this letter has been sent to Landbrook Homes Ltd at 36a Church Street, Willingham, Cambridge CB24 5HT.

(4) The prospective claim concerns the Council's decision issued on 27 May 2021 in regards to planning application 20/02453/S73, which proposes the demolition of the existing bungalow and the erection of two dwellinghouses at The Retreat, Fews Lane, Longstanton, Cambridge CB24 3DP.

(5) The decision is to be challenged on the following grounds:

Ground 1: The Defendant misdirected itself in fact in stating in the officer's report that, "1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street."

Ground 2: Contrary to section 100D(1) of the Local Government Act 1972, the Defendant failed to identify the background papers relied upon in the officer's report and failed to make a copy of each background paper available for inspection.

Ground 3: The Defendant either (A) failed to take into consideration its decision on an application for the erection of additional dwellings at the same site from 2013, OR, even if the Defendant did take its 2013 decision into account, (B) it failed to even briefly state its reasons for reaching a different conclusion on matters of principal importance in the decision, in particular, in regards to highway safety conditions.

The Fews Lane Consortium Ltd is registered in England and Wales. Company No. 11688336

Ground 4: The Defendant misdirected itself in its officer's report in stating that planning permission S/0277/19/FL (A) was capable of implementation and (B) represented a fallback position.

Ground 5: The Defendant misdirected itself as to the proper approach to the determination of applications submitted under s. 73 of the Town and Country Planning Act 1990.

Ground 6: The Defendant ignored a material consideration in failing to consider the key material policy of the development plan, policy H/16, which concerns the erection of additional dwellings within residential gardens.

Legal Framework

Misdirection in fact as grounds for judicial review

(6) In *Smith v Inner London Education Authority* [1978] 1 All ER 411, Lord Denning said (at 415):

> "It is clear that, if the education authority or the Secretary of State have exceeded their powers or misused them, the courts can say: 'Stop'. Likewise, if they have misdirected themselves in fact or in law."

(7) Likewise, in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, Lord Wilberforce said (at 1047F):

> "In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact."

(8) In *Oxton Farms v Selby District Council* [1997] EWCA Civ 4004, [2017] PTSR 1103, Judge LJ said:

> "An application for judicial review based on criticisms on the planning Officers' Report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

Duty to list and provide background papers for inspection

(9) Section 100B(1) of the Local Government Act 1972 (the "**1972 Act**") provides that:

> "Copies of the agenda for a meeting of a principal council and […] copies of any report for the meeting shall be open to inspection by members of the public".

(10) Section 100D(1) of the 1972 Act provides that:

> "if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public—
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council."

(11) Section 100D(4) of the 1972 Act provides that:

"For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—
(c) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
(d) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

(12) Section 100E(1) of the 1972 Act provides that:

"Sections 100A to 100D above shall apply in relation to a committee or sub-committee of a principal council as they apply in relation to a principal council."

(13) In *R (Kinsey) v Lewisham London Borough Council* [2021] EWHC 1286 (Admin) at [101] - [103], Lang J states:

"Access to reports and background papers not only allow the public to be informed, but to participate by making written representations to councillors and officers in advance of the meeting and also assisting the preparation of oral representations. A breach of these provisions is significant: see *R (Joicey) v Northumberland County Council* [2014] EWHC 3657 (Admin), [2015] PTSR 622 at [47] per Cranston J.:

'The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making.'

This decision was recently affirmed by Dove J in *R (Holborn Studios Limited) v London Borough of Hackney (No2)* [2020] EWHC 1509 (Admin), [2021] JPL 17 at [71].

The mere fact of a failure to disclose information strictly in accordance with the duties under sections 100B and 100D will not by itself necessarily require the quashing of any decision made at a relevant meeting. It is necessary to consider the significance of the failure, having regard to the purpose of the duty: see *R (McCann) v Bridgend County Borough Council* [2014] EWHC 4335 (Admin) per HHJ Keyser QC at [27]."

Adequate reasoning

(14) In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 at 1061-1062, Lord Upjohn said that if decision maker "does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

(15) In *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] 1 WLR 3765 at [46], Elias LJ states:

"there do not appear to be any decisions (apart from Jay J in this case) where a court has held that reasons need not be given even though the reasoning is otherwise opaque".

The Court of Appeal then went on to reverse the decision of Jay J referenced above.

(16) In *R v Mendip District Council ex p Fabre* (2000) 80 P. & C.R. 500 (at 510), Sullivan J, as he then was, discussed a situation in which a common law obligation to give reasons would arise:

"An obvious example of such a circumstance is, in principle, where a local planning authority has changed its mind and decided to grant planning permission for a development which it has previously refused … I say 'in principle' because it may be plain from all the surrounding circumstances why the council has changed its mind, as was the case in *ex p. Chaplin* (per Pill LJ at p. 53). There may be cases where reasons should be set out in a minute. … Equally, there may be cases where that would be unnecessary in the light of the factual background. I am satisfied that this case falls into the latter category … If there has been an earlier refusal, as recommended by

a planning officer, followed by a grant of planning permission, contrary to the planning officer's considered recommendation, some explanation will be required, since by definition it will not be possible to find it in the officer's report. So it will be necessary to search elsewhere for the reasons why the members decided to change their minds. In such circumstances, it might well be sensible at the very least to record the members' reasons in the form of a minute …"

(17) *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospect of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

<u>Interpretation of Section 73 of the Town and Country Planning Act 1990</u>

(18) Section 73 of the Town and Country Planning Act 1990 (the "**1990 Act**") provides that:

> "(1) This section applies ... to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and -
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted,
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

(19) In *R (Stefanou) v Westminster City Council* [2017] EWHC 908 (Admin) at [36], Gilbart J states:

> "It is common ground that on a s 73 application the LPA was obliged to comply with s 70(2) *TCPA 1990* and s 38(6) of *PCPA 2004*. Thus, it had to have regard to the development plan and any material considerations (s 70(2) *TCPA*) and then determine the application in accordance with the development plan unless material considerations indicated otherwise (s 38(6) *PCPA*). Reference was made to *Pye v Sec of State for the Envt* [1998] 3 PLR 72, approved in *Powergen UK PLC v Leicester City Council* [2000] JPL 1037 [2001] 81 P &CR 47 (CA) per Schiemann LJ."

(20) In *Stefanou* at [88], Gilbart J further states that:

> What is also quite clear, and I so find, is that the WCC officers had approached this application in an entirely inappropriate mindset. The email of 9th February 2016 that
>
> *'There is a problem I am afraid……*
> *Your proposals now include the addition of a new storey to the link. These are changes that are much more significant than non-material or other minor amendments.*

Therefore I am afraid that you need to apply for the whole scheme, as revised. Applications for planning permission and listed building consent are required.

Clearly, in our assessment we will only focus on the revised elements, because the rest has consent…'

contains a very straightforward error of law. As *Pye* and *Powergen* make clear, the whole scheme now applied for had to be considered in accordance with the relevant tests."

Remedies sought & ADR

(21) The Consortium intends to seek an order quashing the Council's decision, a declaration that the Council erred in law, and an order that the Council pay the Consortium's costs in the claim.

(22) Because a quashing order is necessary, the Consortium does not feel that any form of alternate dispute resolution would be appropriate for this claim. Nevertheless, the Consortium hopes that the Council will recognise the serious legal defects in its decision and agree to a consent order quashing the Council's decision.

(23) The various legal errors committed by the Council go to the heart of Council's decision making process. In no way could it be considered likely that the same decision (particularly in regards to highway safety conditions) would have been reached if not for the legal errors alleged. Accordingly, the court can not rightly refuse to grant permission for judicial review or refuse to grant relief under s. 31 of the Senior Courts Act 1981.

(24) The Consortium intends to issue proceedings as an Aarhus Convention claim pursuant to Parts 45.41 – 45.45 of the Civil Procedure Rules because the claim challenges the legality of a decision of a body exercising a public function which is within the scope of Article 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters agreed at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention).

(25) The Consortium does not envisage that it will be necessary to propose any variation of the standard limits on recoverable costs as stated in Parts 45.43(2)(b) and 45.43(3) of the Civil Procedure Rules.

(26) Should it become necessary to issue a claim, a complete statement of the Consortium's financial resources and a statement of financial support received will be provided at the earliest opportunity and, in any event, will be served with the claim form.

(27) The Consortium's address for the response and service of documents is: Fews Lane Consortium Ltd, The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium will accept a pre-action protocol response by email to <dgf@fewslane.co.uk>.

(28) In the event that legal proceedings become necessary in regards to this prospective claim, please note that the Fews Lane Consortium Ltd does NOT accept service by email.

(29) The Consortium would like to propose a reply date of 5 July 2021, which is 14 days from the date of this letter. As a claim in this matter must be issued by 8 July 2021, the Consortium will not be able to agree to any extensions of time in regards to the pre-action protocol.

Kind regards,

Daniel Fulton
Director

Section B
Authorities
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Town and Country Planning Act 1990

1990 CHAPTER 8

PART III

CONTROL OVER DEVELOPMENT

Determination of applications

70 Determination of applications: general considerations.

(1) Where an application is made to a local planning authority for planning permission—

[F1](a) subject to [[F2]section 62D(5) and] sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

[F1](b) they may refuse planning permission.

[[F3](1A) Where an application is made to a local planning authority for permission in principle—

(a) they may grant permission in principle; or

(b) they may refuse permission in principle.]

(2) In dealing with [[F4]an application for planning permission or permission in principle] the authority shall have regard [[F5]to—

(a) the provisions of the development plan, so far as material to the application,

[[F6](aza) a post-examination draft neighbourhood development plan, so far as material to the application,]

[[F7](aa) any considerations relating to the use of the Welsh language, so far as material to the application;]

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations.]

[[F8](2ZZA) The authority must determine an application for technical details consent in accordance with the relevant permission in principle.

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This is subject to subsection (2ZZC).

(2ZZB) An application for technical details consent is an application for planning permission that—

(a) relates to land in respect of which permission in principle is in force,

(b) proposes development all of which falls within the terms of the permission in principle, and

(c) particularises all matters necessary to enable planning permission to be granted without any reservations of the kind referred to in section 92.

(2ZZC) Subsection (2ZZA) does not apply where—

(a) the permission in principle has been in force for longer than a prescribed period, and

(b) there has been a material change of circumstances since the permission came into force.

"Prescribed" means prescribed for the purposes of this subsection in a development order.**]**

[[F9](2ZA) Subsection (2)(aa) applies only in relation to Wales.**]**

[[F10](2A) **[**[F11]Subsections (1A), (2)(b) and (2ZZA) to (2ZZC) do not**]** apply in relation to Wales.**]**

(3) Subsection (1) has effect subject to **[**[F12]section 65**]** and to the following provisions of this Act, to sections 66, 67, 72 and 73 of the [M1]Planning (Listed Buildings and Conservation Areas) Act 1990 and to section 15 of the [M2]Health Services Act 1976.

[[F13](3B) For the purposes of subsection (2)(aza) (but subject to subsections (3D) and (3E)) a draft neighbourhood development plan is a "post-examination draft neighbourhood development plan" if—

(a) a local planning authority have made a decision under paragraph 12(4) of Schedule 4B with the effect that a referendum or referendums are to be held on the draft plan under that Schedule,

(b) the Secretary of State has directed under paragraph 13B(2)(a) of that Schedule that a referendum or referendums are to be held on the draft plan under that Schedule,

(c) an examiner has recommended under paragraph 13(2)(a) of Schedule A2 to the Planning and Compulsory Purchase Act 2004 (examination of modified plan) that a local planning authority should make the draft plan, or

(d) an examiner has recommended under paragraph 13(2)(b) of that Schedule that a local planning authority should make the draft plan with modifications.

(3C) In the application of subsection (2)(aza) in relation to a post-examination draft neighbourhood development plan within subsection (3B)(d), the local planning authority must take the plan into account as it would be if modified in accordance with the recommendations.

(3D) A draft neighbourhood development plan within subsection (3B)(a) or (b) ceases to be a post-examination draft neighbourhood development plan for the purposes of subsection (2)(aza) if—

(a) section 38A(4)(a) (duty to make plan) or (6) (cases in which duty does not apply) of the Planning and Compulsory Purchase Act 2004 applies in relation to the plan,

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(b) section 38A(5) (power to make plan) of that Act applies in relation to the plan and the plan is made by the local planning authority,

(c) section 38A(5) of that Act applies in relation to the plan and the local planning authority decide not to make the plan,

(d) a single referendum is held on the plan and half or fewer of those voting in the referendum vote in favour of the plan, or

(e) two referendums are held on the plan and half or fewer of those voting in each of the referendums vote in favour of the plan.

(3E) A draft neighbourhood development plan within subsection (3B)(c) or (d) ceases to be a post-examination draft neighbourhood development plan for the purposes of subsection (2)(aza) if—

(a) the local planning authority make the draft plan (with or without modifications), or

(b) the local planning authority decide not to make the draft plan.

(3F) The references in subsection (3B) to Schedule 4B are to that Schedule as applied to neighbourhood development plans by section 38A(3) of the Planning and Compulsory Purchase Act 2004.**]**

[[F14](4) In this section—

"local finance consideration" means—

(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or

(b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy;

"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975;

"relevant authority" means—

(a) a district council;

(b) a county council in England;

(c) the Mayor of London;

(d) the council of a London borough;

(e) a Mayoral development corporation;

(f) an urban development corporation;

(g) a housing action trust;

(h) the Council of the Isles of Scilly;

(i) the Broads Authority;

(j) a National Park authority in England;

(k) the Homes and Communities Agency; or

(l) a joint committee established under section 29 of the Planning and Compulsory Purchase Act 2004.**]**

Textual Amendments

F1 S. 70(1)(a)(b): functions of local authority not to be responsibility of an executive of the authority (E.) (16.11.2000) by virtue of S.I. 2000/2853, reg. 2(1), **Sch. 1**

F2 Words in s. 70(1)(a) inserted (6.9.2015 for specified purposes, 1.3.2016 for specified purposes) by Planning (Wales) Act 2015 (anaw 4), s. 58(2)(b)(4)(b), **Sch. 4 para. 5**; S.I. 2016/52, art. 3(e)

F3 S. 70(1A) inserted (12.7.2016) by Housing and Planning Act 2016 (c. 22), **ss. 150(3)(a)**, 216(2)(c)

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F4 Words in s. 70(2) substituted (13.7.2016) by Housing and Planning Act 2016 (c. 22), s. 216(3), **Sch. 12 para. 11(2)**; S.I. 2016/733, reg. 3(d)

F5 Words in s. 70(2) substituted (15.1.2012) by Localism Act 2011 (c. 20), **ss. 143(2)**, 240(1)(i) (with ss. 143(5), 144)

F6 S. 70(2)(aza) inserted (19.7.2017) by Neighbourhood Planning Act 2017 (c. 20), **ss. 1(2)**, 46(1); S.I. 2017/767, reg. 2(a)

F7 S. 70(2)(aa) inserted (6.9.2015 for specified purposes, 4.1.2016 in so far as not already in force) by Planning (Wales) Act 2015 (anaw 4), **ss. 31(2)**, 58(2)(b)(4)(b) (with s. 31(4)); S.I. 2015/1987, art. 3(e)

F8 S. 70(2ZZA)-(2ZZC) inserted (12.7.2016) by Housing and Planning Act 2016 (c. 22), **ss. 150(3)(b)**, 216(2)(c)

F9 S. 70(2ZA) inserted (6.9.2015 for specified purposes, 4.1.2016 in so far as not already in force) by Planning (Wales) Act 2015 (anaw 4), **ss. 31(3)**, 58(2)(b)(4)(b) (with s. 31(4)); S.I. 2015/1987, art. 3(e)

F10 S. 70(2A) inserted (15.1.2012) by Localism Act 2011 (c. 20), **ss. 143(3)**, 240(1)(i) (with ss. 143(5), 144)

F11 Words in s. 70(2A) substituted (13.7.2016) by Housing and Planning Act 2016 (c. 22), s. 216(3), **Sch. 12 para. 11(3)**; S.I. 2016/733, reg. 3(d)

F12 Words in s. 70(3) substituted (17.7.1992) by Planning and Compensation Act 1991 (c. 34, SIF 123:1), s. 32, **Sch. 7 para.14** (with s. 84(5)); S.I. 1992/1491, art. 2, **Sch. 1**

F13 S. 70(3B)-(3F) inserted (19.7.2017) by Neighbourhood Planning Act 2017 (c. 20), **ss. 1(3)**, 46(1); S.I. 2017/767, reg. 2(a)

F14 S. 70(4) inserted (15.1.2012) by Localism Act 2011 (c. 20), **ss. 143(4)**, 240(1)(i) (with ss. 143(5), 144)

Modifications etc. (not altering text)

C1 S. 70 modified (1.4.1996) by 1994 c. 19, s. 20(3), **Sch. 5 Pt. III para. 19** (with ss. 54(5)(7), Sch. 17 paras. 22(1), 23(2)); S.I. 1995/3198, **art. 4**,, Sch. 2
S. 70 applied (with modifications) (2.8.1999) by S.I. 1999/1892, reg. 2(1), Sch. art. 7, **Sch. 2 Pt. I**
S. 70 applied (with modifications) (2.8.1999) by S.I. 1999/1892, reg. 2(1), Sch. art. 7, **Sch. 2 Pt. II**

C2 S. 70(1) applied (with modifications) (W.) (1.3.2016) by The Developments of National Significance (Wales) Regulations 2016 (S.I. 2016/56), reg. 1(2), **Sch. 7 para. 1(1)(d)** (with regs. 1(3), 47)

C3 S. 70(1)(2) applied (with modifications) (W.) (1.3.2016) by The Developments of National Significance (Application of Enactments) (Wales) Order 2016 (S.I. 2016/54), arts. 1, **3(1)(d)**(e)

C4 S. 70(2) applied (with modifications) (W.) (1.3.2016) by The Developments of National Significance (Wales) Regulations 2016 (S.I. 2016/56), reg. 1(2), **Sch. 7 para. 1(1)(e)** (with regs. 1(3), 47)

Marginal Citations

M1 1990 c. 9.

M2 1976 c. 83.

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Changes and effects yet to be applied to :

- s. 70(3) substituted by 2016 c. 22 s. 5(8)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

- Act applied in part by 2021 c. 2 s. 47(4)

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 69(1)(cza) inserted by 2015 c. 7 Sch. 4 para. 8(2)
- s. 70(3A) inserted by 2017 c. 20 Sch. 3 para. 2
- s. 75ZA and cross-heading inserted by 2016 c. 22 s. 155
- s. 83(1A)-(1C) amendment to earlier affecting provision 2004 c. 5, s. 45(2) by 2011 c. 20 Sch. 8 para. 14(4)(5)Sch. 25 Pt. 16
- s. 83(1A)-(1C) inserted by 2004 c. 5 s. 45(2)
- s. 83(2)-(2B) amendment to earlier affecting provision 2004 c. 5, s. 45(3) by 2011 c. 20 Sch. 8 para. 14(4)(5)Sch. 25 Pt. 16
- s. 83(2)-(2B) substituted for s. 83(2) by 2004 c. 5 s. 45(3)
- s. 83(4) inserted by 2004 c. 5 s. 45(4)
- s. 85(1A) inserted by 2004 c. 5 s. 45(6)
- s. 93(5)(6) inserted by 2017 c. 20 Sch. 3 para. 6
- s. 106ZA inserted by 2016 c. 22 s. 158(1)
- s. 106ZB inserted by 2016 c. 22 s. 159(1)
- s. 108(1A)(1B) inserted by 2015 c. 7 Sch. 4 para. 15(4)
- s. 108(3A) inserted by 2004 c. 5 Sch. 6 para. 6
- s. 108(3B)(ba) inserted by 2015 c. 7 Sch. 4 para. 15(6)
- s. 108(3DA) inserted by 2015 c. 7 Sch. 4 para. 15(7)
- s. 141(6) inserted by 2017 c. 20 Sch. 3 para. 7
- s. 169(1)(a) words renumbered as s. 169(1)(a) by 2017 c. 20 s. 26(5)(a)
- s. 169(1)(b) inserted by 2017 c. 20 s. 26(5)(b)
- s. 170(8BA) inserted by 2017 c. 20 s. 26(6)
- s. 196(1A) inserted by 2008 c. 29 Sch. 10 para. 8(2)
- s. 208(5A) inserted by 2008 c. 29 Sch. 10 para. 9(2)
- s. 303(10A) inserted by 2015 c. 7 Sch. 4 para. 19(3)
- s. 303(12) inserted by 2015 c. 7 Sch. 4 para. 19(4)
- s. 324(1BA) s. 324(1B) renumbered as s. 324(1BA) by 2021 asc 1 Sch. 9 para. 28(a)
- s. 333(3ZB) inserted by 2016 c. 22 s. 159(2)
- Sch. 4B para. 11(3)-(5) inserted by 2017 c. 20 s. 7
- Sch. 7 para. 12(1)-(1C) amendment to earlier affecting provision 2004 c. 5 s. 45(9) by 2011 c. 20 Sch. 8 para. 14(7)
- Sch. 7 para. 12(1)-(1C) substituted for Sch. 7 para. 12(1) by 2004 c. 5 s. 45(9)
- Sch. 9A inserted by 2016 c. 22 Sch. 13
- Sch. 13 para. 24A inserted by 2017 c. 20 s. 26(7)

Town and Country Planning Act 1990

1990 CHAPTER 8

PART III

CONTROL OVER DEVELOPMENT

Determination of applications

73 Determination of applications to develop land without compliance with conditions previously attached.

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

[[F1](2A) See also section 100ZA, which makes provision about restrictions on the power to impose conditions under subsection (2) on a grant of planning permission in relation to land in England.**]**

(3) **[**[F2]Special provision may be made with respect to such applications—

(a) by regulations under section 62 as regards the form and content of the application, and

(b) by a development order as regards the procedure to be followed in connection with the application.**]**

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(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

[[F3](5) Planning permission must not be granted under this section **[**[F4]for the development of land in England**]** to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made.**]**

Textual Amendments

F1 S. 73(2A) inserted (1.10.2018) by Neighbourhood Planning Act 2017 (c. 20), s. 46(1), **Sch. 3 para. 4**; S.I. 2018/567, reg. 3(b)

F2 S. 73(3) repealed (6.8.2004 for certain purposes and otherwise prosp.) by Planning and Compulsory Purchase Act 2004 (c. 5), ss. 42(2), 120, 121, **Sch. 9** (with s. 111); S.I. 2004/2097, **art. 2**

F3 S. 73(5) inserted (24.8.2005 for E and otherwise prosp.) by Planning and Compulsory Purchase Act 2004 (c. 5), **ss. 51(3)**, 121 (with s. 111); S.I. 2005/2081, **art. 2** (subject to savings in art. 4)

F4 Words in s. 73(5) inserted (6.9.2015 for specified purposes, 16.3.2016 in so far as not already in force) by Planning (Wales) Act 2015 (anaw 4), **ss. 35(7)**, 58(2)(b)(4)(b); S.I. 2016/52, art. 5(b) (with art. 13)

Modifications etc. (not altering text)

C1 S. 73: functions of local authority not to be responsibility, of an executive of the authority (E.) (16.11.2000) by virtue of S.I. 2000/2853, reg. 2(1), **Sch. 1** para. A. 2

C2 S. 73: functions of local authority not to be responsibility of an executive of the authority (E.) (16.11.2000) by virtue of S.I. 2000/2853, reg. 2(1), **Sch. 1**

C3 S. 73 applied (16.8.2012) by The Hinkley Point Harbour Empowerment Order 2012 (S.I. 2012/1914), arts. 1(1), **18(4)-(6)** (with arts. 34, 35, 37, 40)

C4 S. 73(2) applied (with modifications) (W.) (1.3.2016) by The Developments of National Significance (Wales) Regulations 2016 (S.I. 2016/56), reg. 1(2), **Sch. 7 para. 1(1)(k)** (with regs. 1(3), 47)

C5 S. 73(2) applied (with modifications) (W.) (1.3.2016) by The Developments of National Significance (Application of Enactments) (Wales) Order 2016 (S.I. 2016/54), arts. 1, **3(1)(k)**

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Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

- Act applied in part by 2021 c. 2 s. 47(4)

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 69(1)(cza) inserted by 2015 c. 7 Sch. 4 para. 8(2)
- s. 70(3A) inserted by 2017 c. 20 Sch. 3 para. 2
- s. 75ZA and cross-heading inserted by 2016 c. 22 s. 155
- s. 83(1A)-(1C) amendment to earlier affecting provision 2004 c. 5, s. 45(2) by 2011 c. 20 Sch. 8 para. 14(4)(5)Sch. 25 Pt. 16
- s. 83(1A)-(1C) inserted by 2004 c. 5 s. 45(2)
- s. 83(2)-(2B) amendment to earlier affecting provision 2004 c. 5, s. 45(3) by 2011 c. 20 Sch. 8 para. 14(4)(5)Sch. 25 Pt. 16
- s. 83(2)-(2B) substituted for s. 83(2) by 2004 c. 5 s. 45(3)
- s. 83(4) inserted by 2004 c. 5 s. 45(4)
- s. 85(1A) inserted by 2004 c. 5 s. 45(6)
- s. 93(5)(6) inserted by 2017 c. 20 Sch. 3 para. 6
- s. 106ZA inserted by 2016 c. 22 s. 158(1)
- s. 106ZB inserted by 2016 c. 22 s. 159(1)
- s. 108(1A)(1B) inserted by 2015 c. 7 Sch. 4 para. 15(4)
- s. 108(3A) inserted by 2004 c. 5 Sch. 6 para. 6
- s. 108(3B)(ba) inserted by 2015 c. 7 Sch. 4 para. 15(6)
- s. 108(3DA) inserted by 2015 c. 7 Sch. 4 para. 15(7)
- s. 141(6) inserted by 2017 c. 20 Sch. 3 para. 7
- s. 169(1)(a) words renumbered as s. 169(1)(a) by 2017 c. 20 s. 26(5)(a)
- s. 169(1)(b) inserted by 2017 c. 20 s. 26(5)(b)
- s. 170(8BA) inserted by 2017 c. 20 s. 26(6)
- s. 196(1A) inserted by 2008 c. 29 Sch. 10 para. 8(2)
- s. 208(5A) inserted by 2008 c. 29 Sch. 10 para. 9(2)
- s. 303(10A) inserted by 2015 c. 7 Sch. 4 para. 19(3)
- s. 303(12) inserted by 2015 c. 7 Sch. 4 para. 19(4)
- s. 324(1BA) s. 324(1B) renumbered as s. 324(1BA) by 2021 asc 1 Sch. 9 para. 28(a)
- s. 333(3ZB) inserted by 2016 c. 22 s. 159(2)
- Sch. 4B para. 11(3)-(5) inserted by 2017 c. 20 s. 7
- Sch. 7 para. 12(1)-(1C) amendment to earlier affecting provision 2004 c. 5 s. 45(9) by 2011 c. 20 Sch. 8 para. 14(7)
- Sch. 7 para. 12(1)-(1C) substituted for Sch. 7 para. 12(1) by 2004 c. 5 s. 45(9)
- Sch. 9A inserted by 2016 c. 22 Sch. 13
- Sch. 13 para. 24A inserted by 2017 c. 20 s. 26(7)

Planning and Compulsory Purchase Act 2004

2004 CHAPTER 5

PART 3

DEVELOPMENT

Development plan

38 Development plan

(1) A reference to the development plan in any enactment mentioned in subsection (7) must be construed in accordance with subsections (2) to (5).

(2) For the purposes of any area in Greater London the development plan is—

(a) the spatial development strategy, [F1]...

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area [[F2], and.

(c) the neighbourhood development plans which have been made in relation to that area.]

(3) For the purposes of any other area in England the development plan is—

(a) the [[F3] regional strategy] for the region in which the area is situated [[F4] (if there is a regional strategy for that region)], and

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area [[F5], and.

(c) the neighbourhood development plans which have been made in relation to that area.]

[[F6](3A) For the purposes of any area in England (but subject to subsection (3B)) a neighbourhood development plan which relates to that area also forms part of the development plan for that area if—

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(a) section 38A(4)(a) (approval by referendum) applies in relation to the neighbourhood development plan, but

(b) the local planning authority to whom the proposal for the making of the plan has been made have not made the plan.

(3B) The neighbourhood development plan ceases to form part of the development plan if the local planning authority decide under section 38A(6) not to make the plan.**]**

(4) For the purposes of any area in Wales the development plan is **[**[F7]—.

(a) the National Development Framework for Wales,

(b) the strategic development plan for any strategic planning area that includes all or part of that area, and

(c) the local development plan for that area**]**

(5) If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document **[**[F8]to become part of the development plan**]**.

(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.

(7) The enactments are—

(a) this Act;

(b) the planning Acts;

(c) any other enactment relating to town and country planning;

(d) the Land Compensation Act 1961 (c. 33);

(e) the Highways Act 1980 (c. 66).

(8) In subsection (5) references to a development plan include a development plan for the purposes of paragraph 1 of Schedule 8.

[[F9](9) Development plan document must be construed in accordance with section 37(3).**]**

[[F10](10) Neighbourhood development plan must be construed in accordance with section 38A.**]**

Textual Amendments

F1 Word in s. 38(2)(a) repealed (15.11.2011 for specified purposes, 6.4.2012 for specified purposes, 3.8.2012 for specified purposes, 6.4.2013 in so far as not already in force) by Localism Act 2011 (c. 20), ss., 240(5)(j), Sch. 9 para. 6(a), **Sch. 25 Pt. 16**; S.I. 2012/628, art. 8(a) (with arts. 9, 12, 13, 16, 18-20) (as amended (3.8.2012) by S.I. 2012/2029, arts. 2, 4); S.I. 2012/2029, arts. 2, 3(a) (with art. 5) (as amended (6.4.2013) by S.I. 2013/797, art. 4); S.I. 2013/797, arts. 1(2), 2

F2 S. 38(2)(c) and word inserted (15.11.2011 for specified purposes, 6.4.2012 for specified purposes, 3.8.2012 for specified purposes, 6.4.2013 in so far as not already in force) by Localism Act 2011 (c. 20), ss., 240(5)(j), **Sch. 9 para. 6(a)**; S.I. 2012/628, art. 8(a) (with arts. 9, 12, 13, 16, 18-20) (as amended (3.8.2012) by S.I. 2012/2029, arts. 2, 4); S.I. 2012/2029, arts. 2, 3(a) (with art. 5) (as amended (6.4.2013) by S.I. 2013/797, art. 4); S.I. 2013/797, arts. 1(2), 2

F3 Words in s. 38(3)(a) substituted (1.4.2010) by Local Democracy, Economic Development and Construction Act 2009 (c. 20), **ss. 82(1)**, 148(5) (with s. 38(2)(3)); S.I. 2009/3318, art. 4(aa)

F4 Words in s. 38(3)(a) inserted (15.11.2011) by Localism Act 2011 (c. 20), s. 240(5)(h), **Sch. 8 para. 13(1)**

Changes to legislation: *There are outstanding changes not yet made by the legislation.gov.uk editorial team to Planning and Compulsory Purchase Act 2004. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

F5 S. 38(3)(c) and word inserted (15.11.2011 for specified purposes, 6.4.2012 for specified purposes, 3.8.2012 for specified purposes, 6.4.2013 in so far as not already in force) by Localism Act 2011 (c. 20), ss., 240(5)(j), **Sch. 9 para. 6(b)**; S.I. 2012/628, art. 8(a) (with arts. 9, 12, 13, 16, 18-20) (as amended (3.8.2012) by S.I. 2012/2029, arts. 2, 4); S.I. 2012/2029, arts. 2, 3(a) (with art. 5) (as amended (6.4.2013) by S.I. 2013/797, art. 4); S.I. 2013/797, arts. 1(2), 2

F6 S. 38(3A)(3B) inserted (19.7.2017) by Neighbourhood Planning Act 2017 (c. 20), **ss. 3**, 46(1); S.I. 2017/767, reg. 2(b)

F7 S. 38(4)(a)-(c) substituted for words in s. 38(4) (6.9.2015 for specified purposes) by Planning (Wales) Act 2015 (anaw 4), **ss. 9**, 58(2)(b)(4)(b)

F8 Words in s. 38(5) substituted (15.11.2011 for specified purposes, 6.4.2012 for specified purposes, 3.8.2012 for specified purposes, 6.4.2013 in so far as not already in force) by Localism Act 2011 (c. 20), ss., 240(5)(j), **Sch. 9 para. 6(c)**; S.I. 2012/628, art. 8(a) (with arts. 9, 12, 13, 16, 18-20) (as amended (3.8.2012) by S.I. 2012/2029, arts. 2, 4); S.I. 2012/2029, arts. 2, 3(a) (with art. 5) (as amended (6.4.2013) by S.I. 2013/797, art. 4); S.I. 2013/797, arts. 1(2), 2

F9 S. 38(9) inserted (6.4.2009) by Planning Act 2008 (c. 29), **ss. 180(7)**, 241(8) (with s. 226); S.I. 2009/400, art. 3(e)

F10 S. 38(10) inserted (15.11.2011 for specified purposes, 6.4.2012 for specified purposes, 3.8.2012 for specified purposes, 6.4.2013 in so far as not already in force) by Localism Act 2011 (c. 20), ss., 240(5)(j), **Sch. 9 para. 6(d)**; S.I. 2012/628, art. 8(a) (with arts. 9, 12, 13, 16, 18-20) (as amended (3.8.2012) by S.I. 2012/2029, arts. 2, 4); S.I. 2012/2029, arts. 2, 3(a) (with art. 5) (as amended (6.4.2013) by S.I. 2013/797, art. 4); S.I. 2013/797, arts. 1(2), 2

Modifications etc. (not altering text)

C1 S. 38 applied in part (with modifications) (23.12.2016) by The Greater Manchester Combined Authority (Functions and Amendment) Order 2016 (S.I. 2016/1267), arts. 1(2), 4(5), **Sch. 1 Pt. 2**

C2 S. 38 applied (with modifications) (8.5.2018) by The West of England Combined Authority Order 2017 (S.I. 2017/126), arts. 1(5), 11(5), **Sch. 2 Pt. 2**

Commencement Information

I1 S. 38 in force at 28.9.2004 for E. by S.I. 2004/2202, **art. 2(c)**

I2 S. 38 in force at 15.10.2005 for W. by S.I. 2005/2847, **art. 2(a)**

Changes to legislation:
There are outstanding changes not yet made by the legislation.gov.uk editorial team to Planning and Compulsory Purchase Act 2004. Any changes that have already been made by the team appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

- s. 38(3) word repealed by 2011 c. 20 Sch. 25 Pt. 16
- s. 38(3)(a) and word repealed by 2011 c. 20 Sch. 8 para. 13(2)Sch. 25 Pt. 16
- s. 38(4)(b) substituted by 2021 asc 1 Sch. 9 para. 2
- specified provision(s) amendment to earlier commencing SI 2006/1061 art. 4 by S.I. 2010/321 art. 3
- specified provision(s) amendment to earlier commencing SI 2007/1369 art. 3 by S.I. 2010/321 art. 4

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 45(A1) inserted by 2011 c. 20 Sch. 8 para. 14(2)
- s. 60K-60N and cross-heading inserted by 2021 asc 1 Sch. 9 para. 4
- Sch. A2 para. 11(2)(d) words substituted by S.I. 2018/1232 reg. 3(3)(a)
- Sch. A2 para. 14(6)(a) words substituted by S.I. 2018/1232 reg. 3(3)(a)
- Sch. A2 para. 14(4) words substituted by S.I. 2018/1232 reg. 3(3)(b)

Town and Country Planning (Development Management Procedure) (England) Order 2015/595
art. 13 Notice of applications for planning permission

Law In Force

Version 1 of 1

15 April 2015 - Present

Subjects
Planning

13.— Notice of applications for planning permission

(1) Except where paragraph (2) applies, an applicant for planning permission must give requisite notice of the application to any person (other than the applicant) who on the prescribed date is an owner of the land to which the application relates, or a tenant—

(a) by serving the notice on every such person whose name and address is known to the applicant; and

(b) where the applicant has taken reasonable steps to ascertain the names and addresses of every such person, but has been unable to do so, by publication of the notice after the prescribed date in a newspaper circulating in the locality in which the land to which the application relates is situated.

(2) Subject to paragraph (3), in the case of an application for planning permission for development consisting of the winning and working of minerals by underground operations, the applicant must give requisite notice of the application to any person (other than the applicant) who on the prescribed date is an owner of any of the land to which the application relates, or a tenant—

(a) by serving the notice on every such person whom the applicant knows to be such a person and whose name and address is known to the applicant;

(b) by publication of the notice after the prescribed date in a newspaper circulating in the locality in which the land to which the application relates is situated; and

(c) by site display in at least one place in every parish within which there is situated any part of the land to which the application relates, leaving the notice in position for not less than 7 days in the period of 21 days immediately preceding the making of the application to the local planning authority.

(3) In the case of an application for planning permission for development consisting of the winning and working of oil or natural gas (including exploratory drilling)—

(a) the applicant is not required to serve a notice under paragraph (2)(a) in relation to any land which is to be used solely for underground operations;

(b) where any part of the land to which the application relates is in an unparished area, the applicant must give notice under paragraph (2)(c) in relation to that part of the land as if for “parish” there were substituted “ward”; and

(c) where sub-paragraph (b) applies, references in this article to notices required by paragraph (2)(c) include notices required by paragraph (2)(c) as modified by sub-paragraph (b).

(4) The notice required by paragraph (2)(c) must (in addition to any other matters required to be contained in it) specify a place within the area of the local planning authority to whom the application is made where a copy of the application for

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planning permission, and of all plans and other documents submitted with it, will be open to inspection by the public at all reasonable hours during such period as may be specified in the notice.

(5) Where a local planning authority maintain a website for the purpose of advertisement of applications for planning permission, the notice required by paragraph (2)(c) must (in addition to any other matters required to be contained in it) state the address of the website where a copy of the application, and of all plans and other documents submitted with it, will be published.

(6) Where the notice is, without any fault or intention of the applicant, removed, obscured or defaced before the period of 7 days referred to in paragraph (2)(c) has elapsed, the applicant is to be treated as having complied with the requirements of that paragraph if the applicant has taken reasonable steps for protection of the notice and, if need be, its replacement.

(7) The date prescribed for the purposes of section 65(2) of the 1990 Act (notice etc. of applications for planning permission)[1] and the "prescribed date" for the purposes of this article, is the day 21 days before the date of the application.

(8) The applications prescribed for the purposes of paragraph (c) of the definition of *"owner"* in section 65(8) of the 1990 Act are minerals applications and the minerals prescribed for the purposes of that paragraph are any minerals other than oil, gas, coal, gold or silver.

(9) In this article—

"minerals applications" mean applications for planning permission for development consisting of the winning and working of minerals;

"requisite notice" means notice in the appropriate form set out in Schedule 2 or in a form substantially to the same effect, but does not include notice served using electronic communications; and

"tenant" means the tenant of an agricultural holding any part of which is comprised in the land to which an application relates.

Notes

1 Section 65 was substituted by section 16(1) of the Planning and Compensation Act 1991 (c. 34) and amended by paragraph 35 of the Schedule to the Agricultural Tenancies Act 1995 (c. 8).

Part 3 Applications > art. 13 Notice of applications for planning permission

Table of Amendments

1 *see commencement below*

Commencement

Pt 3 art. 13(1)-(9) definition of "tenant"	April 15, 2015

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Extent

Pt 3 art. 13(1)-(9) definition of "tenant"	England

Enabling Act

P

Planning and Compulsory Purchase Act 2004 c. 5, Pt 4 s. 54
Planning and Compulsory Purchase Act 2004 c. 5, Pt 7 c. 1 s. 88
Planning and Compulsory Purchase Act 2004 c. 5, Pt 9 s. 122(3)

T

Town and Country Planning Act 1990 c. 8, Pt III s. 55(2A)
Town and Country Planning Act 1990 c. 8, Pt III s. 55(2B)
Town and Country Planning Act 1990 c. 8, Pt III s. 59
Town and Country Planning Act 1990 c. 8, Pt III s. 61(1)
Town and Country Planning Act 1990 c. 8, Pt III s. 61A(5)
Town and Country Planning Act 1990 c. 8, Pt III s. 61W
Town and Country Planning Act 1990 c. 8, Pt III s. 62
Town and Country Planning Act 1990 c. 8, Pt III s. 65
Town and Country Planning Act 1990 c. 8, Pt III s. 69
Town and Country Planning Act 1990 c. 8, Pt III s. 71
Town and Country Planning Act 1990 c. 8, Pt III s. 74
Town and Country Planning Act 1990 c. 8, Pt III s. 74A
Town and Country Planning Act 1990 c. 8, Pt III s. 77(4)
Town and Country Planning Act 1990 c. 8, Pt III s. 78
Town and Country Planning Act 1990 c. 8, Pt III s. 79(4)
Town and Country Planning Act 1990 c. 8, Pt VII s. 188
Town and Country Planning Act 1990 c. 8, Pt VII s. 193
Town and Country Planning Act 1990 c. 8, Pt VII s. 196(4)
Town and Country Planning Act 1990 c. 8, Pt XIII s. 293A
Town and Country Planning Act 1990 c. 8, Pt XV s. 333(4)
Town and Country Planning Act 1990 c. 8, Pt XV s. 333(7)
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 5
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 6
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 7(7)
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 8(6)
Town and Country Planning Act 1990 c. 8, Sch. 4A

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Town and Country Planning (Development Management Procedure) (England) Order 2015/595
art. 15 Publicity for applications for planning permission

Superseded

Version 6 of 8

14 May 2020 - 29 June 2021

Subjects
Planning

15.— Publicity for applications for planning permission

(1) An application for planning permission must be publicised by the local planning authority to which the application is made in the manner prescribed by this article.

[

(1A) In the case of any EIA application accompanied by an environmental statement, the application must be publicised in accordance with the requirements of paragraph (7) and by giving requisite notice—

(a) by site display in at least one place on or near the land to which the application relates for not less than 30 days; and

(b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated.

][1]

(2) In the case of an application for planning permission for development which—[...][2]

(b) does not accord with the provisions of the development plan in force in the area in which the land to which the application relates is situated, or

(c) would affect a right of way to which Part 3 of the Wildlife and Countryside Act 1981 (public rights of way)[3] applies,

the application must be publicised in the manner specified in paragraph (3).

(3) An application falling within paragraph (2) ("a paragraph (2) application") must be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; and

(b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated.

(4) In the case of an application for planning permission which is [neither an application to which paragraph (1A) applies nor a paragraph (2) application][4] , if the development proposed is major development the application must be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—

(a)

(i) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or

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(ii) by serving the notice on any adjoining owner or occupier; and

(b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated.

[

(4A) In a case of an application for technical details consent to which neither paragraph (2) nor paragraph (4) applies, the application must be publicised—

(a) in accordance with the requirements of paragraph (7), and

(b) by giving requisite notice by site display in at least one place on or near the land to which the application relates for not less than 21 days.

][5]

(5) [In a case to which paragraphs (1A), (2), (4) and (4A) do not apply the application must][6] be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or

(b) by serving the notice on any adjoining owner or occupier.

(6) Where the notice is, without any fault or intention of the local planning authority, removed, obscured or defaced before the period of 21 days referred to in paragraph (3)(a), (4)(a)(i) [, (4A)(b)][7] or (5)(a) [, or before the period of 30 days referred to in [paragraph (1A)(a)][9] ,][8] has elapsed, the authority is to be treated as having complied with the requirements of the relevant paragraph if they have taken reasonable steps for protection of the notice and, if need be, its replacement.

(7) The following information must be published on a website maintained by the local planning authority—

(a) the address or location of the proposed development;

(b) a description of the proposed development;

[

(ba) in the case of EIA application accompanied by an environmental statement, that statement;

][10]

(c) the date by which any representations about the application must be made, which must not be before the last day of the period of [21 days][11][, or in the case of an EIA application accompanied by an environmental statement 30 days,][12] beginning with the date on which the information is published;

(d) where and when the application may be inspected;

(e) how representations may be made about the application; and

(f) that, in the case of a householder or minor commercial application, in the event of an appeal that proceeds by way of the expedited procedure, any representations made about the application will be passed to the Secretary of State and there will be no opportunity to make further representations.

[

(7A) Paragraph (7B) applies—

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(a) in the case of an application made to a local planning authority to which paragraph (1A), (2), (4), (4A) or (5) applies; and

(b) if the local planning authority to which the application is made is not able to give requisite notice by one or more of the following methods (as may be required by paragraph (1A), (2), (4), (4A) or (5))—

(i) by site display;

(ii) by serving the notice on an adjoining owner or occupier; or

(iii) by publication of the notice in a newspaper;

because it is not reasonably practicable to do so for reasons connected to the effects of coronavirus, including restrictions on movement.

(7B) In a case falling within paragraph (7A), the local planning authority must—

(a) comply with the requirement to give requisite notice as required by paragraph (1A), (2), (4), (4A) or (5) (as the case may be), only to the extent that it is reasonably practicable to do so;

(b) take reasonable steps to inform any persons who are likely to have an interest in the application of the website mentioned in paragraph (7); and

(c) publish the requisite notice on that website.

(7C) If the local planning authority complies with the requirements set out in paragraph (7B) that authority is discharged of its obligation to give requisite notice as required by paragraph (1A), (2), (4), (4A) or (5)—

(a) by site display;

(b) by serving the notice on an adjoining owner or occupier; or

(c) by publication of the notice in a newspaper;

in so far as such notice was not given because the authority was not able to do so under paragraph (7A)(b).

(7D) In paragraph (7B)(b)—

(a) the persons who are likely to have an interest in an application must include the persons who live or work in, or otherwise have a direct connection with, the area in which the proposed development is located; and

(b) the reasonable steps that are taken by the local planning authority—

(i) may include use of social media and communication by electronic means; and

(ii) must be proportionate to the scale and impact of the development.

(7F) In paragraph (7A)(b) *"coronavirus"* means severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

][13]

(8) Subject to paragraph (9), if the local planning authority have failed to satisfy the requirements of this article in respect of an application for planning permission at the time the application is referred to the Secretary of State under section 77 (reference of applications to Secretary of State) of the 1990 Act[14], or any appeal to the Secretary of State is made under section 78 of the 1990 Act[15], this article continues to apply as if such referral or appeal to the Secretary of State had not been made.

(9) Where paragraph (8) applies, the local planning authority must inform the Secretary of State as soon as they have satisfied the relevant requirements in this article.

(10) In this article—

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"adjoining owner or occupier" means any owner or occupier of any land adjoining the land to which the application relates; and

"requisite notice" means notice in the appropriate form set out in Schedule 3 or in a form substantially to the same effect.

[

(10A) In this article, when computing the number of days, any day which is a public holiday must be disregarded unless—

(i) the application is an EIA application[17] accompanied by an environmental statement; or

(ii) the application is one to which paragraph (11) applies.

][16]

(11) Paragraphs (1) to (6) apply to applications made to the Secretary of State under section 293A of the 1990 Act (urgent Crown development: application)[18] as if the references to a local planning authority were references to the Secretary of State.

Notes

1 Added by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.72(3)(a) (May 16, 2017)
2 Revoked by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.72(3)(b) (May 16, 2017)
3 1981 c. 69; *see* section 66. There are amendments to Part 3 which are not relevant to this Order.
4 Words substituted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.72(3)(c) (May 16, 2017)
5 Added by Town and Country Planning (Permission in Principle) Order 2017/402 Sch.1 para.2(2)(a) (April 15, 2017)
6 Words substituted by Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018/695 reg.3(2) (October 1, 2018)
7 Word inserted by Town and Country Planning (Permission in Principle) Order 2017/402 Sch.1 para.2(2)(c) (April 15, 2017)
8 Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.72(3)(e) (May 16, 2017)
9 Words substituted by Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018/695 reg.3(3) (October 1, 2018)
10 Added by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.72(3)(f)(i) (May 16, 2017)
11 Words substituted by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505 Pt 2 reg.5 (May 14, 2020)
12 Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.72(3)(f)(ii) (May 16, 2017)
13 Added by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505 Pt 2 reg.4 (May 14, 2020)
14 Section 77 was amended by paragraph 18 of Schedule 7 to the Planning and Compensation Act 1991 (c. 34) ("the 1991 Act"), paragraph 2 of Schedule 10 to the Planning Act 2008 (c. 29) ("the 2008 Act") and paragraph 10 of Schedule 12 to the Localism Act 2011 (c. 20) ("the 2011 Act").
15 Section 78 was amended by section 17(2) of the 1991 Act and paragraphs 1 and 3 of Schedule 10 (amendments in force for certain purposes and to come into force for remaining purposes on a date to be appointed, *see* S.I. 2009/400) and paragraphs 1 and 2 of Schedule 11 to the 2008 Act.
16 Added by Town and Country Planning (Local Authority Consultations etc.) (England) Order 2018/119 Pt 2 art.4 (June 1, 2018)

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Notes

17 For the definition of *"EIA application"* see article 2(1) of S.I. 2015/595.
18 Section 293A was inserted by section 82(1) of the 2004 Act.

Part 3 Applications > art. 15 Publicity for applications for planning permission

Table of Amendments

8	Pt 3 art. 15(10B)	Added by Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021/746, Pt 2 art. 6 *July 16, 2021: insertion has effect in relation to applications for planning permission made on or after August 1, 2021*
7	Pt 3 art. 15(7A)-(7F)	Revoked by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505, Pt 2 reg. 4 *June 30, 2021: repeal has effect subject to savings specified in SI 2020/505 reg.19*
	Pt 3 art. 15(7)(c)	Words substituted by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505, Pt 2 reg. 5 *June 30, 2021: repeal has effect subject to savings specified in SI 2020/505 reg.19*
6	Pt 3 art. 15(7A)-(7F)	Added by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505, Pt 2 reg. 4 *May 14, 2020*
	Pt 3 art. 15(7)(c)	Words substituted by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505, Pt 2 reg. 5 *May 14, 2020*
5	Pt 3 art. 15(6)	Words substituted by Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018/695, reg. 3(3) *October 1, 2018*
	Pt 3 art. 15(5)	Words substituted by Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018/695, reg. 3(2) *October 1, 2018*
4	Pt 3 art. 15(10A)	Added by Town and Country Planning (Local Authority Consultations etc.) (England) Order 2018/119, Pt 2 art. 4 *June 1, 2018*
3	Pt 3 art. 15(7)(c)	Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(3)(f)(ii) *May 16, 2017*
	Pt 3 art. 15(7)(ba)	Added by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(3)(f)(i) *May 16, 2017*
	Pt 3 art. 15(6)	Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(3)(e) *May 16, 2017*
	Pt 3 art. 15(4)	Words substituted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(3)(c)

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		May 16, 2017
	Pt 3 art. 15(2)(a)	Repealed by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(3)(b) *May 16, 2017*
	Pt 3 art. 15(1A)	Added by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(3)(a) *May 16, 2017*
2	Pt 3 art. 15(6)	Word inserted by Town and Country Planning (Permission in Principle) Order 2017/402, Sch. 1 para. 2(2)(c) *April 15, 2017*
	Pt 3 art. 15(5)	Words substituted by Town and Country Planning (Permission in Principle) Order 2017/402, Sch. 1 para. 2(2)(b) *April 15, 2017*
	Pt 3 art. 15(4A)	Added by Town and Country Planning (Permission in Principle) Order 2017/402, Sch. 1 para. 2(2)(a) *April 15, 2017*
1		*see commencement below*

Commencement

Pt 3 art. 15(1)-(11)	April 15, 2015

Extent

Pt 3 art. 15(1)-(7F)	England

Enabling Act

P

Planning and Compulsory Purchase Act 2004 c. 5, Pt 4 s. 54
Planning and Compulsory Purchase Act 2004 c. 5, Pt 7 c. 1 s. 88
Planning and Compulsory Purchase Act 2004 c. 5, Pt 9 s. 122(3)

T

Town and Country Planning Act 1990 c. 8, Pt III s. 55(2A)
Town and Country Planning Act 1990 c. 8, Pt III s. 55(2B)
Town and Country Planning Act 1990 c. 8, Pt III s. 59
Town and Country Planning Act 1990 c. 8, Pt III s. 61(1)
Town and Country Planning Act 1990 c. 8, Pt III s. 61A(5)
Town and Country Planning Act 1990 c. 8, Pt III s. 61W
Town and Country Planning Act 1990 c. 8, Pt III s. 62
Town and Country Planning Act 1990 c. 8, Pt III s. 65
Town and Country Planning Act 1990 c. 8, Pt III s. 69
Town and Country Planning Act 1990 c. 8, Pt III s. 71

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Town and Country Planning Act 1990 c. 8, Pt III s. 74
Town and Country Planning Act 1990 c. 8, Pt III s. 74A
Town and Country Planning Act 1990 c. 8, Pt III s. 77(4)
Town and Country Planning Act 1990 c. 8, Pt III s. 78
Town and Country Planning Act 1990 c. 8, Pt III s. 79(4)
Town and Country Planning Act 1990 c. 8, Pt VII s. 188
Town and Country Planning Act 1990 c. 8, Pt VII s. 193
Town and Country Planning Act 1990 c. 8, Pt VII s. 196(4)
Town and Country Planning Act 1990 c. 8, Pt XIII s. 293A
Town and Country Planning Act 1990 c. 8, Pt XV s. 333(4)
Town and Country Planning Act 1990 c. 8, Pt XV s. 333(7)
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 5
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 6
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 7(7)
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 8(6)
Town and Country Planning Act 1990 c. 8, Sch. 4A

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Town and Country Planning (Development Management Procedure) (England) Order 2015/595
art. 33 Representations to be taken into account

Superseded

Version 4 of 6

14 May 2020 - 29 June 2021

Subjects
Planning
[

33.— Representations to be taken into account

(1) A local planning authority must, in determining an application for planning permission, take into account any representations made where any notice of, or information about, the application has been—

(a) given by site display under article 13, within 21 days beginning with the date when the notice was first displayed by site display;

(b) served on an owner of the land or a tenant of an agricultural holding under article 13, within 21 days beginning with the date when the notice was served on that person provided that the representations are made by any person who they are satisfied is such an owner or tenant;

(c) published in a newspaper under article 13, within the period of 14 days beginning with the date on which the notice was published;

(d) given by site display under article 15, within 21 days beginning with the date when the notice was first displayed by site display;

(e) served on an adjoining owner or occupier under article 15, within 21 days beginning with the date when the notice was served on that person, provided that the representations are made by any person who they are satisfied is such an owner or occupier;

(f) published in a newspaper or a website under article 15 , within the period of [21 days][2] beginning with the date on which the notice or information was published; and

(g) served on an infrastructure manager under article 16, within 21 days beginning with the date when the notice was served on that person provided that the representations are made by any person who they are satisfied is such an infrastructure manager.

(2) For an EIA application accompanied by an environmental statement a local planning authority must, in determining the relevant application, take into account any representations made where any notice of, or information about the application has been—

(a) given by site display under article 13 or 15, within 30 days beginning with the date when the notice was first displayed by site display; and

(b) published in a newspaper under article 13 or 15, or on a website under article 15, within the period of 30 days beginning with the date on which the notice or information was published.

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(3) The representations and periods in this article are representations and periods prescribed[3] for the purposes of section 71(2)(a) of the 1990 Act (consultations in connection with determinations under section 70).

(4) A local planning authority must give notice of their decision to every person who has made representations which they were required to take into account in accordance with paragraph (1)(b) and such notice is the notice prescribed for the purposes of section 71(2)(b) of the 1990 Act.

(5) Paragraphs (1) to (4) apply to applications referred to the Secretary of State under section 77 of the 1990 Act (reference of applications to the Secretary of State)[4] and to applications made to the Secretary of State under section 293A(2) of the 1990 Act (application for urgent Crown development)[5] as if—

(a) a reference to a local planning authority were a reference to the Secretary of State; and

(b) a reference to determining an application for planning permission were a reference to determining such application.

(6) Paragraphs (1)(b),(e) and (g) and (4) apply to appeals made to the Secretary of State under section 78 of the 1990 Act (right to appeal against planning decisions and failure to take such decisions)[6] as if—

(a) a reference to a local planning authority were a reference to the Secretary of State; and

(b) a reference to determining an application for planning permission were a reference to determining such appeal.

(7) In this article, when computing the number of days, any day which is a public holiday must be disregarded unless—

(a) the application is an EIA application accompanied by an environmental statement;

(b) the application is one to which sub- paragraph (a), (b), (c), or (g) of paragraph (1) apply; or

(c) the application is made under section 293A(2) of the 1990 Act.

][1]

Notes

1 Substituted by Town and Country Planning (Local Authority Consultations etc.) (England) Order 2018/119 Pt 2 art.5 (June 1, 2018)

2 Words substituted by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505 Pt 2 reg.5 (May 14, 2020)

3 For the definition of "prescribed" see section 71(4) of the Town and Country Planning Act 1990 which was substituted by paragraph 5 of Schedule 7 to the Planning and Compensation Act 1991 (c. 34) ("the 1991 Act").

4 Section 77 was amended by paragraph 20 of Schedule 12 to the 2016 Act; paragraph 11 of Schedule 4 to the Infrastructure Act 2015 (c. 7) ("the 2015 Act"); paragraph 10 of Schedule 12 to the Localism Act 2011(c. 20) ("the 2011 Act") and is to be amended by paragraphs 1 and 2 of Schedule 10 to the Planning Act 2008 (c.29) ("the 2008 Act"), on a date to be appointed.

5 Inserted by section 82(1) of the 2004 Act.

6 Section 78 was amended by paragraph 21 of Schedule 2 to the 2016 Act; paragraph 11 of Schedule 12 to the 2011 Act; paragraph 12 of Schedule 4 to the Infrastructure Act 2015 (c. 7); section 17(2) of the 1991 Act; section 43 of the 2004 Act and Schedule 11 to the 2008 Act.

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Table of Amendments

6	Pt 6 art. 33(7)	Art.33(7) and (8) substituted for art.33(7) by Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021/746, Pt 2 art. 14(2) *July 16, 2021: substitution has effect in relation to applications for planning permission made on or after August 1, 2021*
5	Pt 6 art. 33(1)(f)	Words substituted by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505, Pt 2 reg. 5 *June 30, 2021: repeal has effect subject to savings specified in SI 2020/505 reg.19*
4	Pt 6 art. 33(1)(f)	Words substituted by Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505, Pt 2 reg. 5 *May 14, 2020*
3	Pt 6 art. 33	Substituted by Town and Country Planning (Local Authority Consultations etc.) (England) Order 2018/119, Pt 2 art. 5 *June 1, 2018*
2	Pt 6 art. 33(1)(c)	Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(5)(b) *May 16, 2017*
	Pt 6 art. 33(1)(a)	Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, Pt 12 reg. 72(5)(a) *May 16, 2017*
1		*see commencement below*

Commencement

Pt 6 art. 33(1)-(3)(b)	April 15, 2015

Extent

Pt 6 art. 33(1)-(8)	England

Enabling Act

P

Planning and Compulsory Purchase Act 2004 c. 5, Pt 4 s. 54
Planning and Compulsory Purchase Act 2004 c. 5, Pt 7 c. 1 s. 88
Planning and Compulsory Purchase Act 2004 c. 5, Pt 9 s. 122(3)

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Town and Country Planning Act 1990 c. 8, Pt III s. 55(2A)
Town and Country Planning Act 1990 c. 8, Pt III s. 55(2B)
Town and Country Planning Act 1990 c. 8, Pt III s. 59
Town and Country Planning Act 1990 c. 8, Pt III s. 61(1)
Town and Country Planning Act 1990 c. 8, Pt III s. 61A(5)
Town and Country Planning Act 1990 c. 8, Pt III s. 61W
Town and Country Planning Act 1990 c. 8, Pt III s. 62
Town and Country Planning Act 1990 c. 8, Pt III s. 65
Town and Country Planning Act 1990 c. 8, Pt III s. 69
Town and Country Planning Act 1990 c. 8, Pt III s. 71
Town and Country Planning Act 1990 c. 8, Pt III s. 74
Town and Country Planning Act 1990 c. 8, Pt III s. 74A
Town and Country Planning Act 1990 c. 8, Pt III s. 77(4)
Town and Country Planning Act 1990 c. 8, Pt III s. 78
Town and Country Planning Act 1990 c. 8, Pt III s. 79(4)
Town and Country Planning Act 1990 c. 8, Pt VII s. 188
Town and Country Planning Act 1990 c. 8, Pt VII s. 193
Town and Country Planning Act 1990 c. 8, Pt VII s. 196(4)
Town and Country Planning Act 1990 c. 8, Pt XIII s. 293A
Town and Country Planning Act 1990 c. 8, Pt XV s. 333(4)
Town and Country Planning Act 1990 c. 8, Pt XV s. 333(7)
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 5
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 6
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 7(7)
Town and Country Planning Act 1990 c. 8, Sch. 1 para. 8(6)
Town and Country Planning Act 1990 c. 8, Sch. 4A

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City of Edinburgh Council v Secretary of State for Scotland and another

a

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD MACKAY OF CLASHFERN, LORD STEYN, LORD HOPE OF CRAIGHEAD AND LORD CLYDE

b

23, 24 JUNE, 16 OCTOBER 1997

Town and country planning – Building of special architectural or historic interest – Listed building – Consent for demolition – Whether building listed – Construction of list compiled by Secretary of State – Town and Country Planning (Scotland) Act 1972, s 52.

c

Town and country planning – Permission for development – Statutory presumption in favour of development plan – Whether presumption displaced by other material considerations in particular circumstances – Town and Country Planning (Scotland) Act 1972, s 18A.

d

R Ltd sought outline planning permission for the development of a food store, petrol filling station and ancillary works at a site in Edinburgh known as 'Redford Barracks'. It also sought listed building consent for the demolition of a former riding school building which formed part of the site. An entry had been made in respect of the site on the list of buildings of special architectural or historic interest which by virtue of s 52 of the Town and Country Planning (Scotland) Act 1972 the Secretary of State for Scotland had power to compile. It was listed under the column 'Name of Building' as 'Redford Barracks … original buildings of 1909–15 only', but there was also a column headed 'Description' which made specific reference to the riding school building. The council refused both planning permission and listed building consent and R Ltd appealed to the Secretary of State. A senior reporter who was appointed to determine the appeal found that precedence should be given to the entry under the heading 'Name of Building' and that, since the riding school building had probably been erected after 1915, it did not form part of that entry, notwithstanding its specific mention in the list document and that listed building consent was not required for its demolition. He allowed the appeal on the issue of planning permission, concluding that there were material considerations which overcame the priority that by virtue of s 18A[a] of the 1972 Act had to be given to the local development plan which contained a presumption against such developments. In particular, adopting more recent policy statements which he considered had overtaken the plan, he found that, since other stores in the relevant area were performing at levels significantly higher than the company averages, there was an expenditure surplus which indicated that there was a quantitative deficiency of shopping facilities in the area. The Second Division of the Court of Session allowed the council's appeal on the grounds (i) that the reporter had not been entitled to find that the building was not covered by the entry for the barracks in the list, and (ii) that he had not had a proper factual basis for overcoming the presumption in favour of the development plan. R Ltd appealed to the House of Lords on the

e f g h j

a Section 18A is set out at p 184 *g h*, post

issue of listed building consent, contending that the matter was one of fact for the reporter and that his decision was not therefore open to review. The Secretary of State and R Ltd appealed on the issue of planning permission.

Held – (1) On their true construction, the words 'original buildings of 1909–15 only' in the list did not refer to the period of construction of the original buildings, but to the period of the processes of planning, conception, design and, to an extent, the realisation of the designer's work. Accordingly, the riding school building could consistently with that text be entered under the heading 'Description' as a listed building, notwithstanding that it had been built after 1915. It followed that the reporter, in finding that the building was not listed, had misconstrued the list and so misdirected himself. The Second Division had therefore reached the correct decision and R Ltd's appeal would accordingly be dismissed (see p 176 *e* to *h*, p 183 *b* to *h* and p 192 *b c*, post).

(2) Although s 18A of the 1972 Act introduced a priority to be given to the development plan, it was for the decision-maker to decide, having regard to all the material considerations, what weight was to be given to the development plan and his assessment of those considerations could only be challenged on the ground that it was irrational or perverse. In the instant case, the reporter had considered all the relevant criteria and had concluded that there was a quantitative deficiency. Since such a deficiency was most readily established by a finding that other stores were trading at a level which was higher than expected and the reporter had not been under any obligation to quantify the extent of that deficiency, he had not acted improperly or irrationally. It followed that he had been entitled to grant planning permission and the appeal on that issue would accordingly be allowed (see p 176 *e* to *h*, p 184 *h* to p 185 *a d* to *f*, p 186 *e*, p 188 *e*, p 189 *j* to p 190 *a c h j* and p 191 *j* to p 192 *c*, post).

Notes

For listing of buildings of special architectural or historic interest, see 46 *Halsbury's Laws* (4th edn reissue) para 905.

For local development plans, see ibid para 94.

As from 27 May 1997, s 18A of the Town and Country Planning (Scotland) Act 1972 was replaced by s 25 of the Town and Country Planning (Scotland) Act 1997.

Cases referred to in opinions

Bolton Metropolitan DC v Secretary of State for the Environment (1995) 71 P & CR 309, HL.

Hope v Secretary of State for the Environment (1975) 31 P & CR 120.

Loup v Secretary of State for the Environment (1995) 71 P & CR 175, CA.

Poyser and Mills' Arbitration, Re [1963] 1 All ER 612, [1964] 2 QB 467, [1963] 2 WLR 1309.

Simpson v City of Edinburgh Corp 1960 SC 313, Ct of Sess.

Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All ER 636, [1995] 1 WLR 759, HL.

Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345, Ct of Sess.

Conjoined appeals

The Secretary of State for Scotland and Revival Properties Ltd (Revival) appealed from the decision of the Second Division of the Court of Session (the Lord Justice Clerk (Ross), Lord Morison and Lord McCluskey) (1996 SCLR 600) given on 16 January 1996 allowing an appeal by the respondent, the City of Edinburgh

Council, under ss 231 and 233 of the Town and Country Planning (Scotland) Act 1972 from the decision of a reporter appointed by the Secretary of State, who determined that Revival did not need to obtain listed building consent for the demolition of a building on its proposed development site and granted planning permission for the development of that site. The facts are set out in the opinion of Lord Clyde.

Colin Campbell QC and *Colin Tyre* (both of the Scottish Bar) (instructed by the *Treasury Solicitor*, agent for the *Solicitor to the Secretary of State for Scotland*, Edinburgh) for the Secretary of State.

R L Martin QC (of the English and Scottish Bars) and *P S Hodge QC* (of the Scottish Bar) (instructed by *Berwin Leighton,* agents for *Brodies WS,* Edinburgh) for Revival.

W Stuart Gale QC and *Michael Upton* (both of the Scottish Bar) (instructed by *Rees & Freres*, agents for *Edward Bain,* Edinburgh) for the City of Edinburgh Council.

Their Lordships took time for consideration.

16 October 1997. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he gives I would make the order which he proposes.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Clyde. I agree with it, and for the reasons which he gives I also would allow the appeal on the planning law issue and dismiss the appeal on the issue about listed building consent.

I should like however to add a few observations about the meaning and effect of s 18A of the Town and Country Planning (Scotland) Act 1972, and to say rather more about the listed building consent issue which has revealed some practical problems about the way buildings are listed for the purposes of the statute—as to which I am unable, with respect, to agree with the approach taken by the judges in the Second Division (1996 SCLR 600).

The planning issue

Section 18A of the 1972 Act which was introduced by s 58 of the Planning and Compensation Act 1991, creates a presumption in favour of the development plan. That section has to be read together with s 26(1) of the 1972 Act. Under the previous law, prior to the introduction of s 18A into that Act, the presumption

was in favour of development. The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission. It is not in doubt that the purpose of the amendment introduced by s 18A of the 1972 Act was to enhance the status, in this exercise of judgment, of the development plan.

It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of s 18A of the 1972 Act, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in *Simpson v City of Edinburgh Corp* 1960 SC 313 at 318 'slavishly to adhere to' it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.

The presumption which s 18A of the 1972 Act lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is review the decision, as the only grounds on which it may be challenged in terms of the statute are those which s 233(1) of the 1972 Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of s 18A of the Act was to increase the power of the court to intervene in decisions about planning control. That section, like s 26(1) of the Act, is addressed primarily to the decision-taker. The function of the court is to see that the decision-taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the development plan.

As for the circumstances of the present case, I agree that the reporter was entitled in the light of the material which was before him to give priority to the more recent planning guidance in preference to the development plan, and that the reasons which he gave for his decision in the light of that guidance to grant planning permission were sufficient to explain the conclusions which he had reached.

The listed buildings issue

The appellants' argument was that the list of buildings of special or historic interest which the Secretary of State for Scotland has compiled under s 52 of the 1972 Act did not include the former riding school at Redford Barracks and that the reporter was entitled to make a finding to this effect. Their approach was that the question whether the building was a listed building was a question of fact which the reporter was entitled to decide as part of the case which was before him in the appeal against the refusal of listed building consent. Yet it became clear in the course of counsel's argument that the issue which the appellants regard as one of fact depends upon the proper construction of the entries in the list. So it seems to me that the underlying question—if it is truly one of construction—is one of law.

The structure of the legislation which is contained in ss 52 to 54 of the 1972 Act is to this effect. It is the responsibility of the Secretary of State to compile or approve of the list. He may take account, in deciding whether or not to include a building in the list, of the building itself and its setting. Any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part may be taken into account. So also may be the desirability of preserving any feature of the building fixed to it or comprised within its curtilage on the ground of its architectural or historic interest. The building itself must be identified in the list, but s 52(7) also provides that, for the purposes of the 1972 Act, any object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building shall be treated as part of it. Thus it is not necessary to do more than to identify the building—or, in cases such as the present, the principal buildings—in order to extend the statutory protection to these additional elements. The details of the procedure are set out in the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1975, SI 1975/2069, as amended by the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Amendment Regulations 1977, SI 1977/255.

The control which the 1972 Act lays down of works for the demolition of a listed building, or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest, is the prohibition of any such works which have not been authorised. The question whether works of alteration or extension should be authorised can be dealt with as part of an application for planning permission. Section 54(2) of the 1972 Act provides that, where planning permission is granted for such works, that permission shall operate as listed building consent in respect of those works. But in this case what the appellants wish to do is to demolish the building, so a separate application for listed building consent under Sch 10 to the 1972 Act was required. Paragraph 7(2) of that Schedule provides that a person appealing against a decision to refuse consent by the local planning authority may include in his notice as the ground or one of the grounds of his appeal a claim that the building is not of special architectural or historic interest and ought to be removed from the list. But there is no provision in that Schedule or elsewhere in the Act which enables a person aggrieved to include as one of his grounds of appeal that the building to which his application for consent relates is not included in the list as a listed building. The 1972 Act assumes, in regard to the statutory procedures, that the question whether or not a building is a listed building can be determined simply by inspecting the list which the Secretary of State has prepared.

The list itself is not the subject of any prescribed form. The only prescribed form for which the 1972 Act provides is that for the form of notice which is to be served on every owner, lessee and occupier of the building under s 52(5) stating that the building has been included in, or excluded from, the list as the case may be. The prescribed form of notice is set out in Sch 5 to the 1975 regulations. It is in these terms:

> 'NOTICE IS HEREBY GIVEN that the building known as ..... situated in the ..... has been included in the list of buildings of special architectural or historic interest in that area compiled by the Secretary of State under section 52 of the Town and Country Planning (Scotland) Act 1972 on ..... 19....
>
> Dated ..... 19....
>
> (*Signature of Authorised Officer*).'

It can be seen from this form of notice that the only information which is communicated to the owner, lessee and occupier to indicate the identity of the listed building is the name by which the building is known and the place where it is situated. The effect of s 52(7) of the 1972 Act, as I have said, is to require any object or structure fixed to that building or forming part of the land and comprised within the curtilage of the building to be treated as part of the building for the purposes of the provisions in the Act relating to listed buildings. But the form of notice does not require a description of the building to be given. The assumption is that the name of the building will be sufficient to identify what is in the list.

The list which is available for public inspection under s 52(6) of the 1972 Act is a more elaborate document, and it is this aspect of the matter which appears to have given rise to some confusion in the present case. It comprises six columns, headed respectively 'Map reference', 'Name of Building', 'Description', 'References', 'Category' and 'Notes'. In the column headed 'Name of Building' there appears this entry: 'REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909–15 only).' The column headed 'Description' contains a very detailed description of the premises. It begins by naming the architect, who is said to have been Harry B Measures, Director of Barrack Construction, 1909–15. There then follows a comprehensive description of the barracks and the various buildings comprised therein, together with references to various features of architectural or historic interest. In the middle of this description, which occupies nearly four pages on the list, there appears this passage: 'Other buildings to S with large riding school at extreme SE all tall single-storey, simple treatment.' The column headed 'References' contains this entry: 'Information courtesy Buildings of Scotland Research Unit.'

My impression is that the list which I have been attempting to describe was intended to serve several functions. First, it was intended to identify the listed building. It did this by stating its name and its location. That was all it needed to do in order to record the information which had been given in the prescribed notice to the owner, lessee and occupier. Then it was intended to provide a description of the building. There is no requirement for this—nor is there space—in the prescribed form of notice. But a description is a useful thing to include in the list, as decisions may have to be taken from time to time as to whether authorisation should be given under s 53(2)(a) of the 1972 Act to a proposal to demolish, alter or extend the listed building. Both the decision-taker

and the developer will, no doubt, find it helpful to know what the features were which persuaded the Secretary of State that the building should be listed as being of special architectural or historic interest. Lastly, it was intended to provide a list of references to the sources of information, if any, which had been used in compiling the description. On this analysis I would regard the columns headed 'Description' and 'References', while informative, as subservient to the column headed 'Name of Building'. In my opinion it is the latter column which serves the statutory function of identifying the listed building in the list which the Secretary of State is required to keep available for public inspection under s 52(6) of the 1972 Act. In their printed case Revival Properties Ltd (Revival) state that the inclusion of the words of limitation in this column reflects a practice of compiling the list so that the 'Name of Building' column is the official entry which defines the scope of the listing. That observation is consistent with my understanding of the list.

The Lord Justice Clerk (Ross) mentioned in his opinion that counsel for the Secretary of State had pointed out in the course of the hearing before the Second Division that it has been the practice for some time now for the list of buildings of special architectural or historic interest to be set forth in a different form from that which has been used in this case. A specimen form was produced in the course of that hearing from which it appeared that the list now contained eight columns. The first, which was entitled 'Name of Building and/or Address' was headed as being the 'Statutory List'. The remaining seven columns contained information under various headings not dissimilar to those used in the present case, including 'Description', 'Reference' and 'Notes'. They were the subject of a separate heading which read: 'The information (cols 2 to 8) has no legal significance, nor do errors or omissions nullify or otherwise affect statutory listing'. We were not shown a copy of this form, as the Secretary of State did not appeal against the decision of the Second Division on this point. But Revival refer to this passage in the Lord Justice Clerk's opinion in their printed case, in order to make the point that the modern form of list has merely formalised the practice that it is the 'Name of Building' column which defines the scope of the listing. The description which we have been given is sufficient to indicate that the more modern form is an improvement on the previous form, as it removes the possibility of a misunderstanding about the function which the columns headed 'Description' and 'References' were intended to serve.

It is plain from the way in which the judges of the Second Division approached this issue that they regarded all the columns on the list which was before them in this case as forming part of the statutory listing. For my part—although counsel for Revival was content to adopt this approach in presenting his argument—I think that they were in error in taking this view. It does not seem to me that there is any real difficulty in understanding the functions of each of the columns, if the list is read in the context of the legislation which it was designed to serve. But my conclusion that the only column which sets out the statutory listing is that which is headed 'Name of Building' does not solve all the problems which have arisen in this case.

The listing of Redford Barracks was in itself sufficient, with the benefit of s 52(7) of the 1972 Act, to include within the statutory listing all objects or structures forming part of the land and comprised within the curtilage. Unless some words of limitation were included every building within the curtilage, however modest or unimportant, would be the subject of the statutory controls. It was no doubt for this reason that the words '(original buildings 1909–15 only)'

were included in the column headed 'Name of Building'. But this was not an entirely satisfactory method of distinguishing between those buildings which were intended to be included in the statutory listing and those which were not. The words which were selected were ambiguous. The dates 1909–15 are the same as those mentioned in the next column as being those between which Harry B Measures was the Director of Barrack Construction. But it is not clear whether they were intended to refer to the period of design of the buildings or the period of their construction, and if the latter whether the buildings had to be completed by 1915 in order to qualify or it was sufficient that they were commenced before or during that year. In this situation I think that it is permissible to examine the contents of the column headed 'Description' in order to see whether it can help to resolve the ambiguity. Phrases are used in various parts of the description such as 'some lesser buildings' and 'other buildings' which suggest that this was not intended to be a definitive description of the entire premises comprised within the curtilage. But the fact that the riding school is mentioned in the description is sufficient, in view of the ambiguity, to put in issue the question whether that building was included in the statutory listing.

The reporter concluded, on the evidence which was before him, that the riding school was one of the last buildings to be erected, and that this took place after 1915. It was for this reason that he held that the riding school was not covered by the statutory listing and that listed building consent was not required for its demolition. He noted that the view of all the experts who gave evidence at the inquiry was that, if the riding school was built after 1915, it was not covered by the barracks listing. It seems to me, however, that this evidence was insufficient to resolve the difficulty which had been created by the ambiguity in the list. That evidence did not address the possibility that the riding school was part of the original design for which Harry B Measures was responsible. Unless it could be asserted that this structure had no part to play in the original design it would not be safe to assume that it was not included in the statutory listing. I would therefore hold, albeit for different reasons, that the result at which the Second Division arrived was the right one, as the reporter had insufficient information before him in the evidence to entitle him to resolve this issue in favour of the developer.

I should like, finally, to add this further observation in regard to the ambiguity in the list. The problem which has arisen in this case suggests that the list, even in its new form, may require some reconsideration in order to remove such ambiguities. It is important that words of limitation which are used to exclude parts of a building from the statutory listing are sufficiently clear to enable those who are interested to identify what parts of the building are subject to the statutory controls and what are not. The fact that the controls are the subject of criminal sanctions provides an added reason for seeking greater clarity in the composition of the list than has been exhibited in this case.

LORD CLYDE. My Lords, in 1993 Revival Properties Ltd (Revival), who are the second appellants in this appeal, sought outline planning permission for the development of a food store, petrol filling station and ancillary works at a site in Colinton Mains Drive in Edinburgh. They also sought listed building consent for the demolition of a former riding school building which was on the site. The City of Edinburgh District Council refused planning permission and also refused listed building consent. Revival then appealed to the Secretary of State. A senior reporter was appointed to determine the appeal. He held a public local inquiry

and thereafter issued a decision letter dated 7 March 1995. He decided that listed building consent was not required for the demolition of the former riding school building. On the matter of planning permission he allowed the appeal and granted outline planning permission subject to certain conditions. The council then appealed to the Court of Session both on the matter of the listed building consent and on the matter of planning permission. After hearing the appeal the Second Division of the Court of Session by a majority allowed the appeal on both of those matters (1996 SCLR 600). The Secretary of State and Revival have now appealed to this House.

The matter of listed building consent can conveniently be dealt with at the outset. It has been seen and treated as a distinct and separate issue from that of the planning permission. The reporter considered a preliminary question whether listed building consent was required for the demolition of the former riding school building. It has not been suggested that he was not entitled to explore that question and I express no view on the propriety of his doing so. Section 52 of the Town and Country Planning (Scotland) Act 1972 provided for the compilation of lists of buildings of special architectural or historic interest. The provisions of that Act have now been superseded by the recent consolidating statute, the Town and Country Planning (Scotland) Act 1997, but it will be convenient for the purposes of the present case to refer to the legislation in force at the time of the appeal processes. In terms of s 52(1) of the 1972 Act the lists may be compiled by the Secretary of State or by others with his approval. Section 52(5) provides for notice to be given to the owner, lessee and occupier of a building of its inclusion in or exclusion from the list. That notice is to be given in a prescribed form. But there does not appear to have been any prescribed form for the lists themselves.

There was produced to the reporter a document relating to the City of Edinburgh District headed 'List of Buildings of Architectural or Historic Interest'. The list was set out in six columns. The first and the last three are not of importance. The second was headed 'Name of Building' and the third was headed 'Description'. In the second column there was entered: 'REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909–15 only).'

The third column commenced with the words 'Harry B Measures, Director of Barrack Construction, 1909–15. Two large complexes of building on exceptionally spacious lay-out … comprising chiefly …' There then followed descriptions of a variety of buildings with some architectural detail. Included here, under the subheading 'Farriers' Shops and Riding School', were the words 'other buildings to S with large riding school at extreme SE …' The view taken by the reporter was that in the light of the evidence the building in question had probably been erected after 1915, that precedence should be given to the entry in the second column, and that on account of the reference to 'original buildings of 1909–15 only' the riding school building was excluded from the list notwithstanding its specific mention in the third column. Having taken the view that listed building consent was unnecessary the reporter did not address the question whether the demolition of a listed building should be permitted.

The judges of the Second Division unanimously held that the reporter was not entitled to hold as he had done that the building was not covered by the entry for Redford Barracks in the list. An appeal against that decision was taken only by Revival, the second appellant. Counsel for the Secretary of State did not address the issue. It should be observed that it would have been useful to have had more

evidence about the form used for the compiling of such lists and the relative significance of the respective columns. Plainly it is desirable to compile the list with sufficient clarity and precision to avoid the kind of question which has arisen here. The insertion of a complex of buildings as one entry in a list may well give rise to problems. Even the provision of s 52(7) of the Act which extends the identification to buildings within the curtilage of a building may not produce sufficient clarity, particularly in a case such as the present where the building in question had passed into the separate ownership and occupation of the local authority and had in some way at least become separated from the barracks and other buildings still in military occupation. The argument, however, which was presented in the appeal was essentially that the matter was one of fact for the reporter, or at least was not one which could be open to review. But the critical question here is one of the interpretation of the list and if the reporter has misconstrued it and so misdirected himself that is undoubtedly a matter on which he may be corrected on appeal to a court of law.

On the face of the list there is no evident problem. It was agreed by counsel for Revival that the whole document with its six columns comprised the 'list' and his argument was presented on that basis. The building in issue is specifically mentioned in the document and can readily be taken to be entered on the list. The dates in the second column can be seen to echo the dates in the third column, indicating that it is the work of Harry Measures which is to be listed, and the riding school is noted in the description of the buildings for which he was presumably responsible.

A problem may be thought to arise when it is found that the riding school was built after 1915. But it also appears that the barracks were not completed until the end of 1916. Ambiguity only arises if the words in the brackets are read, as the reporter read them, as if they were intended to refer to buildings built during the specified years. But that is not what is stated and that is not the only possible construction. Even if there was a conflict between the two parts of the list it would be proper to find a construction which would make sense of the whole and that can be readily done by accepting that the period of years to which the passage in brackets refers is a period not of the completion of the building but of the processes of planning, conception, design and, at least to an extent, the realisation of Harry Measures' work. In that way there is no difficulty in recognising that the riding school may consistently with the text in the second column be entered in the third column as a listed building. In my view the judges of the Second Division reached the correct view on this matter and I would refuse the appeal on the matter of the listed building consent.

I turn next to the appeal on the matter of the planning permission. The first point raised on behalf of the Secretary of State in opening his appeal concerned the meaning and effect of s 18A of the 1972 Act. It was stated on his behalf that this was the principal purpose of his appeal. The section had excited some controversy and guidance was required. Neither of the other parties however was concerned to challenge the submission advanced by counsel for the Secretary of State. The views which I would adopt on this part of the appeal accord with his submission and at least in the absence of any contradiction seem to me to be sound.

Ever since the introduction of a comprehensive system for the control of land development in Scotland by the Town and Country Planning (Scotland) Act 1947 planning authorities have been required to prepare a plan which was to serve as a guide for the development of their respective areas. These plans required to be

submitted to the Secretary of State for his approval. Following on the reorganisation of local government introduced by the Local Government (Scotland) Act 1973 planning functions became divided between the regions, who were required to prepare 'structure plans', and the districts, who were required to prepare 'local plans'. For the purposes of the present case the structure plan was the Lothian Regional Structure Plan of 1985 and the local plan was the South West Edinburgh Local Plan (SWELP). But the old terminology was also preserved. Section 17 of the 1972 Act provided that for the purposes of the planning statutes the development plan shall be taken to consist of the structure plan approved by the Secretary of State with any approved alterations and the provisions of the approved local plan with any adopted or approved alterations. In and after the 1947 Act provision was made for the recognition of the development plan in relation to determinations of applications for planning permission. Section 26(1) of the 1972 Act, echoing the language of s 12(1) of the 1947 Act, required a planning authority in dealing with the application to 'have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations …' The meaning of this formulation in the context of s 12(1) of the 1947 Act was set out in a decision in the Outer House of the Court of Session by Lord Guest in *Simpson v Edinburgh Corp* 1960 SC 313. His Lordship stated (at 318–319):

> 'It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. "To have regard to" does not, in my view, mean "slavishly to adhere to". It requires the planning authority to consider the development plan, but does not oblige them to follow it … If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it … In my opinion, the meaning of section 12(1) is plain. The planning authority are to consider all the material considerations, of which the development plan is one.'

Section 18A was introduced into the 1972 Act by s 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by s 26 of the 1991 Act, in the form of a new s 54A to the Town and Country Planning Act 1990. The provisions of s 18A, and of the equivalent s 54A of the English Act, were:

> '*Status of development plans*.—Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.'

Section 18A has introduced a priority to be given to the development plan in the determination of planning matters. It applies where regard has to be had to the development plan. So the cases to which s 26(1) of the 1972 Act apply are affected. By virtue of s 33(5) of the 1972 Act s 26(1) is to apply in relation to an appeal to the Secretary of State. Thus it comes to apply to the present case.

By virtue of s 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern

the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in para 15 of the Planning Policy Guidance Notes PPG1 (January 1988), as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of s 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell LJ observed in *Loup v Secretary of State for the Environment* (1995) 71 P & CR 175 at 186:

> 'What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations.'

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

Correspondingly the power of the court to intervene remains in principle the same as ever. That power is a power to challenge the validity of the decision. The grounds in the context of planning decisions are contained in s 233 of the 1972 Act, namely that the action is not within the powers of the Act, or that there has been a failure to comply with some relevant requirement. The substance of the former of these grounds is too well-established to require repetition here. Reference may be made to the often quoted formulation by the Lord President (Emslie) in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 347–348. Section 18A has not innovated upon the principle that the court is concerned only with the legality of the decision-making process. As Lord Hoffmann observed in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657, [1995] 1 WLR 759 at 780:

> '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.'

In the practical application of s 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.

Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.

This chapter in the appeal was presented as a criticism of the approach adopted by the majority of the judges in the court below. But that criticism comes at the

most to criticism of particular expressions rather than any allegation of error in principle. Lord McCluskey criticised the description given by the reporter in para 181 of his decision letter of the effect of the section. His Lordship stated (1996 SCLR 600 at 612–613):

> 'But section 18A did not simply "enhance the status" of development plans; it made the development plan the governing or paramount consideration and it was to remain so unless material considerations indicated otherwise.'

But while the expression used by the reporter may have been somewhat imprecise in not stressing the priority inherent in the enhanced status it does not appear that the reporter fell into error in any misunderstanding of the effect of the section. The submission made by counsel for the Secretary of State on the construction of s 18A was correctly seen by the respondents as not constituting any serious attack on the decision which they sought to defend. The judges in the Second Division correctly recognised that it was competent for the reporter in principle to decide that the more recent material should overcome the priority given to the development plan. The issue was whether he was entitled to take that course on the material before him. The reference to para 181 of the decision letter leads immediately to the substantial dispute in the appeal regarding the reporter's treatment of the problem of retail trade and impact.

In para 181 the reporter begins to set out his conclusions on the chapter of the decision letter which concerns the issue of retail trade and impact. It should be observed at the outset that the structure plan of 1985 indicated a prohibition of developments such as that proposed by Revival except in existing or new shopping centres, and that SWELP expressed at least a presumption against out-of-centre shopping development. The reporter however stated:

> 'Dealing first with the question of policy, I should say that, although there is no dispute that the statutory development plan consists of the 1985 structure plan and the SWELP, and although recent legislation enhances the status of development plans, I believe that in this case it is appropriate to attach greater weight to other material considerations.'

That he was entitled in principle to decide that the presumption in favour of the development plan had been overcome by other material considerations was recognised in the court below. The criticism of the majority of the court was directed rather at his entitlement to take that course in the circumstances of this case. The other material considerations to which the reporter looked consisted of expressions of policy and planning guidance more recent in date than the structure plan of 1985. He noted that while the SWELP was only adopted as recently as 1993 it was required to conform generally with the provisions of the 1985 structure plan. The more recent material of which the reporter considered account should be taken consisted of the National Planning Guidelines 1986, the Planning Policy Guidance Notes PPG6 (July 1993) and the latest version of the Lothian Region Structure Plan (1994) which had been finalised and sent to the Secretary of State but had not yet been approved. A view was expressed in the court below that it was not appropriate to have considered PPG6 because it applied to England and Wales and not Scotland. No question was raised in that regard in the present appeal and I refrain from expressing any view about it. The new version of the structure plan represented in the view of the reporter the regional council's most recent thinking on the subject of retailing and it was to the policies set out in that document that he applied his mind.

Chapter 7 of the new structure plan deals with shopping. In para 7.37 it was stated that free-standing developments, such as large convenience stores, could generate unacceptable traffic levels and affect residential amenity. The paragraph later states that—

> 'new stores can only be justified to provide consumer choice or where there will be significant local population increase … new developments outside existing or proposed centres should be permitted only if they meet strict criteria.'

The plan then sets out a policy identified as 'S 17'. That policy related to proposals for major retail developments not in or adjacent to existing or proposed strategic shopping centres. It is understood that the proposed development at Colinton Mains Drive is such a proposal. The policy provides that in considering such proposals 'district councils should be satisfied that all of the following criteria are met …' There are then set out seven criteria of which only two need be quoted:

> 'A. LOCAL SHOPPING FACILITIES ARE DEFICIENT IN EITHER QUANTITATIVE OR QUALITATIVE TERMS … C. THEY WOULD NOT, INDIVIDUALLY OR CUMULATIVELY, PREJUDICE THE VITALITY AND VIABILITY OF ANY STRATEGIC SHOPPING CENTRE …'

The strategic shopping centres are listed earlier in the document, but it is unnecessary to refer to that in detail.

The reporter was satisfied that all of the seven criteria were met and it was on that basis that he granted the planning permission. It is with criterion A that the present dispute is concerned. The reporter dealt with the matter of quantitative deficiency in para 184 of his letter as follows:

> 'The *first* matter relates to quantitative or qualitative deficiencies in the area. It appears that there may be a slight increase in both population and expenditure per head on convenience goods in the near future in the study area, but the most obvious indicator of an expenditure surplus is the calculation that certain stores (notably Safeway at Cameron Toll, Morningside and Hunter's Tryst) are performing at levels significantly higher than company averages. Even allowing for the opening of stores at e.g. Straiton (which may be in doubt) and for turnover levels at Colinton Mains substantially higher than would probably be achieved by Tesco in a relatively small store, there would appear to be a quantitative case.'

In para 185 he considered the matter of qualitative deficiency and took the view that the argument for such a deficiency was not strong. The case would accordingly have to rest on the basis of a quantitative deficiency. Finally in this part of his letter he added (para 186):

> 'Many local residents and organisations claim that there is no need for either the proposed foodstore or the pfs. I accept that there is not a significant shortage of either, such as might establish a strong presumption in their favour in the public interest which might outweigh relevant objections. However, planning approval does not have to be based on a case of need. I have explained why I consider the policies in the more recent version of the structure plan are to be preferred, and there remains a general presumption in favour of development unless demonstrable harm is shown to interests of acknowledged importance.'

The majority of the judges in the Second Division held that the reporter had erred in this part of his decision. The Lord Justice Clerk (Ross) was satisfied that the reporter was entitled to regard the National Planning Guidelines and the draft structure plan as justifying a departure from the development plan but considered that the reporter had not had a proper factual basis for overcoming the presumption in s 18A. In particular he considered (1996 SCLR 600 at 609):

> 'Merely to say that certain stores within the area in question are trading at exceptionally high levels does not justify the conclusion that there is a deficiency in local shopping facilities in the area in question.'

He noted that of the three stores mentioned only one, Hunter's Tryst, was, as the reporter had recognised, within the study area. He also noted that the reporter had accepted that there was not a significant shortage of food stores or petrol filling stations. Lord McCluskey questioned whether the reporter had properly addressed the problem of quantitative deficiency at all.

> 'If he has, then he has not even begun to explain how a quantitative deficiency coexists with no significant shortage and a failure to make out any case of need.' (See 1996 SCLR 600 at 614.)

He considered that even if a finding of a quantitative deficiency was justified the reporter had given no indication as to why that circumstance should overcome the presumption in favour of the terms of the development plan. Both the Lord Justice Clerk (Ross) and Lord McCluskey suggested that the final words of para 184 lacked the conviction of a positive finding.

In my view it is critical to an understanding of the reporter's decision to have a clear understanding of the concept of 'quantitative deficiency'. This is a matter of the interpretation of the policy S 17. It may well be that the point was not made sufficiently clear in the presentation of the appeal before the Second Division. Certainly it appears that, as the Lord Justice Clerk (Ross) records, counsel were not at one as to what was meant by the reference to quantitative terms and it was on his own initiative that reference was made to para 7.9 of the draft structure plan for a clue to its meaning. That paragraph starts with the sentence: 'In quantitative terms, demand is determined by trends in consumer expenditure.' This is far from providing a definition but it does, as Lord Morison appreciated, point to the fact that it is consumer expenditure which is being considered as reflected in the turnover in the available shopping facilities. As I understand it from the helpful explanations given to us by counsel for the Secretary of State quantitative deficiency has to do with a comparison between the amount of shopping facility and the amount of customers. It seeks to express a situation where there is a shortage of shopping floorspace as compared with the number of customers in the locality. It is measured by reference to consumer expenditure. Quantitative deficiency is a concept different from that of need, where what is meant is the kind of necessity which would, for example, justify the sacrifice of some amenity for the purpose of the development. There can be a quantitative deficiency even although there is no 'need' for the development in so far as everyone in the area is able to do their shopping albeit with the delay and inconvenience of a possibly overcrowded shop or of travelling some distance to get there. Once the definition is understood there is no discrepancy between paras 184 and 186 of the decision letter.

The next question is how a quantitative deficiency should be established. Where the approach is one of considering consumer expenditure a quantitative

deficiency is most readily established by the discovery that other stores are trading at a level which is above what would be expected of them, the inference being that there is room to accommodate a further shopping facility. As Lord Morison observed (1996 SCLR 600 at 620):

> 'No other way of demonstrating a quantitative deficiency in a particular area, determined only by consumer expenditure, was suggested to us, and none occurs to me.'

That was the kind of evidence which was led in the present case and it appears that while there was dispute about the reliability of the inferences to be drawn from the figures adduced there was no objection taken to the use of that material in principle as a method of establishing the alleged deficiency.

It was suggested that the reporter was not entitled to find some deficiency without going on to quantify the extent of the deficiency. I see no obligation on him to do that. The policy S 17A does not require the finding of any particular extent of the deficiency. If the deficiency is too slight to enable the whole of the proposed new shopping facility to be accommodated then the matter will be covered by criterion C. If the development is greater than can be absorbed by the deficiency then the result may well be to cause prejudice to the vitality and viability of the existing strategic shopping centres. In that respect criterion C secures the adequacy of the extent of the deficiency identified for the purpose of criterion A. In the present case the reporter indeed went further in his assessment of the deficiency than he strictly needed to go. In the final sentence of para 184 he takes into account not only the possible further store at Straiton but also higher levels at the development site at Colinton Mains than were likely to be achieved by the proposed Tesco store. Even taking these into account he finds that 'there would appear to be a quantitative case'. It is evident from that passage that the deficiency was such as to enable the proposed store to be wholly accommodated within it and when account is taken of the hypothesis on which he is proceeding the passage indicates a very positive finding of a quantitative deficiency. What was suggested to be only a tentative finding is in reality clear and certain.

It was argued that the reporter was not entitled to draw the conclusion which he did from the evidence before him. Counsel for the respondents suggested a variety of reasons which might account for the expenditure surplus. He also sought to criticise the quality of the evidence on which the reporter had relied. But it was not suggested that there was no evidence before the reporter which could entitle him to discount such other explanations and to hold that there was an expenditure surplus which pointed to a quantitative deficiency. Whether the evidence did or did not so point was a matter wholly for him to determine. Provided that the evidence was there it was for him to assess it and draw his own conclusions from it. It is no part of the function of a reviewing court to re-examine the factual conclusions which he drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision.

Counsel for the respondents also sought to argue that the reporter had not given proper or adequate reasons for his decision. In part this point was related to matters to which I have already referred, such as a specification of the extent of the deficiency, the allegedly 'tentative' nature of the conclusion on the critical

issue, the finding of the quantitative deficiency in the face of the absence of need, and the link between the expenditure surplus and the quantitative deficiency. But in any event the pursuit of a full and detailed exposition of the reporter's whole process of reasoning is wholly inappropriate. It involves a misconception of the standard to be expected of a decision letter in a planning appeal of this kind. As the Lord President (Emslie) observed in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 348:

> 'The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it.'

It is worth reiterating the observations made by Lord Lloyd of Berwick in *Bolton Metropolitan DC v Secretary of State for the Environment* (1995) 71 P & CR 309 in the context of the requirement on the Secretary of State to notify the reasons for his decision. Lord Lloyd said (at 313):

> 'There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration … He has to have *regard* to every material consideration; but he need not mention them all.' (Lord Lloyd's emphasis.)

As to what should be mentioned Lord Lloyd gave two quotations. In *Re Poyser and Mills' Arbitration* [1963] 1 All ER 612 at 616, [1964] 2 QB 467 at 478 Megaw J said:

> 'Parliament having provided that reasons shall be given, in my view that must clearly be read as meaning that proper, adequate, reasons must be given; the reasons that are set out, whether they are right or wrong, must be reasons which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised …'

In *Hope v Secretary of State for the Environment* (1975) 31 P & CR 120 at 123 Phillips J said:

> 'It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues.'

It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the court to understand that reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to be looked for and a detailed consideration of every point which was raised is not to be expected. In the present case the reporter dealt concisely but clearly with the critical issues. Nothing more was to be expected of him.

The reporter satisfied himself as he was entitled to do that there was quantitative deficiency and that criterion A was met. He then went on to consider the other criteria. He gave careful consideration to criterion C, including in that an assessment of the effect of the development on Hunter's Tryst and at some length its effect on the shopping centre at Wester Hailes. He was satisfied that criterion C was met and no challenge is made to that conclusion. His unchallenged finding on that matter affirms the adequacy of the deficiency which he found for the purpose of criterion A. He had already decided

that the statutory presumption should be overcome by the more recent expressions of policy and in particular the draft structure plan. It was the existence of that recent guidance, not his finding of a quantitative deficiency, which justified the overcoming of the presumption. It is not in dispute that if the seven criteria were met the reporter was then entitled to grant planning permission.

For the foregoing reasons I would refuse the appeal by the appellant, Revival Properties Ltd, on the matter of the listed building consent and I would allow the appeal by both appellants on the matter of the planning permission.

The Secretary of State should be entitled to his costs from the district council both here and in the court below. Revival Properties Ltd should be entitled to one half of their costs from the district council both here and in the court below.

Appeal in respect of listed building consent dismissed. Appeal in respect of planning permission allowed.

Celia Fox Barrister.

A

Court of Appeal

Baroness Cumberlege of Newick and another *v* Secretary of State for Communities and Local Government and another

[2018] EWCA Civ 1305

B

2018 Feb 28; March 1; June 8

Lindblom, Moylan, Peter Jackson LJJ

Planning — Planning permission — Validity — Local planning authority refusing permission for residential development — Secretary of State granting permission on appeal without considering inconsistent previous decision on appeal in similar case in same area — Whether Secretary of State required to take previous decision into account where not drawn to his attention — Whether decision on planning appeal unlawful

C

Following a public inquiry, the Secretary of State recovered for his own determination a developer's appeal against a decision of the local planning authority to refuse planning permission for a residential development in Newick ("the Newick appeal"). The Secretary of State allowed the appeal, concluding that the relevant development plan policy was out of date, with the consequence that the presumption in favour of sustainable development in paragraph 14 of the National Planning Policy Framework applied. Some nine weeks earlier, in a recovered appeal decision relating to a proposed residential development at nearby Ringmer ("the Ringmer appeal"), the Secretary of State had concluded that the relevant policy was up to date. The claimants, local residents who objected to the Newick development, applied under section 288 of the Town and Country Planning Act 1990 for an order quashing the decision on the ground, inter alia, that the Secretary of State had unlawfully failed to take into account a material consideration, namely his conclusion in the Ringmer appeal. The Secretary of State conceded that the failure to take the decision in the Ringmer appeal into account was an error of law vitiating the Newick appeal decision but the developer contended, inter alia, that the decision was not a material consideration which the Secretary of State had been obliged to take into account since it had not been drawn to his attention when determining the Newick appeal. The judge granted the claimants' application.

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F

On the developer's appeal—

Held, dismissing the appeal, that there was no absolute rule of law to the effect that the Secretary of State was never obliged to have regard to a previous planning decision which had not been placed before him by one or more of the parties; that, rather, because consistency in planning decisions was important, there would be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he was considering, even where none of the parties had relied on it or brought it to the Secretary of State's attention; that in such circumstances it might be necessary in the interests of fairness to give the parties an opportunity to make further representations in the light of the previous decision; that the court should not attempt to prescribe or limit the circumstances in which a previous decision could be a material consideration; that such a decision might be material because it related to the same site, or to the same or a similar form of development on another site to which the same development plan policy related, or to the interpretation or application of a particular policy common to both cases; that when determining whether it had been unreasonable for the Secretary of State not to have had regard to a previous decision the court had to consider whether the Secretary of State had been aware, or ought to have been aware, of the previous decision and its significance for the appeal now being determined; that

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the decision in the Ringmer appeal was undoubtedly a material consideration in the Newick appeal, given that the two appeals concerned the same form of development in the same district, had been recovered for determination by the Secretary of State for the same reason and had been before the Secretary of State at the same time; that there was, between the two decisions, an obvious and unexplained difference in the Secretary of State's approach to the status of the relevant policy, which was a matter of basic importance in both appeals; that, therefore, it had been unreasonable for the Secretary of State not to have had regard to the Ringmer decision before determining the Newick appeal; and, that, accordingly, the Secretary of State had erred in the Newick appeal in failing to take into account and distinguish the Ringmer decision (post, paras 32, 34, 36, 41, 42, 47, 58, 72, 73, 74).

Dicta of Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137, 145, CA applied.

Per curiam. When considering whether the Secretary of State ought to have had regard to a particular matter it is simpler and less likely to mislead or produce an incorrect result to ask whether the matter is one which no reasonable decision-maker would have failed to take into account in the circumstances, rather than whether it is so obviously material that no reasonable person would have failed to take it into account. The two tests are effectively one and the same (post, paras 22–23, 73, 74).

Decision of John Howell QC sitting as a deputy judge of the Queen's Bench Division [2017] EWHC 2057 (Admin); [2017] PTSR 1513 affirmed.

The following cases are referred to in the judgment of Lindblom LJ:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Bath Society (The) v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834, CA
CREEDNZ Inc v Governor General [1981] 1 NZLR 172
Cotswold District Council v Secretary of State for Communities and Local Government [2013] EWHC 3719 (Admin)
Dear v Secretary of State for Communities and Local Government [2015] EWHC 29 (Admin)
Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19
Dunster Properties Ltd v First Secretary of State [2007] EWCA Civ 236; [2007] 2 P & CR 26, CA
E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351; [2004] LGR 463, CA
Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)
Gallagher Homes Ltd v Solihull Metropolitan Borough Council [2014] EWCA Civ 1610; [2015] JPL 713, CA
Grantchester Retail Parks plc v Secretary of State for Transport, Local Government and the Regions [2003] EWHC 92 (Admin)
Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318, CA
Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865, SC(E)
Hounslow London Borough Council v Secretary of State for Communities and Local Government [2009] EWHC 1055 (Admin)
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C-127/02) EU:C:2004:482; [2005] All ER (EC) 353; [2004] ECR I-7405, ECJ
North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P & CR 137, CA
Pertemps Investments Ltd v Secretary of State for Communities and Local Government [2015] EWHC 2308 (Admin)

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A *R v Secretary of State for the Environment, Ex p Baber* [1996] JPL 1034, CA
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Connolly) v Havering London Borough Council [2009] EWCA Civ 1059; [2010] 2 P & CR 1, CA
R (D) v Parole Board of England and Wales [2018] EWHC 694 (Admin); [2018] 3 WLR 829; [2018] 3 All ER 417, DC
B *R (Fox Strategic Land and Property Ltd) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198; [2013] 1 P & CR 6, CA
R (Hurst) v London Northern District Coroner [2007] UKHL 13; [2007] 2 AC 189; [2007] 2 WLR 726; [2007] 2 All ER 1025, HL(E)
R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening) [2011] UKSC 12; [2012] 1 AC 245; [2011] 2 WLR 671; [2011] 4 All ER 1, SC(E)
C *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154; The Times, 9 March 2005, CA
St Albans City and District Council v Secretary of State for Communities and Local Government [2015] EWHC 655 (Admin)
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665; 75 LGR 190, CA and HL(E)
D *Sweetman v An Bord Pleanála (Galway County Council intervening)* (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092, ECJ

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

E *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin); [2017] PTSR 1283
Chelmsford City Council v Secretary of State for Communities and Local Government [2016] EWHC 3329 (QB)
Daventry District Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 1146; [2017] JPL 402, CA
Dignity Funerals Ltd v Breckland District Council [2017] EWHC 1492 (Admin)
F *Edinburgh (City of) Council v Secretary of State for Scotland* [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)
R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Comr for Refugees intervening) [2006] EWCA Civ 1279; [2008] QB 289; [2007] 2 WLR 1219, CA
R (Cooper) v Ashford Borough Council [2016] EWHC 1525 (Admin); [2016] PTSR 1455
G *R (DLA Delivery Ltd) v Lewes District Council* [2017] EWCA Civ 58; [2017] PTSR 949, CA
R (Faraday Development Ltd) v West Berkshire Council [2016] EWHC 2166 (Admin)
R (J (A Child)) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] PLCR 31, CA
R (Khatun) v Newham London Borough Councilf [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417; [2004] LGR 696, CA
H *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council* [2009] EWCA Civ 734; [2010] 1 P & CR 10, CA
R (London Criminal Courts Solicitors Association) v Lord Chancellor (No 2) [2015] EWHC 295 (Admin); [2015] ACD 95, DC
R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin); [2015] EWCA Civ 537; [2015] 2 P & CR 19, CA

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R (Plant) v Lambeth London Borough Council [2016] EWHC 3324 (Admin); [2017] PTSR 453 A
R (South Staffordshire and Shropshire NHS Foundation Trust v Managers of St George's Hospital [2016] EWHC 1196 (Admin); [2017] 1 WLR 1528
South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)
South Oxfordshire District Council v Secretary of State for Communities and Local Government [2016] EWHC 1173 (Admin): [2016] JPL 1106 B
Stroud District Council v Secretary of State for Communities and Local Government [2015] EWHC 488 (Admin)
Telford and Wrekin Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 3073 (Admin)
Wiltshire Council v Secretary of State for Communities and Local Government [2015] EWHC 1459 (Admin)
Wychavon District Council v Secretary of State for Communities and Local Government [2016] EWHC 592 (Admin); [2016] PTSR 675 C

APPEAL from John Howell QC sitting as a deputy judge of the Queen's Bench Division

By a CPR Pt 8 claim form the claimants, Baroness Cumberlege of Newick and Patrick Cumberlege, applied under section 288 of the Town and Country Planning Act 1990 to quash a recovered decision of the first D defendant, the Secretary of State for Communities and Local Government, dated 23 November 2016 allowing an appeal by the second defendant developer, DLA Delivery Ltd, under section 78 of the 1990 Act against a decision of the local planning authority, Lewes District Council, to refuse the developer outline planning permission for a residential development of up to 50 dwellings plus associated works at Mitchelswood Farm, Allington Road, E Newick. The grounds of claim were that the Secretary of State's decision was unlawful because (1) the approach which he had adopted in the developer's case to policy CT1 of the Lewes District Local Plan was inconsistent with the approach which he had adopted towards that policy in an earlier appeal concerning a proposed residential development for up to 70 dwellings at Broyle Gate Farm, Lewes Road, Ringmer ("the Ringmer decision"), and (2) the development would occur in a zone established to F protect the Ashdown Forest Special Protection Area and Special Area of Conservation. On 14 March 2017 the Secretary of State submitted to judgment on the first ground but the developer sought to defend the Secretary of State's decision. By order dated 4 August 2017 John Howell QC, sitting as a deputy judge of the Queen's Bench Division, upheld both grounds of challenge and quashed the Secretary of State's decision G [2017] PTSR 1513.

By an appellant's notice filed on 24 August 2017, and with permission granted by the judge, the developer appealed on the grounds that the deputy judge had erred (1) in his approach to the test to be applied when determining when a decision might be invalid where a consideration capable of being material was not taken into account, and in quashing the decision due to a failure to have regard to a previous decision in another appeal, H namely the Ringmer decision, and (2) in his construction of the Conservation of Habitats and Species Regulations 2010 (SI 2010/490).

The facts are stated in the judgment of Lindblom LJ, post, paras 2–4, 16–18.

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A *Christopher Young QC* and *Thea Osmund Smith* (instructed by *Irwin Mitchell llp, Manchester*) for the developer.

Heather Sargent (instructed by *DAC Beachcroft llp*) for the claimants.

The Secretary of State did not appear and was not represented.

The court took time for consideration.

B 8 June 2018. The following judgments were handed down.

LINDBLOM LJ

Introduction

1 Did the Secretary of State for Communities and Local Government, C when determining an appeal against the refusal of planning permission for a development of housing, err in law in failing to take into account a recent decision of his own—even though he had not been asked to do so? That is the main question in this appeal.

2 The appellant, DLA Delivery Ltd ("DLA Delivery"), appeals against the order of Mr John Howell QC, sitting as a deputy judge of the Queen's Bench Division, dated 4 August 2017, by which he allowed the application of D the claimants, Baroness Cumberlege of Newick and her husband, Mr Patrick Cumberlege, under section 288 of the Town and Country Planning Act 1990, challenging the decision of the interested party, the Secretary of State, in a decision letter dated 23 November 2016, to allow an appeal by DLA Delivery under section 78 of the 1990 Act. The section 78 appeal was against the decision of Lewes District Council, as local planning authority, to refuse DLA E Delivery's application for outline planning permission for a development of up to 50 dwellings on land at Mitchelswood Farm, Allington Road, Newick. Baroness Cumberlege and her husband are residents of Newick and members of the Newick Village Society. They were objectors to DLA Delivery's proposal.

3 The section 78 appeal was heard by an inspector at an inquiry in February 2016. Newick Village Society appeared at the inquiry, opposing F the appeal. After the inquiry, on 24 May 2016, the Secretary of State recovered the appeal for his own determination, under section 79 of the 1990 Act, because it involved residential development of more than ten units in an area where a "qualifying body" had submitted "a neighbourhood plan proposal" to the local planning authority or a neighbourhood plan had been made. In his report, dated 5 August 2016, the inspector recommended that G the appeal be allowed and planning permission granted, subject to conditions. In his decision letter the Secretary of State largely agreed with the inspector's conclusions and accepted his recommendation. One of his conclusions was that saved policy CT1 of the Lewes District Local Plan—which required development to be "contained within . . . planning boundaries"—was "out of date", and that the policy for the "presumption in favour of sustainable development" in paragraph 14 of the National H Planning Policy Framework ("the NPPF") was therefore engaged.

4 The Secretary of State's decision was challenged on two grounds: first, that he had failed to take into account as a material consideration his own conclusion, in a decision letter dated 19 September 2016—some nine weeks earlier—dismissing an appeal for a proposed development of housing at

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Broyle Gate Farm, Lewes Road, Ringmer, that policy CT1 was "up to date for the purposes of this appeal"; and, secondly, that he had made a material error of fact in treating the appeal site as lying outside the seven-kilometre "zone of influence" for the Ashdown Forest Special Protection Area ("SPA") and Special Area of Conservation ("SAC"), or had unlawfully granted planning permission without imposing a condition to ensure that the new housing would be built outside the "zone of influence". Before the hearing, on 14 March 2017, the Secretary of State submitted to judgment on the first ground. However, DLA Delivery sought to defend his decision. The council played no part in the proceedings. The judge upheld the application on both grounds. He also granted permission to appeal.

The issues in the appeal

5 In granting permission to appeal the judge identified three questions for this court. Those three questions were modified somewhat in the course of argument before us. As they emerged from counsel's submissions, the issues are these:

(1) Did the judge apply the correct test in law in considering whether the Secretary of State's decision was unlawful because he failed to take into account his conclusion on policy CT1 in his decision letter on the Ringmer appeal?

(2) Did the Secretary of State err in law in failing to take into account his decision in the Ringmer appeal?

(3) Did the Secretary of State misapply regulation 68(3) of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations")?

Policy CT1

6 The relevant history of the development plan is set out in the judgment in the court below: paras 15–23. By the time of the Secretary of State's decision in the Newick appeal, it comprised the Lewes District Local Plan, Part 1, Joint Core Strategy 2010–2030 (adopted in May 2016), certain saved policies of the Lewes District Local Plan (adopted in March 2003) and the Newick neighbourhood plan (adopted in July 2015). Upon the adoption of the joint core strategy some of the policies of the local plan that had previously been saved by the Secretary of State in 2007 were replaced. Others, including policy CT1, were not.

7 Policy CT1 states:

> "*Planning Boundary and Key Countryside Policy*
>
> "CT1 Development will be contained within the planning boundaries as shown on the Proposals Map. Planning permission will not be granted for development outside the planning boundaries, other than for that specifically referred to in other chapters of the plan or listed below . . . (b) new residential development in the countryside (policy RES6 & RES7) . . . (e) affordable homes exceptions sites (policy RES10) . . . (h) any other development in the countryside for which a specific policy reference is made [elsewhere] in the plan . . .
>
> "The retention of the open character of the countryside is of heightened importance where it separates settlements and prevents their coalescence."

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A 8 Among the settlements for which planning boundaries were defined on the proposals map were Newick, Ringmer and Ringmer (The Broyle). Mitchelswood Farm is outside the planning boundary for Newick.

The Secretary of State's conclusions on policy CT1 in the Ringmer appeal

9 The proposal in the Ringmer appeal was for a development of up to B 70 dwellings at Broyle Gate Farm. The Secretary of State recovered the appeal for his own determination on 6 October 2015, because it related to proposed residential development of more than ten units in an area where a "qualifying body" had submitted a neighbourhood plan. The inquiry was held in May 2016. The inspector's report is dated 15 June 2016.

10 Under the heading "Planning boundaries", the inspector said there was "no dispute that the housing element of the proposals would be outside C the planning boundary for Ringmer and therefore contrary to retained policy CT1", and "[the] question of whether this policy should be regarded as up to date was a controversial matter". The "residential element" of the proposal, was, he said, "a very substantial element of the scheme as a whole". It followed that "the scheme as a whole should be regarded as being in conflict with policy CT1": para 10.7. Although the Ringmer neighbourhood plan D "[did] not define settlement boundaries, except in relation to its own allocations . . . it [was] to be read together with the JCS [Joint Core Strategy] so the policy CT1 planning boundaries could be taken to apply, as far as still relevant". Policy 4.1 "[sought] to resist development outside planning boundaries, where there would be an adverse effect on the countryside or rural landscape, unless it can be demonstrated that the benefits of the proposals would outweigh the adverse effects": para 10.8.

E 11 In a subsequent passage of his report (in paras 10.39–10.44), under the heading "Whether relevant policies for the supply of housing are up to date", the inspector concluded:

> "10.39 The appellant agreed that the council is able to demonstrate a five-year supply of deliverable housing sites in accordance with the requirements of the Framework. It was not suggested that there is any F objection in principle to a planning boundary policy such as policy CT1. Nevertheless, the appellant argued that the policy CT1 planning boundaries should be regarded as out of date on the basis that they were drawn in the context of the LP03 for the purposes of meeting housing requirements up to 2011. Further, it was argued that the boundaries would not meet housing requirements up to 2030, that they would need G to be varied to accommodate the JCS strategic allocations and neighbourhood plan allocations and that they are bound to be reviewed in the LPPt2 [Local Plan Part 2].
>
> "10.40 The first point to note is that the CT1 planning boundaries have been retained in the JCS, pending review through the LPPt2. Although originally defined in relation to the LP03, they must now be considered in the context of a development plan context which also includes: the JCS H strategic allocations; the JCS planned growth targets for specified settlements; neighbourhood plan allocations[.] At the inquiry the council accepted that the JCS inspector did not find the retained policies sound in the sense of examining them individually against an evidence base. However, he found the JCS as a whole sound, including its provisions to

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save certain policies pending review under LPPt2. To my mind that is an important point, particularly given that the JCS was adopted as recently as May 2016. It seems to me that, in finding the JCS as a whole sound, the JCS inspector was accepting the approach of allocating some of the development sites now, whilst retaining the CT1 boundaries for the time being pending review through LPPt2. That is a strong indication that the CT1 planning boundaries should be regarded as up to date.

"10.41 Nevertheless, it is relevant to consider the practical consequences of the approach that has been taken. The JCS housing requirement up to 2030 is 6,900 dwellings, or around 345 dwellings per year. After making allowances for completions, commitments, windfalls and rural exception sites there is a balance of 3,597 dwellings which is to be met from strategic site allocations . . . (which have already been identified), planned growth at specified levels in identified settlements and about 200 units in locations to be determined. The residual figure of 200 is therefore a relatively small amount, amounting to less than one year's requirement.

"10.42 The JCS requirement for Ringmer and Broyle Side is 385 dwellings. Allowing for commitments, completions and the strategic allocation at [Bishop's] Lane leaves a balance of 217 units. The RNP has already allocated sites for 184 units leaving just 33 still to be determined. The council suggested that all of these could be accommodated by increasing delivery at Caburn Field, a site currently allocated for 40 units. Given that the site extends to some 1·3 hectares, and is centrally located within the village, it seems reasonable to assume some uplift on the current figure . . . However, in the absence of further information about the prospective scheme for this site it is not possible to form a view on whether as many as 70 is likely to be achievable. That said, even if no allowance is made for additional delivery at Caburn Field, 33 is still a relatively small number amounting to less than 10% of the total growth planned for Ringmer up to 2030.

"10.43 It is possible that some of the 200 units in locations still to be determined will ultimately be allocated to Ringmer and/or Broyle Side. However, it seems likely that the local planning authority would look first to the four towns in the district, as these are likely to offer the most sustainable locations. Moreover, the exercise of seeking locations for those units will no doubt have regard to the infrastructure constraints at Ringmer identified by the JCS inspector.

"10.44 The broad conclusion is that a large proportion of the total growth planned, or likely to be planned, for Ringmer up to 2030 has already been provided for in the JCS and RNP. Bearing in mind that: the district has a five-year supply of housing sites; the JCS has been adopted, and the RNP has been made, very recently; and there is an identified process for allocating the balance of the housing sites required[.] I conclude that policy CT1 should be regarded as up to date for the purposes of this appeal."

12 The inspector then (in paras 10.45–10.47) discussed three recent appeal decisions in Lewes District—at North Chailey, Wivelsfield and Bishop's Lane, Ringmer—in which policy CT1 had been considered:

"10.45 Reference was made to three recent appeal decisions in Lewes District, relating to sites at North Chailey, Wivelsfield and Bishop's

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A Lane, Ringmer. The appellant contended that these decisions support the proposition that CT1 should be regarded as out of date. At North Chailey, the inspector found the planning boundary to be out of date in circumstances where the boundary was tightly drawn and it was common ground that it could not accommodate the level of housing required by the JCS. There was no neighbourhood plan. This contrasts with the situation in Ringmer where there is a neighbourhood plan which, together with the B JCS, has made provision for most of the relevant housing requirement."

"10.46 The situation at Wivelsfield was different in that the inspector there did not expressly find policy CT1 to be out of date. Instead, she concluded that it 'does not fully accord with the Framework', a position which the council appears to have agreed with in that case . . . The arguments appear to have been put rather differently in that appeal. C In the present appeal, there was no suggestion from any party that policy CT1 is, in principle, inconsistent with the Framework. In any event, the Wivelsfield decision appears to have turned on the fact that the scheme was found to accord with the emerging JCS (at it then was) and was a preferred site in an emerging neighbourhood plan. The facts are therefore quite different to the current appeal.

D "10.47 From my reading of the [Bishop's] Lane inspector's report, it does not appear that the inspector found policy CT1 to be out of date. Rather, he found that it was outweighed by the compliance of the appeal scheme with the emerging development plan context, albeit that there was a degree of conflict with the emerging RNP [Ringmer Neighbourhood Plan]. This reasoning was accepted by the Secretary of State . . . Consequently, while I have noted all three of the decisions E referred to, they do not alter my findings as set out above."

13 He therefore concluded, in para 10.48:

"There was no suggestion from any party that any relevant policy other than policy CT1 should be regarded as out of date or inconsistent with the Framework. I therefore conclude that the development plan F context for this appeal should be regarded as up to date."

14 That conclusion was carried into the inspector's "Planning balance", where he said that the proposal would conflict with policy CT1 and other policies of the development plan, and with "the development plan as a whole" (para 10.76); that the development plan was "up to date" and that he had "not identified any reason to reduce the weight to be attached to any of the policies G relevant to this appeal" (para 10.77); and that other material considerations were "not sufficient to indicate that the appeal should be determined other than in accordance with the development plan": para 10.81. He did not apply the "presumption in favour of sustainable development" in paragraph 14 of the NPPF. And he therefore recommended that the appeal be dismissed: para 11.1.

15 In his decision letter the Secretary of State agreed with the inspector's H conclusions and accepted his recommendation: para 3. As for "Planning boundaries and site allocations", he agreed with the inspector that "[for] the reasons given at IR10.7–10.8 . . . the scheme as a whole should be regarded as being in conflict with JCS policy CT1 and therefore with RNP policy 4.1": para 7. In his "Conclusions on the development plan" he agreed with the

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inspector "that the conflicts with saved policies CT1 and RG3 and with RNP policies 6.3 and 7.4 are of sufficient importance to conclude that the appeal scheme would conflict with the development plan as a whole", and also "that the conflict with RNP policy 4.1 needs to be weighed in the overall balance": para 13. On the question "Whether relevant policies for the supply of housing are up to date", he said, in para 14:

> "Having carefully considered the inspector's arguments at IR10.39–10.48, the Secretary of State agrees with his conclusion at IR10.42 and IR10.48 that JCS policy CT1 should be regarded as up to date for the purposes of this appeal."

His conclusions on the planning balance also matched those of the inspector. He did not apply the so-called "tilted balance" under the policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF. He said that "the development plan is up to date and no reasons have been identified to reduce the weight to be attached to any of the policies relevant to this appeal": para 22. And he found that the balance of other considerations was "not sufficient to indicate that the appeal should be determined other than in accordance with the development plan": para 23.

The Secretary of State's conclusions on policy CT1 in the Newick appeal

16 The inspector in the Newick appeal found that policy CT1 "only has a limited degree of consistency with [the NPPF] and does not reflect its presumption in favour of sustainable development": para 151 of his report. The Lewes District Local Plan "was adopted in 2003 and covered the period up to 2011", so that "[the] spatial distribution of development that policy CT1 seeks to control is . . . based on the requirements of the previous plan for the district": para 153. He went on to say, in paras 154 and 155:

> "154. The JCS has now been adopted and sets out a requirement to provide at least 6,900 new homes in the district, with a minimum of 100 dwellings in Newick. Although the NNP [Newick Neighbourhood Plan] has proactively allocated sites to meet this figure ahead of the site allocations process, it is clearly expressed as a 'minimum', and must be read in the context of a full objectively assessed need for some 10,900 new homes. With this in mind the council accepts that more sites may be allocated for housing in the village in the Part 2 site allocations process . . . JCS policy SP2 also includes roughly 200 units in locations 'to be determined', some of which *could* be in Newick. As the NNP process demonstrates, achieving the strategic aspirations of the JCS cannot be met by only containing development within the planning boundaries.
>
> "155. In summary therefore, whilst the housing requirement for the district and its spatial distribution is up to date, the restrictive nature of policy CT1, based on the old LDLP [Lewes District Local Plan], is not. Along with its consistency with the Framework this point was acknowledged by the council in preparation of the JCS, confirming that 'The wording of policy CT1 itself will need amending to ensure that it is consistent with the strategic policies of the core strategy and the more permissive approach to development in rural areas set out in the NPPF'."

The policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF was therefore engaged: para 156.

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A 17 Later in his report, under the heading "Balancing exercise and conclusion on main issue", the inspector said, in paras 226–228:

> "226. . . . It is . . . common ground that the proposal conflicts with saved LDLP policy CT1 by reason of its location beyond the planning boundary for Newick.
>
> "227. However, policy CT1 was adopted in 2003 and seeks to limit B development within the planning boundaries defined under the LDLP, which expired in 2011. It does not reflect the housing requirement or spatial distribution set out in the recently adopted JCS, and its protection of the countryside from encroachment by inappropriate development is not, as the council contend, entirely consistent with the Framework. Based on the evidence provided the weight which can be attributed to this policy conflict is therefore reduced, and for the purposes of the C Framework it is out of date.
>
> "228. In saving CT1 beyond 2007 the Secretary of State confirmed that it must be read in the context of other material considerations. This includes the Framework, and where relevant policies are out of date, its presumption in favour of sustainable development. In achieving sustainable development the Framework sets out three dimensions; the D economic, social and environmental. It also confirms that these roles are mutually dependant, and I have considered the proposal on the same basis."

18 In his decision letter the Secretary of State said, in para 27:

> "For the reasons given by the inspector at IR227–228 the Secretary of E State agrees that saved LDLP policy CT1 is out of date. As such the Secretary of State considers that paragraph 14 of the Framework is engaged. He has therefore considered whether the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the Framework policies as a whole."

and, in para 33:

> F "He also finds that the weight that can be given to the conflict with LDLP policy CT1 is reduced for the reasons set out by the inspector or IR227, and he gives only limited weight to this conflict."

The Wivelsfield decision

19 On 14 March 2017, some four months after he had issued his G decision letter in the Newick appeal, the Secretary of State dismissed an appeal against the council's refusal of planning permission for a development of 95 dwellings on land at Ditchling Road, Wivelsfield. The inspector's report in that case had been submitted to the Secretary of State on 25 October 2016, about five weeks after his decision in the Ringmer appeal and about four weeks before his decision in the Newick appeal. The inspector concluded (in para 328 of his report) that "policy CT1 is not out of date for H the purposes of paragraph 14 of the NPPF, and . . . the conflict with it should be given significant weight in the decision". The Secretary of State did not disagree. In his decision letter he said that he "agrees that LP policy CT1 is not out of date (either by operation of paragraph 215 or paragraph 49 of the Framework) and that the conflict with it should be given significant weight in

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the decision" (para 15), and that he "considers that the appeal scheme is not in accordance with the saved policies CT1 and [Wivelsfield neighbourhood plan] policy 1, that these policies should be considered up to date": para 18. He did not apply the "presumption in favour of sustainable development" in paragraph 14 of the NPPF. He concluded (para 18) that the proposal was not in accordance with the development plan, and that material considerations weighing in its favour did not outweigh that conflict with the plan.

Issue (1): the relevant test for material considerations

20 Before us, this issue was not controversial. The parties were agreed on the approach the court should take, which is already the subject of ample authority.

21 Prominent in the case law is the decision of House of Lords in *In re Findlay* [1985] AC 318, 333, 334. In that case there was no express statutory requirement for consultation, and it was impossible to imply any such requirement into the statute. But the "*Wednesbury* principle" (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) was invoked in support of a submission that no reasonable Home Secretary could have reasonably omitted to consult the Parole Board on the new policy in question. In his speech, at pp 333F–334B, Lord Scarman referred to two passages in the judgment of Cooke J in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 183. The first passage was:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

But it was the second passage that Lord Scarman found decisive. As he said:

> "[Cooke J] in a later passage [also on p 183], did recognise that in certain circumstances, notwithstanding the silence of the statute, 'there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers . . . would not be in accordance with the intention of the Act'."

Those two passages of Cooke J's judgment in the *CREEDNZ Inc* case were, in Lord Scarman's view, "a correct statement of principle".

22 In this case, the judge undertook a careful review of the relevant authorities. Having done so, he concluded at [2017] PTSR 1513, para 74 that "on analysis it seems . . . the matter is 'so obviously material' in such circumstances when no reasonable person would have failed to take it into account", and (in para 77) that it was "simpler and less likely to mislead or produce an incorrect result to ask . . . only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances".

23 Both Ms Heather Sargent, on behalf of Baroness Cumberlege and her husband, and Mr Christopher Young QC, for DLA Delivery, were content for us to adopt that approach in considering whether the Secretary of State ought to have taken into account his own previous decision in the

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A Ringmer appeal. They both acknowledged that he was obliged to do that if, in the circumstances, no reasonable Secretary of State would have failed to do so.

24 I agree. In this sense, the two "tests" are, it seems to me, effectively one and the same. As well as Lord Scarman's speech in *In re Findlay* [1985] AC 318, endorsing as "a correct statement of principle" the two passages to which he referred in Cooke J's judgment in the *CREEDNZ Inc* case [1981] B 1 NZLR 172, I have in mind the speech of Lord Brown of Eaton-under-Heywood in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, in which, at para 57, he cited the same two passages of Cooke J's judgment and went on to say, in paras 58 and 59:

> "58. . . . it seems to me quite impossible to say that the unincorporated C international obligation on the United Kingdom here was 'so obviously material' to the coroner's decision whether or not to resume this inquest that he was required to give it 'direct consideration' . . .
>
> "59. Even, therefore, had the coroner recognised and felt able to satisfy the international law obligation upon the United Kingdom by reopening the inquest, I for my part would not hold his refusal to do so irrational or otherwise unlawful."

D

25 In the context of planning law, one can point to the judgment of Carnwath LJ in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19, which, as the judge acknowledged (in note 7 to his judgment), was "consistent with the interpretation of *In re Findlay* as imposing a *Wednesbury* test". Carnwath LJ referred (in para 25 of his judgment) to Cooke J's "important statement of E principle" in the *CREEDNZ Inc* case, which "had been adopted by the House of Lords in *In re Findlay*", and by the Court of Appeal in *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154; The Times, 9 March 2005. He noted (in para 26) that Cooke J "took as a starting point" the observation of Lord Greene MR in the *Wednesbury* case [1948] 1 KB 223, 228, that:

F

> "If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

He quoted the two passages of Cooke J's judgment in the *CREEDNZ Inc* G case approved by Lord Scarman in *In re Findlay*: see [2010] 1 P & CR 19, paras 26 and 27. As he put it, in para 28, recalling what Cooke J had said:

> "It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the H statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

26 I see no need for any further discussion of the relevant jurisprudence, nor any need to add to it. The essential principles are already sufficiently clear in the authorities (see, for example, though in quite different legal

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context, the recent judgment of the Divisional Court in *R (D) v Parole Board of England and Wales* [2018] 3 WLR 829, para 141). A

Issue (2): did the Secretary of State fail to have regard to a relevant previous appeal decision?

27 In submitting to judgment, the Secretary of State accepted that his decision to allow the Newick appeal had been made unlawfully, because he had not had regard to his decision in the Ringmer appeal. In the Treasury Solicitor's letter to the court dated 14 March 2017 the Secretary of State conceded that the Newick decision should be quashed "because [he had] failed to take into account the '[Ringmer] decision' and specifically the finding in that earlier decision that development plan policy CT1 'should be regarded as up to date for the purposes of this appeal' ". The statement of reasons attached to the draft consent order proposed by the Secretary of State said: B C

> "The Secretary of State probably should be cognisant of decisions in his own name, whether or not flagged up in the materials before him: *Dear v Secretary of State for Communities and Local Government* [2015] EWHC 29 (Admin) at [32]. The conclusion as to policy CT1 in the [Ringmer] decision was in the circumstances obviously material to the present case (adopting the language of [the *Derbyshire Dales District Council* case], at para 28) such that the Secretary of State was required to take the [Ringmer] decision into account as a matter of legal obligation and provide reasons for departing from his prior conclusion as to policy CT1.
>
> "The Secretary of State did not take the [Ringmer] decision into account in determining the [Newick] appeal. He concedes that this was an error of law vitiating the [Newick] appeal." D E

28 It is well established, as a general principle, that policies issued to guide the exercise of administrative discretion are an essential means of securing consistency in decision-making, and that such policies should be consistently applied: see, for example, the judgment of Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245, paras 26, 34. And that principle certainly applies in the sphere of land use planning, where, under the statutory code, decisions on applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004. As Lord Clyde said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 140: F G

> "Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the local H

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A development plans and policies which the planning authorities will use in resolving their own local problems."

29 That previous decisions of the Secretary of State or his inspectors on planning appeals are capable of being material considerations is also well established: see, for example, *Gallagher Homes Ltd v Solihull Metropolitan Borough Council* [2015] JPL 713, *R (Fox Strategic Land and Property Ltd) v* B *Secretary of State for Communities and Local Government* [2013] 1 P & CR 6, *Dunster Properties Ltd v First Secretary of State* [2007] 2 P & CR 26, *R v Secretary of State for the Environment, Ex p Baber* [1996] JPL 1034 and *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137. The classic statement of principle here is to be found in the judgment of Mann LJ in the *North Wiltshire District Council* case, C at p 145:

"It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is D self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency E and to give his reasons for departure from the previous decision.

"To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. F A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on G occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

30 In *Ex p Baber* [1996] JPL 1034, 1040 Glidewell LJ suggested a slightly different question for the decision-maker, which was:

"a previous decision having been drawn to my attention, do I take the H view that it may well be sufficiently closely related to the matters in issue in my appeal that I ought to have regard to it and either follow it or distinguish it?"

Morritt LJ, at p 1041, framed the question slightly differently again: "May the earlier decision be sufficiently related to the decision I have to make?

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That is something that I should properly comment on either following or, if disagreeing, saying why."

31 In these proceedings we are concerned with a previous appeal decision of the Secretary of State issued after the close of the inquiry in the case under consideration, and not relied upon by any of the parties in further representations to the Secretary of State before he made the challenged decision. How should the court approach such a case?

32 Rightly in my view, the judge rejected a submission made to him on behalf of DLA Delivery that, as a matter of law, when the previous decision in question has not been placed before the Secretary of State by one or more of the parties, he is never obliged to have regard to it. There can be no "absolute rule" to that effect—as the judge demonstrated (in paras 86–106 of his judgment), having regard to a decision-maker's general obligation to take reasonable steps to acquaint himself with the relevant information to enable him to decide relevant questions correctly, an obligation emphasised by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065. As the judge concluded, the relevant authorities do not establish so rigid a principle: see, in particular, the first instance judgments in *St Albans City and District Council v Secretary of State for Communities and Local Government* [2015] EWHC 655 (Admin) at [88]–[101], *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin) at [61], *Hounslow London Borough Council v Secretary of State for Communities and Local Government* [2009] EWHC 1055 (Admin) at [13]–[19] and *Grantchester Retail Parks plc v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 92 (Admin) at [26]–[28]. And the decisions of the Court of Appeal in *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303 and *R (Connolly) v Havering London Borough Council* [2010] 2 P & CR 1 seem incompatible with it. In *Connolly's* case the judge at first instance had quashed an inspector's decision on the ground of a mistake of fact concerning the existence of a relevant previous decision to which the local planning authority had failed to refer. The judge's decision was upheld by this court. In *The Bath Society* case [1991] 1 WLR 1303 the Secretary of State allowed an appeal and granted planning permission for a housing development without taking into account the recommendation in the local plan inspector's report that the land should be allocated as open space. The appeal inspector had been unaware of the local plan inspector's report; the Secretary of State had received it, but not in connection with the appeal. Glidewell LJ concluded, at p 1313C–D, that he had erred in "failing to comply with his duty to have regard to this material consideration".

33 The approach taken at first instance in *Dear v Secretary of State for Communities and Local Government* [2015] EWHC 29 (Admin)—the case referred to by the Secretary of State in submitting to judgment in these proceedings—seems to have been similar. There the forthcoming decision of an inspector in another appeal had been mentioned to the Secretary of State, but not for its possible relevance to the issue with which the challenge to his decision was ultimately concerned—whether there was a realistic prospect of sites for travellers coming forward in the relevant period. On that issue the Secretary of State's decision, though consistent with the recommendation made to him in his inspector's report, was inconsistent with the inspector's

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A decision in the other case, issued about two months before. Judge Belcher, sitting as a judge of the Queen's Bench Division, was inclined to accept that the Secretary of State "should be cognisant of decisions in his name, whether or not flagged up in the materials before him", and that he "[could not] avoid the issue of consistency by suggesting that it was for [the claimant] to inform him of decisions made on his behalf after the close of her appeal". But she did not have to go that far, because the inspector's decision in the other case had B been "clearly flagged in the materials, albeit on a different point"—whether there was a need for travellers' sites. In the circumstances, the Secretary of State "should have had regard to" the inspector's decision: para 32 of the judgment.

34 I would accept three general propositions, which I think accord with the basic principles referred to by Mann LJ in the *North Wiltshire District* C *Council* case 65 P & CR 137 and applied since in several decisions of this court, and which align with the judge's conclusions in this case (in particular, at [2017] PTSR 1513, paras 100–105). First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering. This may sometimes be so even though none of the parties has relied on the D previous decision or brought it to the Secretary of State's attention: para 100. And it may be necessary in those circumstances, in the interests of fairness, to give the parties an opportunity to make further representations in the light of the previous decision. Secondly, the court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. It may be material, for example, because it relates to the same E site, or to the same or a similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases: see para 92 of Holgate J's judgment in the *St Albans City and District Council* case [2015] EWHC 655. Thirdly, the circumstances in which it can be unreasonable for the Secretary of State to fail to take into account a previous appeal decision that has not been brought to his notice by one of the parties will vary. But in F tackling this question, it will be necessary for the court to consider whether the Secretary of State was actually aware, or ought to have been aware, of the previous decision and its significance for the appeal now being determined: paras 100, 101 and 105 of the judgment. As the judge said at para 101:

> "Before the close of the 'adversarial' part of the proceedings, the G Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further inquiries about any matter, including about other . . . decisions that may be significant."

35 In a witness statement dated 8 November 2017, Mr Philip Barber, the decision officer in the planning casework unit responsible for issuing the decision on the Newick appeal, tells the court that the number of appeals H dealt with by the planning inspectorate each year is between 11,000 and 13,000 (para 4), and that the number of cases in which an application is called in or an appeal recovered by the Secretary of State is between 60 and 90: para 7. When this decision was made, the Planning Casework Unit "did not routinely undertake a search for potentially relevant" previous decisions

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of the Secretary of State: para 9. It "did not undertake a search in this case, nor did it identify the [Ringmer appeal decision] in any other way": para 10. Since the planning casework unit was restructured in April 2017 a different procedure has been adopted, in which, says Mr Barber, "team leaders identify any other relevant decisions in an area where we have recently issued a decision . . . consider any implications of this", and "then ensure that all members of staff in the planning casework unit are made aware of any such relevant decisions": para 13.

36 Like the judge, I would not accept that, as a matter of law, the Secretary of State ought to be aware of every previous decision taken in his name, whether by himself or a ministerial predecessor or by one of the inspectors to whom his decision-making function is largely delegated. In my view that concept is unrealistic and unworkable, given the number of decisions on planning appeals that have been made, year upon year, since the modern statutory code came into existence under the Town and Country Planning Act 1947. There will, however, be circumstances in which, having regard to the interests of consistency in decision-making, the court is prepared to hold that the Secretary of State has acted unreasonably in not taking into account a previous decision of his own. Whether this is so in a particular case will always depend on the facts and circumstances: [2017] PTSR 1513, paras 102–104. A possible example would be a case in which, within a short span of time, the Secretary of State has called in applications for his own determination, or recovered jurisdiction in appeals, in cases of a sufficiently similar kind, to which the same policies of the development plan apply.

37 Was the Secretary of State's decision on the Ringmer appeal—in particular, his conclusion on policy CT1—"obviously material" to the Newick appeal, as he has conceded. And was it, in the circumstances, unreasonable for him not to have regard to that decision? If he was to depart from the Ringmer decision on that particular point, did he have to explain why? And was his failure to have regard to it enough to vitiate the decision he made in the Newick appeal? In my view the answer to all these questions is "yes".

38 In the court below it was submitted on behalf of DLA Delivery that the Secretary of State's decision on the Ringmer appeal was itself "perverse, irrational and *Wednesbury* unreasonable"—because policy CT1 was a policy dealing only with growth until 2011 and was now necessarily out of date, and also because the protection of the countryside under policy CT1 was inconsistent with national planning policy in the NPPF. The judge rightly rejected that submission: [2017] PTSR 1513, paras 112–117. At the time of the Secretary of State's decision on the Newick appeal, the Ringmer decision stood unchallenged. The court did not have to review the legal soundness of that earlier decision before determining whether it was a material consideration in the decision under challenge in these proceedings.

39 Mr Young's argument in this court was, in essence, that the two cases were readily distinguishable. The sites and proposals were different. They were in different settlements. Though both settlements were rural service centres for which neighbourhood plans had been prepared, the circumstances were not the same. It was open to each of the two inspectors in the appeals, and in turn the Secretary of State, to conclude as they did when considering whether or not policy CT1 was up to date. In the Newick

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A appeal the Secretary of State was clearly entitled to conclude that the policy was out of date: see the judgment of Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, para 63.

40 Ms Sargent submitted that the facts and circumstances of the two cases, including the position relating to the relevant housing requirements, were plainly parallel, but that the approach taken by the inspectors, and by B the Secretary of State, was starkly different. There was an obvious and irreconcilable inconsistency between the two decisions, both on the question of whether policy CT1 was generally up to date, and also on the question of whether it was up to date in the particular circumstances of either settlement.

41 I cannot accept Mr Young's submissions. The decision in the Ringmer C appeal was undoubtedly a material consideration in the Newick appeal. And there was, between the two decisions, an obvious and unexplained difference in the Secretary of State's approach to the status of policy CT1, which was a matter of basic importance in both appeals.

42 There were, I think, at least three factors that, taken together, made it unreasonable for the Secretary of State not to have regard to the Ringmer decision before determining the Newick appeal, and, in particular, before D reaching a conclusion on the question of whether policy CT1 was up to date.

43 First, the two proposals were for the same form of development in the same district—housing on unallocated sites outside planning boundaries as defined for the purposes of policy CT1, in settlements identified as "rural service centres" in the joint core strategy. They were subject to the same district-wide policies in the development plan, including the relevant policies E of the joint core strategy and the "saved policies" of the 2003 local plan, one of which was policy CT1. Each was on the edge of a rural settlement for which a neighbourhood plan had been prepared. The schemes were of similar scale; the Newick proposal was for a development of up to 50 dwellings, the Ringmer proposal for a development of up to 70. And the applications for planning permission had been before the council for determination at the same time. In the Newick case the application had been F submitted in September 2014, and was refused in February 2015; in the Ringmer case the application had been submitted in December 2014, and was refused in May 2015.

44 Secondly, both appeals had been recovered for determination by the Secretary of State for the same reason—essentially because, in each case, they related to a proposal for housing development of more than ten G dwellings in an area where a neighbourhood plan had been prepared. Implicit in the decision to recover appeals in such cases was the need for a consistent approach to their determination.

45 Thirdly, the appeals were before the Secretary of State at the same time, and the two decision-making processes were largely concurrent. In the Newick appeal, the inquiry was held in February 2016, the appeal was recovered in May 2016, the inspector reported in August 2016, and the H Secretary of State's decision was issued in November 2016. The Ringmer appeal was recovered by the Secretary of State in October 2015, the inquiry was held in May 2016, the inspector reported in June 2016, and the decision was issued in September 2016—some seven months after the inquiry in the Newick appeal had closed, and about six weeks after the Secretary of State

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had received the inspector's report in that case. So both inspectors' reports were with the Secretary of State at the same time, before he issued his decision on the Ringmer appeal. And when he made the Newick decision some nine weeks later, the Ringmer decision had not been the subject of any legal challenge.

46 It would not have been difficult for those whose task it was to prepare decision letters on behalf of the Secretary of State to find out whether another decision had recently been made by him in which effectively the same issues had been dealt with. But I think it is right to go further. In the particular circumstances here, no reasonable Secretary of State, aware of his responsibility for securing consistency in development control decision-making, would have failed to take reasonable steps to ensure that his own decisions on cases of the same kind, in the same district, taken within the same period, and which, for the same reason, he had recovered to determine himself, were consistent with each other—or, if they were not consistent, that the inconsistency was clearly explained. In determining the Newick appeal, he was, in my view, obliged to have regard to his very recent decision in the Ringmer case, even though none of the parties had sought to rely on that decision or brought it to his attention. In the circumstances the onus lay on him to inform himself of the decision, and to have regard to it.

47 Were the two decisions inconsistent, so as to require of the Secretary of State in his decision letter on the Newick appeal a clear explanation for the main points of difference between them? In my opinion they were.

48 The inspector in the Ringmer appeal had been faced with an argument that the planning boundaries under policy CT1 were now out of date because they had been defined in the Lewes District Local Plan with a view to meeting housing requirements only to 2011, would not enable housing requirements to 2030 to be met, would have to be varied to accommodate the strategic allocations in the joint core strategy and allocations in neighbourhood plans, and were bound to be reviewed in the Lewes District Local Plan, Part 2: para 10.39 of the inspector's report. He rejected that argument. The planning boundaries under policy CT1 had been retained in the joint core strategy, pending their review in the Lewes District Local Plan, Part 2. The joint core strategy inspector had concluded that the joint core strategy "as a whole" was sound. This was "an important point". The joint core strategy had been adopted only in May 2016. In the inspector's view, this was "a strong indication" that the planning boundaries under policy CT1 "should be regarded as up to date": para 10.40. The residual housing requirement figure of 200 dwellings was "relatively small": para 10.41. The joint core strategy housing requirement for Ringmer and Broyle Side, of 385 dwellings, had almost been met. Once allowance was made for commitments, completions and the strategic allocation at Bishop's Lane, a balance of 217 dwellings remained, and the Ringmer neighbourhood plan had already allocated sites for "184 units"—which left only 33 "still to be determined": para 10.42. Some of the 200 dwellings "in locations still to be determined" might be allocated in Ringmer or Broyle Side, but it seemed likely that the council would look first at the four towns in the district: para 10.43. The inspector did not say it was necessary to place his assessment in the context of the full, objectively assessed need for housing. There was, as he said, a five-year supply of housing sites in the district. The joint core strategy had been adopted, and

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A the Ringmer neighbourhood plan made, very recently. And there was a process for allocating the balance of the sites required for housing. The inspector concluded, therefore, that "policy CT1 should be regarded as up to date for the purposes of this appeal" (para 10.44), and also that "the development plan context for this appeal should be regarded as up to date": para 10.48.

B **49** None of those conclusions was doubted by the Secretary of State in his decision letter. He agreed with the conclusion in para 10.48 of the inspector's report—that "the development plan context for this appeal", including policy CT1, "should be regarded as up to date for the purposes of this appeal": para 14 of the decision letter. This conclusion was not said to be confined to the effect of policy CT1 in the settlement of Ringmer alone, or merely to the planning boundary for that particular settlement. Reflecting C the general conclusions in paras 10.39–10.44 and 10.48 of the inspector's report, it was relevant to the application of policy CT1 as a district-wide policy. In the light of the inspector's conclusion in para 10.48 that "the development plan context for this appeal" should be regarded as "up to date", the force of the words "for the purposes of this appeal" was to emphasise that the relevant policies of the plan, including policy CT1, remained up to date, at this stage, for a development control decision to D which that policy was relevant.

50 In the Newick appeal, however, whilst the facts and circumstances were plainly similar, the conclusions of the inspector and the Secretary of State on the question of whether policy CT1 was up to date were markedly different.

51 The inspector in the Newick appeal acknowledged that the Newick E neighbourhood plan had "proactively allocated" sites to meet the requirement of 100 dwellings, though he observed that this was a "minimum" figure, and that policy SP2 of the joint core strategy included "roughly 200 units" in locations "to be determined", some of which, he said, "*could* be in Newick": para 154.

52 He gave three main reasons for his view that policy CT1 was out of date. First, the policy sought to limit development within the planning F boundaries defined in the Lewes District Local Plan, which had been adopted in 2003 and "expired in 2011". Secondly, it did not reflect the "housing requirement" or the "spatial distribution" in the recently adopted joint core strategy. And thirdly, its protection of the countryside was "not . . . entirely consistent" with the NPPF: para 227. The Secretary of State had confirmed when saving policy CT1 beyond 2007, that the policy G had to be "read in the context of other material considerations", including, "where relevant policies are out of date", the NPPF policy for the "presumption in favour of sustainable development": para 228.

53 As the Secretary of State made clear in para 27 of his decision letter, he agreed with the "reasons" given by the inspector in paras 227 and 228 of the report, and it was for those reasons that he shared the inspector's view that "saved LDLP policy CT1 is out of date". He went on, in para 33, to H confirm his agreement with the inspector's "reasons" in para 227 of the report as a basis for giving "only limited weight" to the proposal's conflict with policy CT1. These conclusions, like the inspector's on which they were based, were all expressed in general terms. They were not said to relate only to the application of policy CT1 to the settlement of Newick, or to the

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planning boundary for that settlement. They were entirely unqualified. Their tenor was that policy CT1 was out of date in its application throughout the district of Lewes.

54 In my view the relevant reasons and conclusions of the inspector and Secretary of State in the Ringmer appeal are irreconcilable with those of the inspector and Secretary of State in the Newick appeal. The approach to the question of whether policy CT1 was up to date was quite different between the two cases.

55 The first and second of the three reasons given by the inspector in the Newick appeal to explain his conclusion that policy CT1 was out of date are not consistent with the approach of the inspector and the Secretary of State in the Ringmer appeal. In the Newick appeal, the fact that the planning boundaries had been defined in a local plan whose period ended in 2011 was seen as a consideration supporting the view that the policy was out of date. So was the fact that the policy did not reflect the "housing requirement" and the "spatial distribution" in the recently adopted joint core strategy. The conclusion that the policy was out of date was accepted by the Secretary of State in that appeal. In sharp contrast, the Ringmer appeal inspector, in finding policy CT1 up to date, thought it significant that the joint core strategy as a whole, including its retention of the existing planning boundaries, had been assessed as sound, that a large proportion of the planned growth in the joint core strategy—for the period to 2030—had already been provided for, and that, in the process for allocating the remainder of the sites required, the council was likely to look first at the four towns in the district. Nothing was said in either decision letter to differentiate the prospect of further allocations being made in Newick from the prospect of this happening in Ringmer, or to distinguish between the two settlements in any other relevant respect. The third reason given by the Newick appeal inspector for his conclusion that policy CT1 was out of date—that its protection of the countryside was "not . . . entirely consistent" with the NPPF—did not feature in the conclusions of the Ringmer appeal inspector. The fact that in saving policy CT1 beyond 2007, the Secretary of State had said it must be "read in the context of other material considerations", including NPPF policy for the "presumption in favour of sustainable development"—was another general point, which, if significant, would have been equally so in the Ringmer appeal.

56 The two cases were, as Mann LJ put it in the *North Wiltshire District Council* case 65 P & CR 137, 145, "like cases", in the sense of their being, on the face of it, indistinguishable on an issue of critical importance in their determination—the interpretation and application of a relevant and significant policy in the development plan: see, for example, the first instance judgment in *Pertemps Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2308 (Admin) at [61]. Notwithstanding the other respects in which they were different on their fact—as Mr Young emphasised, their circumstances were closely enough related on that crucial issue to call for a clear explanation of the Secretary of State's approach in the second case if it was to diverge materially from the approach he had taken in the first. Policy CT1 was relevant in both cases, and in essentially the same way. Yet the approach taken to the status of that policy—whether it was up to date or not, the conclusion reached on this

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A question, and the consequences of that conclusion—in particular, whether the "presumption in favour of sustainable development" was engaged or not, were different. It cannot be said that such differences as there were between the two cases made it unnecessary for the Secretary of State, when determining the Newick appeal, to take into account his decision in the Ringmer appeal, and his conclusion there that policy CT1 was up to date. B And if his approach to that issue and his conclusion on it were to be different, he had to explain why. No reasonable Secretary of State could have failed to do that. The interests of consistency in appellate decision-making required it.

57 My conclusion here would be the same even if my understanding of the Secretary of State's use of the expression "for the purposes of this appeal" in para 14 of his decision letter in the Ringmer appeal was wrong, and in C using it he was indeed seeking to confine his conclusion on the status of policy CT1 to that particular appeal. If this is what he meant, why was his approach so obviously different in the Newick appeal, where he concluded that the policy was out of date in a general way, throughout the district? And if the policy was up to date in the Ringmer appeal, why was it not up to date in the Newick appeal? In the light of the Ringmer appeal inspector's D reasons and conclusions, and the Secretary of State's endorsement of them, those questions were unavoidable. But they went unanswered. No attempt was made by the Secretary of State to square his conclusion in the Newick appeal to the effect that the policy was simply out of date in a general sense with his prior conclusion in the Ringmer appeal to the effect that it was up to date at least in Ringmer. This of itself was an inconsistency. And it was not E addressed by the Secretary of State.

58 I therefore agree with the judge that the Secretary of State erred in the Newick appeal in failing to take into account and distinguish his own decision in the Ringmer appeal. As the judge said at para 122, aptly in my view:

> F "It can only undermine public confidence in the operation of the development control system for there to be two decisions of the Secretary of State himself, issued from the same unit of his department . . . within ten weeks of each other, reaching a different conclusion on whether or not a development plan policy is up to date without any reference to, or sufficient explanation in the later one for the difference."

G The Secretary of State did not explain, or recognise, the inconsistency between these two decisions, in his approach to the status of policy CT1, his relevant conclusion, and the consequences of it. The error of law is clear. The Secretary of State was right to acknowledge it when submitting to judgment in the court below. And there was no proper basis here for the court to withhold relief. The judge's conclusion that the decision had to be quashed was plainly correct: para 159.

H 59 The Secretary of State's relevant conclusion in his subsequent decision in the Wivelsfield case, that policy CT1 was up to date, only accentuates the error he made. That later decision cannot, of course, play any part in the analysis on which we decide this issue in the appeal before us.

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Issue (3): regulation 68(3) of the Habitats Regulations A

60 Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L206, p 7)) ("the Habitats Directive") provides that

> "[any] plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon . . . shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives", B

and:

> "In the light of the conclusions of the assessment of the implications for the site . . . the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public." C

61 Regulations 61 and 68 of the Habitats Regulations apply to the granting of planning permission under Part 3 of the 1990 Act. Regulation 61(1) provides:

> "A competent authority, before deciding to . . . give any . . . permission . . . for . . . a plan or project which . . . is likely to have a significant effect on a European site . . . must make an appropriate assessment of the implications for that site in view of that site's conservation objectives." D

Regulation 61(6) provides:

> "In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the . . . permission . . . should be given." E

Regulation 68(3) provides: F

> "Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site . . . could be carried out under the permission, whether before or after obtaining approval of any reserved matters." G

62 Core Policy 10.3 of the joint core strategy seeks to give effect to the "precautionary principle"—as amplified, for example, in the judgment of the Court of Justice of the European Union in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353; [2004] ECR I-7405: see, in particular, paras 43–45. It states that "[to] ensure that [the SAC] and [the SPA] is protected from recreational pressure, residential development that results in a net increase of one or more dwellings within seven kilometres of the Ashdown Forest will be required to contribute" to "[the] provision of suitable alternative natural greenspaces ('SANGs') at the ratio of eight H

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A hectares per additional 1,000 residents", and "[the] implementation of an Ashdown Forest strategic access management and monitoring strategy ('SAMMS')". It continues: "Until such a time that appropriate mitigation is delivered, development that results in a net increase of one or more dwellings within seven kilometres of Ashdown Forest will be resisted."

63 DLA Delivery's application for planning permission being in outline B with all matters except access reserved for future determination, the inspector confirmed that he had considered the proposal on the basis that the layout, scale, appearance and landscaping of the development were all indicative: para 2 of his report. He had before him an illustrative masterplan (Drawing No ZMG734/022), showing a layout for a development of "49 units".

64 Among the matters agreed between the parties in the statement of common ground, as the inspector said, was that "[the] site is located outside C the seven-kilometre zone of influence surrounding the Ashford Forest Special Protection Area": para 29 of his report. This was not correct. At its north-eastern end the site extended a short distance into the seven-kilometre "zone of influence", though the illustrative master plan did not show any buildings in that part of the site. Later in his report, the inspector said that "[the] Ashdown Forest SPA and SAC are located approximately seven kilometres to D the north of Mitchelswood Farm", and that he had "therefore had regard to the effect of the proposal on the integrity of this European site": para 212. Repeating the parties' error in the statement of common ground, he went on to say, in para 213:

> "Although the appeal site is situated close to the boundary of the seven-kilometre 'zone of influence', it is none the less located outside the E designated area. This led to the council's conclusion that, following assessment by Natural England, the proposal would not result in any likely significant effects on the internationally important features [of] the designated areas, either in isolation or combined with other projects. Based on the evidence provided I have no reasons to disagree."

65 The inspector recommended the imposition of a condition— F condition 7—requiring the submission and approval of a scheme of ecological enhancement and management: para 134. Condition 7 states:

> "No development shall take place until a detailed scheme of ecological enhancements and mitigation measures, to include on-going management as necessary, based on the recommendations of the ecological assessment (September 2014) by Aspect Ecology Ltd has been submitted to and G approved in writing by the local planning authority. The scheme shall be carried out and managed thereafter in accordance with the approved details."

66 In his decision letter the Secretary of State referred to the council's conclusion that the proposed development would not result in any likely significant effects on the Ashdown Forest SPA and SAC, and agreed with the H inspector's conclusion in para 213 of his report "that the proposal would not result in any likely significant effects on the internationally important features of the designated areas, either in isolation or combined with other projects": para 21. He imposed condition 7 on the outline planning permission, as recommended by the inspector: para 25.

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67 The judge accepted Ms Sargent's argument that the inspector's conclusion in para 213 of his report, which the Secretary of State adopted, was wrong as a matter of fact, that the error was material, and that condition 7 was ineffective to ensure that the part of the site within the seven-kilometre "zone of influence" was kept free from construction. He was not persuaded by Mr Young's argument—which was put forward again in the appeal—that, as the illustrative master plan demonstrates, the development could be confined to the part of the site outside the "zone of influence", that the council could be relied upon not to approve any submission of reserved matters showing built development within it, that it was inconceivable that any houses would be constructed there, and that any breach of regulation 68(3) was, in any event, "de minimis": [2017] PTSR 1513, paras 135–140.

68 I agree with the judge. The inspector may have been led into error by the parties, but it is clear that he was in error, and so too was the Secretary of State. Part of the site is within the seven-kilometre "zone of influence". Condition 7 does not prevent the erection of buildings on that land. No other restriction on the outline planning permission does so. It is possible that at the reserved matters stage the scheme submitted for approval would avoid siting buildings within the "zone of influence". But the developer, whoever it is, would be free to bring forward a layout in which the 50 dwellings were differently arranged on the site, with one or more of them inside the seven-kilometre "zone of influence".

69 The crucial point, however, as the judge recognised (in para 136 of his judgment), is that the designation of the seven-kilometre "zone of influence", to which Core Policy 10.3 applies, is the means by which the "precautionary principle" is given effect. It ensures that development, including housing development, will not adversely affect the integrity of the Ashdown Forest SPA and SAC. Regulation 68(3) does not provide that outline planning permission may be granted if the competent authority is satisfied that no development likely to affect the integrity of a European site is likely to be carried out, or would be carried out, under the permission. It provides that outline planning permission "must not be granted unless" the competent authority is "satisfied . . . that no [such] development . . . could be carried out". The relevant test here is stringent. It applies specifically to the granting of outline planning permission, not to the approval of reserved matters. It can, in principle, be satisfied by the imposition of a suitable condition. But its terms reflect the strict application of the "precautionary principle" that is required in a decision authorising development: see, for example, the judgment of the Court of Justice in *Sweetman v An Bord Pleanála (Galway County Council intervening)* (Case C-258/11) [2014] PTSR 1092, para 51.

70 In this case, not only did the Secretary of State make a mistake of fact as to the relationship between the site of the proposed development and the seven-kilometre "zone of influence", but that mistake led him to decide the appeal in breach of article 6(3) of the Habitats Directive and regulation 68(3) of the Habitats Regulations. This would have been enough on its own to justify an order quashing the planning permission, even if that outcome was not also inevitable in any event, given the Secretary of State's failure to take into account his decision in the Ringmer appeal.

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A 71 Shortly before the hearing of the appeal, on 26 February 2018, DLA Delivery made an application for leave to adduce as further evidence a draft section 106 planning obligation, in the form of a unilateral undertaking, which would have committed itself and its successors in title not to construct any building on the part of the site within the seven-kilometre "zone of influence". The council pointed out several basic shortcomings in the draft unilateral undertaking, and, not surprisingly, opposed this new evidence B being adduced at that very late stage. At the end of the hearing we announced our decision to refuse the application, and undertook to give our reasons when judgment was handed down. After the hearing, on 19 April 2018, Mr Young sent an e-mail to the court, to which a signed unilateral undertaking was attached. No formal application to adduce that evidence was made at that stage, but Ms Sargent made it clear that any such C application would be opposed. Nevertheless, on 22 May 2018, such an application was made. I would also reject this even more belated attempt to bring new evidence before the court, and for essentially the same reasons as I would give for refusing the application that was made on the eve of the hearing. The reasons can be shortly stated. They rest on the familiar principles in *Ladd v Marshall* [1954] 1 WLR 1489, *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 and *E v Secretary of State for* D *the Home Department* [2004] QB 1044. As Hale LJ said in *Bubb's* case, at p 2324, parties "should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed". That principle applies as strongly in challenges to planning decisions as it does in other proceedings. Here, in my view, the application to adduce new evidence came far too late, and with no proper E explanation or excuse. No such application was made in the court below. The unilateral undertaking, if it was to be relied upon, could and should have been presented to the court at that stage. Even then, however, the new evidence would have made no difference to the outcome, for the Secretary of State's decision would have had to be quashed in any event—because Baroness Cumberlege's challenge succeeded on the ground relating to inconsistency. That will be so in this court too if the appeal should fail, as F I think it must, on that distinct and separate issue.

Conclusion

72 For the reasons I have given, I would dismiss this appeal.

MOYLAN LJ

G 73 I agree.

PETER JACKSON LJ

74 I also agree.

Appeal dismissed.

H SCOTT MCGLINCHEY, Barrister

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Judgments

R (on the application of Davison) v Elmbridge Borough Council

[2019] EWHC 1409 (Admin)

Queen's Bench Division, Administrative Court (London)

Thornton J

6 June 2019

Judgment

Mr Andrew Parkinson (instructed by **Richard Buxton Solicitors**) for the **Claimant**

Mr Zack Simons (instructed by **Head of Legal Services Elmbridge Borough Council**) for the **Defendant**

- -

Judgment

The Hon. Mrs Justice Thornton :

Introduction

1. The Claimant seeks to quash the decision of Elmbridge Borough Council ("the Council"), dated 26 April 2017, to grant planning permission for a new football and athletic Stadium and associated development, located in the metropolitan Green Belt at Walton on Thames in Surrey. The development is now constructed and has been operational since 14 September 2017.

2. This is the second round of litigation in respect of the project. In January 2017 Mr Justice Supperstone quashed an earlier planning permission for the development ((R(Boot) v Elmbridge Borough Council [2017] EWHC 12 (Admin)), on grounds that the Council erred in its interpretation of paragraph 89 of the National Planning Policy Framework (NPPF) in finding that the sports facility was approved development despite it causing harm to the openness and purpose of the Green Belt.

3. There is one ground of challenge before this Court. The Claimant contends that the Council contravened the principle of consistency in decision-making in departing, without reasons, from its previous finding that the proposed development would have an adverse impact on the openness of the

Green Belt to deciding that it would not have an adverse effect. The Council contends that it was not required to consider its previous planning judgment, because the decision in question had been quashed by the Court in R(Boot) v Elmbridge BC.

4. Accordingly, the issue for this Court is the application of the principle of consistency of decision making in planning law to a second round of decision making following the quashing of a previous decision.

Background Facts

5. The site in question is 14.2 ha. It is owned by the Council and is located within the metropolitan Green Belt. As well as being the site owner, the Council is the local planning authority.

6. The Claimant, Mr Davison, is the joint owner of the Weir Hotel and Restaurant which is located adjacent to the site.

7. On 5 March 2015, the Council applied for planning permission for a new football and athletics stadium with associated development. The development was considered likely to have significant effects on the environment and was therefore subject to the legal regime for assessing the environmental impacts of development (set out then in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (2011/1824) ("the EIA Regulations").

8. On 4 June 2015, the planning officer published his report on the application ("OR1").

9. The Council's Planning Committee resolved to grant planning permission on 14 December 2015. The planning permission was issued on 26 January 2016 ("Permission 1"). Pursuant to Regulation 24 of the EIA Regulations the Council published its reasons for deciding to grant permission.

10. On 8 March 2016 a local resident, Miss Amanda Boot applied to judicially review the 2016 permission.

11. On 14 October 2016, the Council submitted a further planning application to develop the site for a football and athletics stadium. It is common ground that the differences between the two schemes are minor.

12. On 11 January 2017 the planning officer published his report on the second planning application ("OR2").

13. On 16 January 2017, the High Court quashed Permission 1 (R(Boot) v Elmbridge Borough Council [2017] EWHC 12).

14. The day after, on 17 January 2017, the Council's planning committee met to determine the second planning application. Members were provided with an update report from the Planning Officer addressing the implications of the Court's judgment. The Committee resolved to grant permission. The planning permission was issued on 26 April 2017 ("Permission 2").

15. Proceedings were issued on behalf of the Claimant and permission to apply for judicial review was granted on 8 September 2017.

The 2015 Planning Officer's report (Permission 1) – 4 June 2015

16. The Planning Officer's report, dated 4 June 2015, outlines the proposal as comprising a new football and athletic Stadium with associated development. The proposed pavilion will be in the middle of the site and will be 56 m in length and 29 m in width with a height of 8.7 m. It will be 2 stories high. The pavilion will have raked seating on 2 sides and comprise 636 seats with half facing the athletics track and half facing the main football pitch.

17. The impact of the development on the surrounding Green Belt was considered at paragraphs 80 to 95 of the report. In particular, paragraphs 90 to 95 address the impact of the pavilion on the openness of the Green Belt as follows:

> "*90 the physical size of the proposed pavilion compared to the existing buildings means that it would have a greater impact on the openness of the greenbelt compared to the existing buildings. While it may be appropriate development an assessment must be made in terms of whether the proposal preserves the openness of the Belt. The proposed landscaping in the amended scheme involves the creation of a series of landforms around the perimeter of the site to enhance the character of the informal open space and will assist in screening activity within the site from certain viewpoints. Whilst there would be a larger area of formal enclosed sports facilities it is not considered that the impact on the openness of the Green Belt would be significant.*
>
> *91 the existing buildings … are of poor quality and are no longer considered to be fit for purpose. All are close to the northern boundary, approximately 33-50m from the River Thames…*
>
> *The buildings, including those removed, had a combined footprint of 785sqm, volume of 2100m³ an average height of approximately 2.7 m. The proposed pavilion has a gross external area, excluding seating, of 1674sqm and will be 56m in length and 29m in width with a height of 8.7m. However, it will be located within the centre of the site. In the amended scheme the landscape buffer has been increased in width to move the pitches and athletics ground further from the river.*
>
> …
>
> *94 The proposed pavilion is significantly smaller in scale than the outline permission has been granted under 2012/1185 and therefore it is considered that the proposal would have less impact on the openness of the Green Belt than the previous.*

95 Taking Green Belt policy as a whole the proposals comprise development which is appropriate within the Green Belt. There will be limited adverse impact on landscape and visual amenity and openness of the Green Belt, however there will also be significant benefits in terms of facilitating the beneficial use of land within the Green Belt by providing significant opportunities for public access and outdoor sport and recreation by improving the damage land."

The EIA Statement of Reasons for granting permission ("Permission 1") – undated but early 2016

18. The statement of reasons required pursuant to the EIA regime provides as follows:

"*The building comprise development which is appropriate within the Green Belt in line with para. 89 and 90 the NPPF…. The function of the pavilion will be ancillary and appropriate to the use of the site football and athletics. There will be a limited adverse impact on landscape and visual amenity and openness of the Green Belt, however there will also be significant benefits in terms of facilitating the beneficial use of land within the Green Belt by providing significant opportunities for public access and outdoor sport and recreation by improving damage land which supported by para. 81 of the NPPF.*

…

It is concluded that the proposal represents appropriate development within the Green Belt the proposal is not considered to have a significant adverse impact on the openness of the Green Belt or the amenity of nearby properties."

The 2017 Planning Officer's report (Permission 2) – 12 January 2017

19. The report, dated 12 January 2017, compiled by the planning officer recommends the grant of planning permission. It acknowledges the ongoing judicial review challenge to the earlier planning permission.

20. Paragraphs 86 – 113 consider whether the proposed development would represent inappropriate development in the Green Belt under the NPPF. The following key paragraphs record the Officer's conclusions on the impact on green belt openness:

"*105 The physical size of the proposed pavilion compared to the previous buildings mean that its size, height, bulk and mass is greater than the previous buildings. The buildings, including those removed had a combined footprint 785sqm, volume of 2100m³ and average height of approximately 2.7m. The proposed pavilion has a gross external area, excluding seating of 1674sqm and will be 56m in length and 29m in width with a height of 8.7m. The site of siting of the pavilion away from the river reduces the prominence of the main built development on the site. It would be located within the centre of the site whereas the previous buildings were near the north-western boundary visible from the road*

and the River Thames towpath. The purpose of the building is clearly ancillary to outdoor sport and therefore the building would be associated with the outdoor use. On balance, it is considered that the pavilion would preserve the openness of the Green Belt.

106 The proposed landscaping involves the creation of a series of landforms around the perimeter of such a site to enhance the character of the informal open space will assist in screening activity within the site from certain viewpoints. The proposal would result in the replacement of a slightly undulating landscape with a flatter landscape which would have landscape bunds and additional planting along the north-western boundary. Whilst there would be a larger area of formal enclosed sports facilities, and would limit views across the site, it is considered that the landscaping would preserve the openness of the Green Belt.

…

108 The two main football pitches and the athletics track would be artificial surfaces and are considered to preserve the openness the Green Belt.

109 In terms of any other external facilities, there would be an increase in the number and height of floodlit floodlight columns compared to the previous football club. However, due to their slender nature, it is considered that the floodlights would preserve the openness of the Green Belt. It is noted that the Walton Casuals site had 8 flood lights which were closer to the north west boundary from the proposed athletics floodlights.

110 The proposed car park and associated car parking access road lighting would also preserve the openness of the Green Belt.

111 On the basis of its scale and development footprint, whilst taking account of the previous development on the site in the context of neighbouring buildings, the proposed development is considered to preserve the openness of the Green Belt.

112 If members which take the view that the built development as part of the proposal are not appropriate facilities for outdoor sports and outdoor recreation, that it conflicts with any of the 5 purposes of including land within the greenbelt, it does not minimise the impact on the greenbelt under the policy DM 17 or it fails to preserve the openness of the greenbelt, then the proposal constitutes inappropriate development within the greenbelt."

<u>The judgment in R(Boot) v Elmbridge Borough Council (Permission 1) – 16 January 2017</u>

21. In his judgment quashing Permission 1, Mr Justice Supperstone held that the Council had erred in its interpretation of paragraph 89 of the NPPF by finding that the sports facility was appropriate development in the Green Belt despite also finding that it would have an adverse impact on the openness of the Green Belt:

"*25. Mr Parkinson contends that the question of law raised by the Claimant's first ground of challenge is whether a new sports facility can be appropriate development even if it causes harm to the openness and purposes of the Green Belt.*

26. He suggests this is because the Defendant found that the new stadium would cause harm to the openness and purposes of the Green Belt (see OR95 and 177, and the Statement of Reasons), but (despite this) found it was appropriate development and complied with paragraph 89 of the NPPF.

Mr Parkinson submits that the Defendant's interpretation of the policy is wrong. He contends that if a new sports facility causes harm to the openness of the Green Belt (even limited harm) it is not appropriate development for four main reasons:…

39. Mr Parkinson submits that West Lancashire establishes that if a proposal has an adverse impact on openness, the "inevitable conclusion" (see para 22 of the judgment) is that it does not comply with a policy that requires openness to be maintained. A decision maker does not have "any latitude" to find otherwise, based on the extent of the impact. In the present case the Defendant concluded that there was an adverse impact on openness, but nevertheless granted permission without giving consideration to whether under paras 87 and 88 of the NPPF there were very special circumstances that would justify it.

40. I accept Mr Parkinson's submissions. In my judgment the Defendant erred in its interpretation of paragraph 89 of the NPPF."

22. The Judge made an order quashing the planning permission.

The Planning Officer's update report following the Court's judgment (Permission 2) – 17 January 2017

23. The officer's update to the planning committee on the Court's judgment stated as follows:

"*The court found that the local planning authority had erred in law in advising the previous proposal had limited harm on the openness of the Green Belt but still preserved the openness of the greenbelt. The court concluded that it is not possible to have limited harm to the Green Belt reserve openness when para.89 of the NPPF is considered.*

…

The report relating to the current application concludes that the proposal complies with para.89 of the NPPF…

The judgement is a material consideration to the current application. The decision is based on the detailed drafting of the officer report relating to consideration of the Green Belt. The

current planning application requires consideration on its own merits and there are a number of changes to the scheme, as explained within the officer report. The officer report has given extended consideration to para.89 of the NPPF and the issue of preserving the openness the Green Belt."

The Minutes of the Planning Committee Meeting (Permission 2)

24. The Minutes provide as follows:

"*Prior to the introduction of the application by the Planning Officer, the Chairman invited the Law Practice Manager to provide some guidance to the Committee on their role and to advise on the outcome of the Judicial Proceedings that had been delivered on 16 January 2017….*

The Law Practice Manager advised that the role of Members of the Planning Committee that evening was to consider the planning merits of the Sports Hub application before them. The application was a new application and therefore should be considered on its own merits.

It was acknowledged that the scheme itself is very similar to one previously agreed by the Planning Committee, however, there were some minor variations to layout, lighting columns etc., and the Law Practice Manager advised that these matters have been addressed in the Planning Officer's report.

…

The Law Practice Manager advised that members were aware that the previous permission for the site had been quashed on 16 January 2017, following a Judicial Review. Members of the Committee, including those attending as temporary substitutes had been sent copies of the High Court decision and had also been provided with a short briefing note on the judgement in the context of the application before them that evening. The decision had been on a narrow point of policy interpretation and did not go into the merits of the application.

…

Judgement has been handed down on Monday 16 January 2017 and quashed the previous planning permission (2015/0949) relating to the Elmbridge Sports Hub, Waterside Drive. That application was the one under which works are been undertaken to date.

The Judge in the High Court found that the Local Planning Authority had erred in law in the test applied in the Officer's report, and stating the previous proposal had limited harm on the openness of the Green Belt but still preserved the openness of the Green Belt. The Court concluded that it was not possible to have limited harm to the Green Belt preserve openness, and therefore it was contrary to paragraph 89 of the National Planning Policy Framework (NPPF), so the test had not been properly applied.

…

Members were advised that the judgement was a material consideration to the current application. The committee should have regard to the planning application before them that evening, on its own merits, all of which was explained in the Officer's report on what the Officer had done in his report that evening was to give extended consideration to paragraph 89 of the NPPF and the issue of preserving openness of the Green Belt.

…

Members debated the application before them and concluded that, for the reasons set out in the Planning Officer's detailed report, as updated, the proposed development was in accordance with the Development Plan when considered as a whole. The Committee were of the view that the proposed development was not inappropriate development in the Green Belt and that the proposal was compliant with NPPF policy in relation to the Green Belt."

The policy framework

25. Paragraphs 79 - 92 of the NPPF set out current national policy in relation to the protection of the Green Belt. The Government attaches great importance to Green Belts. The essential characteristics of greenbelt are their openness and permanence. The fundamental aim of greenbelt policies is to prevent urban sprawl by keeping land permanently open. Part of their purpose is to check the unrestricted sprawl of large built-up areas and to assist in safeguarding the countryside from encroachment (paragraphs 79-80).

26. The effect of paragraphs 87, 88 and 90 of the NPPF, when read together, is that all development in the Green Belt is inappropriate unless it is either development falling within one or more of the categories set out in paragraph 90 of the NPPF or is the construction of a new building or buildings that comes or potentially comes within one of the exceptions referred to in paragraph 89 (Fordent Holdings v Secretary of State for Communities and Local Government [2013] EWHC 2844 at para 19).

27. The exceptions in paragraph 89 include the exception relevant to the proposed development, namely:

"*Provision of appropriate facilities for outdoor sport, outdoor recreation of the cemeteries as long as it preserves the openness of the greenbelt does not conflict with the purposes of including land within it.*"

Submissions on behalf of the Claimant

28. On behalf of the Claimant, Mr Parkinson submits that the Council made two inconsistent planning judgments in relatively short succession as to the impact of the proposed development on the openness of the Green Belt, in circumstances where none of the surrounding circumstances or policy framework had changed. The Council granted Permission 1 on the basis of a planning judgment that the proposal would have an adverse impact on greenbelt openness. It granted Permission 2 on the basis of no such impact. The difference in view was not referred to, or explained, in Permission 2. This is a stark example of inconsistency in planning decision making. The principle of consistency applies despite the fact that Permission 1 was quashed. The reasoning in the EIA Statement and the Officer's report remain in existence. Moreover, the judgment of Supperstone J leaves untouched the Council's planning judgment about Green belt openness which was capable in law of being a material consideration when deciding Permission 2. There is no general rule that a previously quashed decision must be taken into account. The question is fact and circumstance specific. However, the circumstances of this case made it unreasonable for the Council not to have considered its previous assessment. The development was the same, as was the Planning Officer. None of the surrounding circumstances or policy had changed. The difference in judgment was stark and unexplained. The site is sensitive. The proposed development is EIA development in the Green Belt. The judgment in R(Boot) made it clear that the Court had not interfered with the Council's previous planning judgment.

Submissions on behalf of the Defendant

29. On behalf of Elmbridge Borough Council, Mr Simons accepted that the principle of consistency applied to local authority decision making. The EIA statement of reasons and the officer's report for Permission 1, which detail the previous planning judgment continue to exist in law and were capable of being a material consideration in the decision making for Permission 2. However, Permission 1 had been quashed and the weight to be given to the underlying reasoning was a matter of weight for the Council. The Council were entitled to give it no weight given the decision had been quashed by the Court. A decision of some kind is still necessary for the consistency principle to apply. It was rational and sensible for the Council not to start examining the reasoning for its earlier decision. The application was a fresh decision which was considered by the Committee on its own merits. The Planning Officer's report on Permission 2 considered the impact on the green belt at greater length than the report on Permission 1. The reasoning for Permission 2 was sound and had not been challenged save in respect of the consistency principle. Councillors would face practical difficulties trying to identify which parts of Permission 1 remained and which had been quashed.

Analysis

The legal framework

30. In determining any application for planning permission, planning authorities must have regard to 'the provisions of the development plan so far as material to the application and to 'other material considerations' (section 70(2) and 70(1) of the Town and Country Planning Act 1990). The "determination must be made in accordance with the development plan unless material considerations indicate otherwise" (section 38(6) of the Planning and Compulsory Purchase Act 2004).

31. It is for the courts to determine whether or not a consideration is relevant such that it becomes a

material consideration. But it is for the decision-maker to attribute to a relevant consideration such weight as s/he thinks fit and the courts will not interfere unless the judgment is irrational (Tesco Stores Ltd v Secretary of State [1995] 2 All ER 636).

32. The general principle is that any consideration which relates to the use and development of land is capable of being a planning consideration, but "whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances" (Stringer v Ministry of Housing and Local Government [1971] 1 All ER 65,68 LGR 788, [1970] 1 WLR 1281, 1294).

The principle of consistency

33. When an administrative discretion is vested in a public authority that falls to be exercised on a potentially indefinite number of occasions, the law requires steps be taken to achieve reasonable consistency and avoid arbitrariness in its exercise (R(Lumba) v Secretary of State for the Home Department [2012] 1 AC 245 (at [26] & [34]).

34. Consistency in decision making is a well established principle in planning law. The classic statement of the principle is set out by the Court of Appeal in North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P&CR 137:

"*In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest, and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.*

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way, am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

35. In Dunster Properties Ltd v the First Secretary of State & Anr [2007] EWCA Civ 236, Lord Justice Lloyd explained the rationale for the principle:

"***[22]*** *It seems to me that a factor which is relevant to the duty to give reasons in planning decisions is the point which emerges more clearly in cases such as Flannery than in the planning cases, that the requirement to give reasons concentrates the mind and if fulfilled is likely to lead to a more soundly based decision (see Henry LJ in Flannery at p 381)…*

[23] …it seems to me that by declining to comment, other than to refer to his own reasons already expressed, Mr Mead appears not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. Omission to deal with the conflicting decision, as in the North Wiltshire *case, might have been sufficient in itself. But Mr Mead's last sentence in para 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons.*"

36. A recent example of the application of the principle is the decision by the Court of Appeal in DLA Delivery Ltd v Baroness Cumberledge of Newark [2018] EWCA Civ 1305 (Lindblom LJ).

37. The cases of North Wiltshire, Dunster and Baroness Cumberledge were cases of inconsistency between decisions by planning inspectors. Mr Simons accepted however that the principle is capable of applying to local authority decision making. This was a sensible concession. In R(Thompson) and Oxford City Council [2014] EWCA Civ 94, Lloyd Jones LJ considered that the principles stated in Dunster are of general application and not limited to planning cases. The principle flows from the function of reasons as a safeguard of sound decision making. The case of R(Havard) v South Kesteven DC [2006] EWHC 1373 is an example of the application of the principle to decision making by a local planning authority decision making. In Baroness Cumberledge of Newick v Secretary of State, John Howell QC, sitting as a Deputy High Court Judge, considered that the public interest in securing reasonable consistency in the exercise of administrative discretions which may make it unreasonable for a decision maker not to take other decisions into account applies to all planning authorities. His analysis was approved by Lindblom LJ in the Court of Appeal.

38. The case law on consistency in decision-making must be seen in the broader context of the jurisprudence on challenges to the decision maker's reasons. The case of JJ Gallagher Ltd v Secretary of State [2002] EWHC 1812 suggests that the more stark the inconsistency, the more it behoves an explanation:

"*58….. In my judgment the need for an express explanation of an apparent inconsistency between the decision under consideration and an earlier decision will depend on the circumstances. If the explanation for the inconsistency is obvious, a formal statement of it will be unnecessary. Where the inconsistency is stark and fundamental, as it seems to me it is in the present case, it will in my judgment usually be insufficient to leave it to the reader to infer the explanation for the inconsistent decisions. The reason for this is that unless the decision-maker deals expressly with the earlier decision and gives reasons that are directed at explaining the apparent inconsistency, there is likely to be a doubt as to whether he has truly taken the earlier decision into account.*" (George Bartlett QC sitting as a deputy

High Court Judge)

Application of the principle

39. The consistency principle is given practical effect in planning decision making via the test of material considerations. There is no rigid rule that a decision maker must always treat a previous decision as a material consideration. Where the complaint is a failure to consider a previous decision, any such failure will make the decision unlawful if no reasonable decision maker would have failed to take it into account in the circumstances of the decision making. There is no exhaustive list of the matters in respect of which a previous decision may be relevant. That must inevitably depend on the circumstances. Whether a decision with which the decision-maker has not been supplied is one that no reasonable decision-maker would have failed to take into account will likewise depend on the circumstances. These may include whether the decision-maker was or ought to have been aware that such a decision may exist, the significance that any such decision might have in relation to the decision to be made and what steps may have been required to ascertain whether or not it did exist and to obtain it. (See John Howell QC in Baroness Cumberledge of Newick v Secretary of State [2017] EWHC 2057 approved by Lindblom LJ in the Court of Appeal in DLA Delivery Ltd v Baroness Cumberledge of Newark [2018] EWCA Civ 1305).

Application of the consistency principle in the context of a previously quashed decision

40. The application of the consistency principle to decision making following the quashing of a previous decision was the core legal dispute between the parties.

41. It was common ground that a quashed decision is incapable of having any legal effect on the rights or duties of the parties to the proceedings (Hoffman La Roche v Secretary of State for Trade and Industry [1975] AC 295):

"*It would however be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power …if the judgment of a Court…that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings.*" (Lord Diplock)

42. It was also common ground that where the Court quashes a planning permission, the decision maker must start the decision making again, with a clean sheet, having regard to the development plan and other material considerations, including material considerations which have emerged since the matter was originally considered (Kingswood District Council v Secretary of State for the Environment (1989) 57 P&CR 153 (Graham Eyre QC sitting as a Deputy High Court Judge)).

43. Mr Parkinson submitted that the principle of consistency in decision making still applies where a previous decision has been quashed and the previous decision may be a material consideration. This was particularly so in a case like the present where the EIA statement of reasons and the Officer's

Planning report remain in existence, despite the permission itself having been quashed.

44. In support of his contention that a quashed decision may be a material consideration in the fresh round of decision making, he relied on R (Fox Strategic Land and Property Ltd) v Secretary of State [2012] EWCA Civ 1198; Land and Development Ltd v First Secretary of State [2003] EWHC 2200; Vallis v Secretary of State [2012] EWHC 578 (Admin) and St Albans City and District Council v SS [2015] EWHC 655. Each case concerned two inconsistent decisions by inspector(s) where the first decision in time had been quashed save that, in the case of Fox where the first decision in time was under legal challenge at the time of the second decision.

45. In support of his contention that a quashed decision cannot be a material consideration Mr Simons relied on the first instance decisions of Arun District Council v Secretary of State [2013] EWHC 190, in which the Court (HHJ Seys-Llewellyn QC sitting as a Deputy High Court Judge) held that as a matter of law the first inspector's conclusion could not be a material consideration, following the principle in Hoffman La Roche that a quashed decision is of no legal effect. Mr Simons also relied on R (West Lancashire Borough Council) v Secretary of State [2017] EWHC 3451 which followed Arun.

46. Mr Simons contended that the principle of consistency did not arise where there was no previous decision in existence because it had been quashed. He relied in this respect on a passage in a judgment by Lindblom J (as he then was) in Benjamin Butterworth v Secretary of State [2015] EWHC (Admin) 108 at [40] in which the Judge commented that: "I should also add that I think Mr Westmoreland Smith's reliance on the decision in Arun is misplaced. As the judge in that case acknowledged, the circumstances there – an appeal decision quashed by the court and the appeal re-determined with a different result – are not analogous to cases in which the decision-maker is obliged to consider the principle of consistency (see paras 17 to 22 of the judgment)". Mr Simons used the passage to distinguish between 'previous quashed decisions' from 'previous, not quashed decisions'. The consistency principle applies to the latter but not the former. In this context Mr Simons submitted that this Court would be extending existing caselaw if the Court were to hold it necessary for a decision maker to consider a previously quashed decision.

Discussion

47. Starting from principle, before I turn to the caselaw, I find it difficult to accept Mr Simons' argument that the consistency principle applies only to a decision and not to its underlying reasoning. I do not see how the two can be as hermetically sealed as Mr Simons suggests. The cases of North Wilts and Dunster emphasise that the rationale for the principle is to 'concentrate the mind of the decision maker'; to 'force him/her to grasp the intellectual nettle' and to uphold 'public confidence in the planning system'. In (R(Thompson) and Oxford City Council [2014] EWCA Civ 94, Lloyd Jones LJ considered that the principle flows from the 'function of reasons as a safeguard of sound decision making'. Given the content and breadth of the rationale, I am of the view that the consistency principle is of broad application. It seems to me to be artificial to distinguish between the formal decision and its underlying reasoning in the way that Mr Simons seeks to do.

48. I accept, as was common ground, the principle established in Hoffman la Roche, that a quashed decision is incapable of having any legal effect on the rights and duties of the parties. However, that

case, about patented drugs, does not address the nature of the subsequent decision making in the particular context of planning law, which is the focus of the present case. In this regard, it was also common ground that where the Court quashes a planning permission, the decision maker must start the decision making afresh, with a clean sheet, having regard to the development plan and other material considerations (Kingswood District Council v Secretary of State for the Environment (1989) 57 P&CR 153). In this context, I accept that the Council is entitled to change its mind in its fresh decision making, subject to the constraints of consistency explored below.

49. It seems to me that the argument advanced by Mr Simons before this Court was essentially the same as that advanced on behalf of the Secretary of State in R(Fox Strategic Land and Property Ltd) v Secretary of State [2012] EWCA Civ 1198. The case concerned an Inspector's decision ('the Fox decision') in which the Inspector gave no weight to his previous and inconsistent decision in relation to a nearby site (the Richborough decision). The Richborough decision was under legal challenge but the challenge had not yet been determined at the time of the Fox decision:

"*15] On behalf of the Secretary of State Mr Warren submits that it was open to the Secretary of State to afford the* Richborough *decision no weight. It has throughout been accepted to be a material consideration when making the* Fox *decision. However, it was not a precedent in a legal sense, and whether to attach weight to it and, if so, the weight to be attached, was a decision for the decision-maker…*

[16] Moreover, submits Mr Warren, the Secretary of State was bound to consider that the challenge in the Richborough *decision might succeed, as in the event it did succeed by consent. While it had not been conceded at the time of the* Fox *decision the Secretary of State was entitled to take the prospect of it being quashed into account in deciding to attach no weight to it. The* Richborough *appeal decision was* sub judice *at the point of decision, he submits, though accepting that the technical term may not be entirely apt. It would not have been appropriate to apply that decision prior to a final determination of the challenge to its legality.*

…"

50. Pill LJ rejected the Secretary of State's argument:

"***[19]*** *I do not accept that proposition. Further analysis was required by the Secretary of State of the situation that had arisen before making his decision in the Fox appeal.*

…

[32] …. In my judgment it was not open to the Secretary of State to put aside the Richborough *decision when making the* Fox *decision. He could not put it aside on the ground that there was a High Court challenge, the challenge being made on quite different grounds.*

[33] *Mr Warren argues that, whatever the grounds, if the decision is*

quashed it is quashed, but that in my judgment is to take too simplistic a view of the situation. One has to look forward…..

[34] *There should have been an analysis of the relevance of the Richborough decision to the Fox decision and a consideration of what the implications of favourable findings in Richborough were for the Fox appeal. If the Secretary of State was minded to depart from the spatial findings in Richborough, at least an explanation was required of why he proposed to do so. Rather than provide that, he simply relied on the existence of the High Court challenge which, upon analysis, does not begin to deal with the key question of inconsistency and also does not provide a justification for failing to address the question of inconsistency.*

[35] *In my judgment the judge was correct to reach the conclusion he did on this issue. It was unlawful to ignore the implications of the Richborough decision when making the Fox decision. The inconsistencies against which the North Wiltshire principles guard were present in this case and have led to an unlawful decision by the Secretary of State which I too would quash.*"

51. Similarly, in Vallis v Secretary of State [2012] EWHC 578 (Admin) Mr Justice Coulson considered the position to be as follows:

"*26 On analysis, therefore, it seems to me that the relevant principles are these:*

a) The second inspector must consider carefully the reasons put forward by the first inspector.

b) The second inspector is not bound by the views of the first; he or she must exercise his own judgment.

c) If the second inspector reaches a different conclusion then, for consistency/public confidence reasons, he or she must explain why. Those reasons must satisfy the usual South Bucks test (see paragraph 23(c) above).

27. Ms Busch argued that, whilst these principles may not themselves be objectionable, she did not accept that they could apply to a case like this, where the first inspector's decision letter has been agreed to be unlawful. That is a reasonable point, but only to the extent that it relates to a matter connected with the unlawfulness of the first decision. In other words, if the first inspector decided a particular issue in such a way that his or her decision on that point was unlawful, the second inspector would be justified in dealing with that issue entirely afresh, without making any reference to the previous unlawful decision on that issue. If, on the other hand, the first inspector provided clear and cogent reasons for a conclusion on a specific issue, which explanation was nothing whatsoever to do with the subsequent unlawfulness of the decision, then the principles that I have outlined above must apply. In other words, the mere fact that the first inspector's decision was quashed as being unlawful should not, without more, render the whole decision irrelevant to the second inspector.'

52. As a decision of the Court of Appeal, Fox Strategic is binding on this Court unless it can be distinguished. Mr Simons sought to do so on the basis it concerned a decision under challenge which had not yet been quashed. I do not accept his distinction. In his judgment Pill LJ 'looked forward' to consider the implications of the first decision being quashed. Mr Simons suggested 'the looking forward' was a fact specific assessment. I do not accept that this detracts from Pill LJ's assessment that it is too simplistic to simply rely on a decision having been quashed. Further analysis of the decision is required.

53. The case of Arun District Council relied on by Mr Simons was a decision by His Honour Judge Seys-Llewellyn QC, sitting as a deputy High Court Judge. The judge rejected the argument that the first inspector's decision was a material consideration in light of the principle expressed in Hoffman La Roche that the decision on appeal had been quashed in its entirety. The Judge emphasised the potential confusion and complexity for Inspectors on remitted appeals if as a preliminary step they have to consider which part or parts of a quashed decision might or might not be capable of being revived as a material consideration in its own right.

54. In R(West Lancashire Borough Council) v Secretary of State [2017] EWHC 3451, the Court followed Arun and the Judge (HHJ Pelling QC) considered that the first instance case law was in a state of some confusion:

"*The approach adopted in Vallis is inconsistent with that which had been adopted in Kingswood, which was not cited and with Arun which does not appear to have been cited either Similarly, Fox v Secretary of State [2013] 1 P & CR 6 does not provide a definitive answer because the authorities on which the judge had taken a different view in Arun were not cited to the court and because the decision relied upon in Fox was under challenge but had not been quashed. Thus, this is an area of planning law which has been left in some confusion because of the conflicting approaches by first instance judges in many cases where those first instance judges had not had the or any of the relevant authorities cited to them*"

55. I am not convinced there is any inconsistency in the case law. It seems to me that the approach of the Court in the cases of Fox, Vallis, and Land and Development, relied on by Mr Parkinson, is no more than the application of the test for material considerations. All the decisions proceed on the assumption that the Hoffman La Roche and Kingswood principles apply. The first decision is of no legal effect and the second decision maker must start afresh and make a de novo decision. The question for the Court in each case is whether the previously quashed decision was a material consideration for the purposes of the second decision. This is a fact specific assessment. Unsurprisingly, the fact specific assessment varies. Viewed in this light, the case of West Lancashire is particular to its facts, a case in which the Interested Party developer attempted to rely upon a quashed decision in another appeal with different parties and different land to demonstrate that any error in the decision making before the Court would not have made a difference to the outcome. The Court in Arun and West Lancashire were persuaded of the complexity in discerning which elements of the quashed decision remained unaffected by the quashing. This is a factor to considered in the fact specific assessment as the Court in Fox Strategic and Vallis recognised. There may be times when the complexity entitles the decision maker to put aside the previous decision making, provided this is explained. In Arun, the Judge was influenced by the fact that the second Inspector's reasoning was comprehensive enough to make the reasons for the change in view apparent. Nonetheless; to the extent that Arun and West Lancashire are inconsistent with the Court of Appeal's decision in Fox Strategic, the latter is binding on this Court and makes clear that it is unlawful for the subsequent decision maker to ignore the implications of a previously quashed decision, without further

analysis.

Applicable principles

56. Accordingly, from the cases above, I draw the following principles which seem to me to be relevant to the present case:

i) The principle of consistency is not limited to the formal decision but extends to the reasoning underlying the decision (North Wilts v Secretary of State; Dunster; Baroness Cumberledge; Fox Stategic and Vallis).

ii) Of itself, a decision quashed by the Courts is incapable of having any legal effect on the rights and duties of the parties. In the planning context, the subsequent decision maker is not bound by the quashed decision and starts afresh taking into account the development plan and other material considerations (Hoffman La Roche; and Kingswood).

iii) However, the previously quashed decision is capable in law of being a material consideration. Whether, and to what extent, the decision maker is required to take the previously quashed decision into account is a matter for the judgment of the decision maker reviewable on public law grounds. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account (DLA Delivery Ltd v Baroness Cumberledge of Newark)

iv) The decision maker may need to analyse the basis on which the previous decision was quashed and take into account the parts of the decision unaffected by the quashing (Fox and Vallis). Difficulties with identifying what has been quashed and what has been left could be a reason not to take the previous decision into account (as with the cases of Arun and West Lancashire).

v) The greater the apparent inconsistency between the decisions the more the need for an explanation of the position (JJ Gallagher).

Application of the law to the facts

57. Applying the principles set out above to the facts of the present case:

58. The two planning applications for the sport stadium relate to the same site and the same development. They were identical in all material respects. The policy framework was the same.

59. The Council is awarding planning permission to itself in circumstances where its earlier decision making has been criticised by the Courts. Contrary to the submission of Mr Simons, it seems to me that the rationale for the consistency principle outlined in North Wilts, namely the need to secure public confidence in the planning system, is heightened in the present circumstances.

60. In deciding to grant Permission 1 in 2016, the Planning Committee decided that the proposed development would have a (limited) adverse impact on the openness of the Green Belt. This is set out in the EIA Statement of Reasons and the OR 2016, both of which remain in existence despite the permission itself having been quashed.

61. The day after Permission 1 was quashed the Committee made a fresh determination on a new planning application and came to a different decision, namely that there would be no adverse impact on the openness of the Green Belt.

62. The impact of the development on the openness of the Green Belt was a key planning judgment in the decision making. Under the policy framework, an adverse impact on openness makes the development inappropriate unless it satisfies the stringent exceptions in the 'very special circumstances' test.

63. The judgment in R(Boot) v Elmbridge County Council makes clear that Council's planning judgment on openness was unaffected by the Court's decision to quash Permission 1. This is entirely unsurprising, given the well established principle that planning judgments are for the planning authority not the Courts. There is therefore, it seems to me, no practical difficulty in ascertaining the implications of the Court's decision and I reject Mr Simons' submissions to the contrary.

64. The site and the promised development are sensitive. The development proposed was considered likely to have significant effects on the environment. It is to be located in the Green Belt.

65. Mr Simons submitted that the Council was entitled to give its previous decision no weight because it considered matters afresh the second time round and the analysis in OR2 is more comprehensive than in OR1. I have compared the most relevant paragraphs in both reports (paragraphs 90-91 in OR 1 and 105-106 in OR2).

66. I accept Mr Simons' submission that OR2 provides a more comprehensive assessment of Green Belt issues than OR1 does and that the Planning Committee considered the second application afresh and on its own merits. I also bear in mind that the adverse impact in OR1 was considered to be limited and the judgment in OR2 was reached 'on balance'. I do not therefore accept that the inconsistency was as stark as Mr Parkinson sought to portray. Looked at closely, the difference between OR1 and OR2 appears to be that in OR2 the officer gives greater weight to the benefits of moving the building away from the river to the centre of the site and on the beneficial effect of the landscaping. The minutes of the planning meeting indicate that the Planning Committee followed the Planning Officer's reasoning. I accept that the Council is entitled to come to a different view in its second round of decision making and that weight is a matter for the planning authority and not for this Court.

67. Nonetheless, I have come to the view that it was incumbent on the Officer and the Planning Committee to address the change in position on openness between the two reports. The applications were identical in all material respects and related to the same site. Public confidence in the Council's

decision making was important given the earlier judicial criticism and given the Council was awarding permission to itself. It was both unsurprising and clear from the judgment in Boot that Court's criticism of Permission 1 did not extend to the issue of Green Belt openness. The EIA Statement of Reasons and OR1 which contain the apparently inconsistent decision on openness remains in existence. In the absence of any explanation it is simply not possible to know whether the Planning Officer and especially the Planning Committee were even aware they had changed their position, let alone whether they had grasped the intellectual nettle of the difference in view. Nor was the explanation for the apparent inconsistency so obvious that a formal statement about it was unnecessary. The Court has been left to attempt to infer the reasons for the difference in view by a close scrutiny of both reports.

68. Accordingly, in this case I am of the view the Planning Committee unlawfully failed to take into account its previous decision that the proposal would have an adverse impact on Green Belt openness, when determining the second application for planning permission.

Relief

69. The effect of my conclusion is that the Council's failure to take account of its previous decision was unlawful. Even so, I have a discretion not to quash the decision. I am required to consider whether the decision would necessarily have been the same had the flaws in the decision not occurred (Simplex GE Holdings v Secretary of State (1989) 57 P&CR. Further, Section 31 of the Senior Courts Act 1981 provides that the Court must refuse to grant relief on an application for judicial review, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In effect, the court must still be satisfied on the balance of probabilities that it is highly likely that the permission would have been granted had the unlawful conduct found not occurred. The question is not whether it is highly likely that the judge hearing the case would have taken the same decision. The court is not required to treat itself as the decision maker and must act on the evidence it has or on reasonable inferences from it.

70. Mr Simons submits that the scheme and the site were already well known to Committee members. The officer's report on the second proposal was comprehensive. All that would have been required to avoid the present litigation was a sentence saying that the previous report had reached a different judgment and explaining why a different view had been taken.

71. In the absence of any explanation of the inconsistency, it is simply not possible to tell whether the Committee was even aware of its previous apparently inconsistent planning judgment or what view they would have taken of matters had they been aware. It may be that they would have followed the Officer's view of matters, which the Court has attempted to infer from a close reading of both reports. Equally, however, they may not have done and it is not for the Court to speculate. A judgment about openness on Green Belt is a planning judgment that Parliament has entrusted to the Committee, and not to the Court.

Conclusion

72. For the reasons given above, the local planning authority acted unlawfully in failing to take into account its previous decision that the development could have an adverse impact on Green Belt

openness, when determining the second planning application Pursuant to the exercise of the Court's direction, the decision is quashed.

Assuming, as I do, such an internal inquiry as is referred to in the foregoing paragraph and taking judicial notice, as I think I am entitled to, of the fact that important decisions in Government are rarely taken without time-consuming consultation and deliberation, I can see nothing in the lapse of 12 days to show that the identification of the disloyal servant who had made the unauthorised disclosure was not a matter of urgency.

The role of the Court of Appeal was not that of a school-mistress to scold the Crown for the poor quality of its evidence as if it were a piece of homework required to be done over again. A potential threat to national security was clearly revealed and, assuming that the gravity of the threat could be weighed at all, it was certainly not to be weighed by the scruple. Any threat to national security ought to be eliminated by the most effective and speediest means possible.

I would dismiss the appeal.

Appeal dismissed.
No order as to costs.

Solicitors: Lovell White & King; Treasury Solicitor.

C. T. B.

[HOUSE OF LORDS]

COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS . . . . . APPELLANTS

AND

MINISTER FOR THE CIVIL SERVICE . . . RESPONDENT

1984 Oct. 8, 9, 10, 11, 15, 16; Nov. 22 — Lord Fraser of Tullybelton, Lord Scarman, Lord Diplock, Lord Roskill and Lord Brightman

Crown—Minister, determination by—Whether subject to review by courts—Minister for Civil Service giving instruction that staff no longer to be permitted to belong to national trade unions—Instruction given without prior consultation with those affected—Whether reviewable—Whether decision-making process unfair—Whether justified on ground of national security

Judicial Review—Crown—Prerogative power—Minister for Civil Service issuing instruction under Order in Council—Whether open to review by courts

The main functions of Government Communications Headquarters ("GCHQ") were to ensure the security of military and official communications and to provide the Government with signals intelligence; they involved the handling of secret

A information vital to national security. Since 1947, staff employed at GCHQ had been permitted to belong to national trade unions, and most had done so. There was a well-established practice of consultation between the official and trade union sides about important alterations in the terms and conditions of service of the staff. On 22 December 1983, the Minister for the Civil Service gave an instruction, purportedly under article 4 of the Civil Service Order in Council 1982, for the immediate B variation of the terms and conditions of service of the staff with the effect that they would no longer be permitted to belong to national trade unions. There had been no consultation with the trade unions or with the staff at GCHQ prior to the issuing of that instruction. The applicants, a trade union and six individuals, sought judicial review of the minister's instruction on the ground that she had been under a duty to act fairly by consulting those C concerned before issuing it. In an affidavit, the Secretary to the Cabinet deposed to disruptive industrial action in support of national trade unions that had taken place at GCHQ as part of a national campaign by the unions designed to damage government agencies and that it had been considered that prior consultation about the minister's instruction would have involved a risk of precipitating further disruption and would moreover have indicated vulnerable areas of GCHQ's operations. D Glidewell J. granted the applicants a declaration that the instruction was invalid and of no effect. The Court of Appeal allowed an appeal by the minister.

On appeal by the applicants:—

Held, dismissing the appeal, (1) that executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from a common law, or E prerogative, rather than a statutory source, and a minister acting under a prerogative power might, depending on its subject matter, be under the same duty to act fairly as in the case of action under a statutory power (post, pp. 399A–E, 400C, 407A–F, 410C, 411A, F–H, 417G–H, 418C–D, 419B–C, 423G—424B).

Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864, D.C. applied.

F (2) That the applicants would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the minister issued her instruction of 22 December 1983, and, accordingly, the decision-making process would have been unfair by reason of her failure to consult them and would have been amenable to judicial review (post, pp. 401E–F, 407F–G, 412C–D, 419H—420B, 423G—424B).

G *O'Reilly v. Mackman* [1983] 2 A.C. 237, H.L.(E.) applied.

(3) That, however, it was for the executive and not the courts to decide whether, in any particular case, the requirements of national security outweighed those of fairness; and that the evidence established that the minister had considered, with reason, that prior consultation about her instruction would have involved a risk of precipitating disruption at GCHQ and H revealing vulnerable areas of operation, and, accordingly, she had shown that her decision had in fact been based on considerations of national security that outweighed the applicants' legitimate expectation of prior consultation (post, pp. 402B–C, 403D, 407F–G, 412H—413B, 420E–G, 423B–D, F, G—424B).

The Zamora [1916] 2 A.C. 77, P.C. and *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, H.L.(E.) applied. A

Quaere (*per* Lord Fraser of Tullybelton and Lord Brightman). Whether judicial review extends to a direct exercise of a prerogative power (post, pp. 398G–H, 423G—424B).

Decision of the Court of Appeal affirmed.

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

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

Attorney-General v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508, H.L.(E.)

Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629; [1983] 2 W.L.R. 735; [1983] 2 All E.R. 346, P.C.

Burmah Oil Co. Ltd. v. Lord Advocate, 1964 S.C. (H.L.) 117; [1965] A.C. 75; [1964] 2 W.L.R. 1231; [1964] 2 All E.R. 348, H.L.(Sc.)

Chandler v. Director of Public Prosecutions [1964] A.C. 763; [1962] 3 W.L.R. 694; [1962] 3 All E.R. 142, H.L.(E.) C

Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, H.L.(E.)

Commissioners of Crown Lands v. Page [1960] 2 Q.B. 274; [1960] 3 W.L.R. 446; [1960] 2 All E.R. 726, C.A.

Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.)

Findlay, In re [1985] A.C. 318; [1984] 3 W.L.R. 1159; [1984] 3 All E.R. 801, H.L.(E.) D

Griffin v. Lord Advocate, 1950 S.C. 448

Laker Airways Ltd. v. Department of Trade [1977] Q.B. 643; [1977] 2 W.L.R. 234; [1977] 2 All E.R. 182, C.A.

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)

Proclamations Case (1611) 12 Co.Rep. 74 E

Prohibitions del Roy (1608) 12 Co.Rep. 63

Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain [1979] Q.B. 425; [1979] 2 W.L.R. 42; [1979] 1 All E.R. 701, C.A.

Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864; [1967] 3 W.L.R. 348; [1967] 2 All E.R. 770, D.C.

Reg. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B. 299; [1972] 2 W.L.R. 1262; [1972] 2 All E.R. 589, C.A. F

Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball [1977] 1 W.L.R. 766; [1977] 3 All E.R. 452, D.C. and C.A.

Reg. v. Secretary of State for War [1891] 2 Q.B. 326, C.A.

Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149; [1969] 2 W.L.R. 337; [1969] 1 All E.R. 904, D.C. and C.A.

Secretary of State for Defence v. Guardian Newspapers Ltd. [1985] A.C. 339; [1984] 3 W.L.R. 986; [1984] 3 All E.R. 601, H.L.(E.) G

United Australia Ltd. v. Barclays Bank Ltd. [1941] A.C. 1; [1940] 4 All E.R. 20, H.L.(E.)

Zamora, The [1916] 2 A.C. 77, P.C.

The following additional cases were cited in argument:

Air Canada v. Secretary of State for Trade [1983] 2 A.C. 394; [1983] 2 W.L.R. 494; [1983] 1 All E.R. 910, H.L.(E.) H

Attorney-General for Canada v. Cain [1906] A.C. 542, P.C.

Blackburn v. Attorney-General [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380, C.A.

A *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090; [1979] 3 W.L.R. 722; [1979] 3 All E.R. 700, H.L.(E.)
Cheall v. Association of Professional Executive Clerical and Computer Staff [1983] Q.B. 126; [1982] 3 W.L.R. 685; [1982] I.C.R. 543; [1982] 3 All E.R. 855, C.A.; [1983] 2 A.C. 180; [1983] 2 W.L.R. 679; [1983] I.C.R. 398; [1983] 1 All E.R. 1130, H.L.(E.).
China Navigation Co. Ltd. v. Attorney-General [1932] 2 K.B. 197, C.A.
B *Church of Scientology Inc. v. Woodward* (1982) 43 A.L.R. 587
Cinnamond v. British Airports Authority [1980] 1 W.L.R. 582; [1980] 2 All E.R. 368, C.A.
Conway v. Rimmer [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.)
D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.)
de Freitas v. Benny [1976] A.C. 239; [1975] 3 W.L.R. 388, P.C.
C *Erebus Royal Commission, In re; Air New Zealand Ltd. v. Mahon (No. 2)* [1981] 1 N.Z.L.R. 618
Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)
H.T.V. Ltd. v. Price Commission [1976] I.C.R. 170, C.A.
Hanratty v. Lord Butler of Saffron Walden, The Times, 13 May 1971, C.A.
Kamrudin Pirbhai v. Secretary of State for Foreign and Commonwealth
D *Affairs* (unreported), 7 September 1984, Woolf J.
McInnes v. Onslow-Fane [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211
Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278; 1971 S.C. 85, H.L.(Sc.)
Port Louis Corporation v. Attorney-General of Mauritius [1965] A.C. 1111; [1965] 3 W.L.R. 67, P.C.
Reg. v. Criminal Injuries Compensation Board, Ex parte Ince [1973] 1
E W.L.R. 1334; [1973] 3 All E.R. 808, C.A.
Reg. v. Criminal Injuries Compensation Board, Ex parte Thompstone [1984] 1 W.L.R. 1234; [1984] 3 All E.R. 572, C.A.
Reg. v. Criminal Injuries Compensation Board, Ex parte Tong [1976] 1 W.L.R. 1237; [1977] 1 All E.R. 171, C.A.
Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council [1982] Q.B. 593; [1982] 2 W.L.R. 693, D.C.
F *Ridge v. Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Riordan v. War Office [1959] 1 W.L.R. 1046; [1959] 3 All E.R. 552
Royal Commission on Thomas Case, In re [1980] 1 N.Z.L.R. 602; [1982] 1 N.Z.L.R. 252
Salemi v. MacKellar (No. 2) (1977) 137 C.L.R. 396
Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.
G *Toohey, In re, Ex parte Northern Land Council* (1981) 38 A.L.R. 439
United Kingdom Association of Professional Engineers v. Advisory, Conciliation and Arbitration Service [1981] A.C. 424; [1980] 2 W.L.R. 254; [1980] 1 All E.R. 612, H.L.(E.)

APPEAL from the Court of Appeal.

H By notice of application for leave to apply for judicial review pursuant to R.S.C., Ord. 53, r. 3, dated 7 March 1984, as amended on 21 June 1984, the applicants, the Council of Civil Service Unions, Jack Hart, Ann Sarah Downey, Christopher Hugh Braunholz, Jeremy

Windust, David Francis McCaffrey and Dennis Mitchell, sought (1) a declaration that the certificate issued by the Secretary of State for the Foreign and Commonwealth Office, dated 25 January 1984, that employment in or under Government Communications Headquarters (GCHQ) was required to be excepted for the purpose of safeguarding national security, pursuant to section 121(4) of the Employment Protection Act 1975, was invalid by reason of the fact that it had been issued in breach of the duty of the Secretary of State to act fairly and accordingly to consult; (2) a declaration that the certificate issued by the Secretary of State for the Foreign and Commonwealth Office, dated 25 January 1984, that employment in or under GCHQ was required to be excepted for the purpose of safeguarding national security, pursuant to section 138(4) of the Employment Protection (Consolidation) Act 1978, was invalid by reason of the fact that it had been issued in breach of the duty of the Secretary of State to act fairly and accordingly to consult; (3) an order of certiorari to remove into the court and quash the instructions purportedly issued by the Minister for the Civil Service, and the altered conditions of those employed in or under GCHQ, set out in letters dated 25 January 1984, 7 February 1984 and 21 February 1984 and in General Notice 100/84; (4) a declaration that the notification to persons employed at GCHQ of changes in their conditions of service/contracts of service effected by the letter of 25 January 1984 from the Director of GCHQ to all the staff and the General Notice 100/84 of the same date was ineffective lawfully to vary the conditions of service/contracts of service of the said persons or any of them; (5) a declaration that the purported acceptance by divers persons employed at GCHQ of either option A or option B set out in the option form attached to the letter of 25 January 1984 from the Director of GCHQ to all members of staff was ineffective lawfully to vary the conditions of service/contracts of service of the said persons or any of them; (6) a declaration that any decision to dismiss or to transfer any person employed at GCHQ who refused to give up his or her membership of, or alternatively the right to belong to, a national trade union would, in so far as the reason for the decision to dismiss and/or transfer was the refusal, be void or alternatively be wrongful and in breach of the conditions of service/contracts of service, on the grounds: (a) the two certificates issued by the Secretary of State for Foreign and Commonwealth Affairs dated 25 January 1984 were invalid by reason of the fact that the Secretary of State had failed to comply with his duty in exercise of his powers under section 121(4) of the Act of 1975 and section 138(4) of the Act of 1978 to act fairly in that no consultation with the employees of GCHQ or their union representatives had taken place before the issue of the certificates; (b) on a true construction of article 4 of the Civil Service Order in Council 1982 the Minister for the Civil Service (i) was not entitled to issue instructions to prevent persons who wished to remain at GCHQ from remaining as members of or attaining the right to belong to national trade unions because such instructions would affect a fundamental right not falling within the meaning of "conditions of service" in article 4; alternatively (ii) no longer had any power to alter the conditions of service/contracts of service so as to prevent persons who wished to

A remain at GCHQ from remaining in or attaining the right to become members of national trade unions, the power in question having been superseded by section 5 of the Trade Dispute and Trade Union Act 1927 and not revived by repeal of the Act by the Trade Dispute and Trade Unions Act 1946; (c) in issuing the purported instructions the Minister for the Civil Service had erred in law in the following ways: (i) she had been under a duty to act fairly and therefore to consult the employees at B GCHQ before issuing any such instructions; no consultation had in fact taken place before the issue of the General Notice on 25 January 1984; (ii) she had misdirected herself by proceeding on the basis that the certificates under the Acts of 1975 and 1978 could be validly issued without any consultation and would be valid and effective when issued on 25 January 1984 whereas that had not been the case; (iii) she had C misconstrued the true nature of the international obligations of Her Majesty's Government contained in International Labour Organisation Convention No. 87; (iv) she had wrongly taken into account the need to bring employment at GCHQ into line with the employment of those engaged in other security and intelligence services, whereas those employed in other security and intelligence services did not have comparable duties and did not work in similar conditions; (v) she had D held that the issue of instructions informally under article 4 of the Order in Council of 1982 amounted to a prescription in law within the meaning of article 11(2) of the European Convention on Human Rights; a misdirection as to the true meaning of article 11(2) invalidated the relevant decision as a matter of English law if, as was apparent from the terms of a statement in writing made by the Foreign and Commonwealth E Office to the Select Committee on Employment, a consideration of the meaning of article 11(2) had formed an integral part of the decision-making process; alternatively, no reasonable minister could have formed the view that informal instructions amounted to prescription by law within the meaning of article 11(2); (vi) by failing to have any regard to relevant factors, namely: (a) the existence in the conditions of service/contracts of service of employees at GCHQ of a right to belong to a F national trade union and (b) the fact that she was obliged by the relevant conditions of service/contracts of service and/or by long standing industrial relations practice to consult about relevant changes in conditions of service; (d) no reasonable Minister for the Civil Service could have come to the conclusion that it was necessary to alter the conditions of service/contracts of service for the following reasons: G (i) the industrial action taken by certain employees at GCHQ in the period 1979–1981 had been insufficiently disruptive of operational work at GCHQ to prompt fears that national security would in the future be jeopardised; (ii) the delay of three years before any executive action by way of considering the alteration was such as to negative any suggestion that national security was being inadequately safeguarded without resort to the alteration of the conditions of service/contracts of service of H GCHQ employees; (iii) the official "avowal" in May 1983 that GCHQ was a part of the nation's security and intelligence services was insufficient reason for the delay in determining to alter the conditions of service/contracts of service since there had been no change in the

operational activities at GCHQ that required the alteration on 25 January 1984 when no exception had been considered necessary during the previous three years; moreover, by 1978 at the latest the intelligence services conducted at GCHQ had been given wide publicity; (e) (i) in a statement made in writing by the Foreign and Commonwealth Office to the Select Committee on Employment the legal requirements for a change in the conditions of service had been illustrated in the following terms: "Such regulations or instructions are legal instruments under the prerogative power and in the case of GCHQ the changes in the conditions of service have been made by instruction given by the Prime Minister under that power"; (ii) nothing amounting to a legal instrument under the prerogative power had been issued before 25 January 1984 and accordingly the letter of 25 January 1984 and the General Notice 100/84 were both invalid; (iii) on a true construction of article 4 of the Order in Council of 1982 "instructions" "providing for" "the conditions of service" of civil servants were specific instructions in writing setting out the relevant conditions of service; no such instructions had been given by the Minister for the Civil Service and accordingly the letter of 25 January 1984 and General Notice 100/84 were both invalid; (f) (i) the Minister for the Civil Service had no power lawfully to compel persons employed at GCHQ to give up membership of a national trade union or to deprive them of their right to join a national trade union since the existing conditions of service/contracts of service of such persons permitted such membership; any change in those conditions of service/contracts of service could be affected only by a lawful variation thereof; no such lawful variation had been achieved by the proposed unilateral variation since the Crown had no power, statutory, prerogative or otherwise, to vary conditions of service/contracts of service at will; (ii) furthermore, no purported acceptance of the new conditions of service/contracts of service, whether of option A or of option B set out in the option form attached to the letter of 25 January 1984 from the Director of GCHQ to all members of staff had affected such a lawful variation since: (1) no consideration had been given for the purported agreement to accept the new terms and (2) such acceptances as had been given had been given under duress, namely in relation to option A the unlawful threat by the Crown to transfer or dismiss persons refusing to accept the changes proposed in option A in breach of their conditions of service/contracts of service and in relation to option B the unlawful threat by the Crown to dismiss persons refusing to accept the changes proposed in option B in breach of their conditions of service/contracts of service; alternatively (iii) if, which was denied, the Minister for the Civil Service had power to vary the conditions of service/contracts of service at will, such power had been exercised contrary to law and in breach of the conditions of service/contracts of service in that it was a provision of the conditions of service/contracts of service that the said persons or their union representatives would be consulted before changes in the conditions of service/contracts of service were effected; no such consultation had taken place; (g) any decision to transfer and/or to dismiss any person employed at GCHQ by reason of his or her refusal to give up membership of, or the right to be a member of, a national trade union

A would be void and/or would be wrongful and in breach of his or her conditions of service/contract of service in that: (i) each person employed at GCHQ was given the right by his or her original conditions of service/contract of service to belong to the appropriate national trade union if he or she so wished; (ii) it was inconsistent with such a term for the Crown to subject such a person to any detriment by reason of such union membership; (iii) the transfer or alternatively dismissal of such a B person would constitute such a detriment.

On 8 March 1984 the Divisional Court (Glidewell J.) gave the applicants leave to apply for judicial review. At the hearing of the application, the applicants withdrew their application for relief in respect of the certificates under the Acts of 1975 and 1978 and indicated that they would be content with declaratory relief in lieu of an order of C certiorari to quash the instructions purportedly issued by the minister. Glidewell J., on 16 July 1984, declared that the instruction purportedly issued by the Minister for the Civil Service on 22 December 1983 that the terms and conditions of service of civil servants serving at GCHQ should be revised so as to exclude membership of any trade union other than a departmental staff association approved by the Director of GCHQ was invalid and of no effect.

D On 6 August 1984, the Court of Appeal (Lord Lane C.J., Watkins and May L.JJ.) allowed an appeal by the Minister for the Civil Service, giving the applicants leave to appeal to the House of Lords. They dismissed a cross-appeal by the applicants relating to costs.

The applicants appealed.

The facts are set out in the opinions of Lord Fraser of Tullybelton E and Lord Roskill.

Louis Blom-Cooper Q.C., Patrick Elias and *Richard Drabble* for the applicants. A "staff association" and a "trade union" are not necessarily the same thing: a staff association might not be affiliated to a national trade union. It *is* part of a national trade union, but may only recruit amongst the staff themselves.

Glidewell J.'s finding that General Notice 100/84 was a notice giving F information, not a set of regulations or instructions, is adopted: it is a correct analysis of the situation regarding the direction and the general notice. The Court of Appeal made no analysis.

Three points are made regarding the situation up to 25 January 1984. (1) As to the decision or direction made orally on 22 December 1983 to ban national trade unions and substitute departmental associations, there G was no other or further indication in that direction or in the confirming letter of 7 February 1984 written by Sir Robert Armstrong to the director of GCHQ. That is all the knowledge that anyone had. (2) On 25 January, a month later, the Secretary of State issued the two certificates. Because of the date, one assumes that that was consequential on the direction of 22 December, not the other way round. (3) The general notice of 25 January 1984 was not an instruction; the instruction H is and can only be the decision or direction of 22 December; it is that and that alone.

Assuming that there was a duty to act fairly, the refusal to enter on consultation has a bearing on that duty. There is a body of opinion that thought that the failure to consult was a breach of it.

Whether the respondent was in breach of any I.L.O. regulation is a matter that could have been relevant to the duty to act fairly. One of the main matters for consultation would have been for the staff to say to the Government that they were in breach of an I.L.O. regulation. That goes to show the value of consultation: to indicate to the Government what it should have in mind before making its decision.

The applicants' submissions, in skeleton form, are as follows. 1(*a*). The applicants' challenge to the oral direction of 22 December 1983 is directed at the exercise of a specific power vested in the respondent by article 4 of the Civil Service Order in Council 1982. The power is delegated by the Sovereign in legislation outwith Parliament to a Minister of the Crown, in contradistinction to a delegated power expressed in legislation by the Sovereign in Parliament. Each power is likewise judicially reviewable, according to established principles of administrative law. (*b*) The oral direction of 22 December 1983 does not qualify as an "instruction" within the meaning of article 4. (i) because the respondent has failed to adduce sufficient evidence of any "instruction"; and (ii) because the "instruction" did not sufficiently specify the conditions of service that were being altered. 2. The delegated power in article 4 is an emanation of the prerogative in the field of industrial relations between the Crown and Her Majesty's Home Civil Service, and as such is outwith any of the recognised categories of the prerogative power traditionally regarded as either beyond or only within limited judicial review in relation to either: (i) the substance of the exercise of such power or (ii) the manner in which procedurally it is exercised. 3. National security considerations are relevant both to the issue whether the power to ban trade union membership at GCHQ (an acknowledged part of the Home Civil Service) is justiciable and whether, and to what extent (if any), procedural obligations in the exercise of that power may be judicially enforceable. In both instances the courts will require the Crown to adduce evidence sufficient to justify any limitation on judicial review on the grounds of national security. 4. National security considerations did not in this case (based on the evidence adduced by the respondent before Glidewell J.) detract in any way from her obligation to act fairly in the exercise of the powers in article 4. Fairness demanded prior consultation in full (or at least in the limited way indicated by Glidewell J.) in relation to the banning of trade union membership for staff at GCHQ. As a corollary of that right being forfeited, the right to trade union recognition at GCHQ and the right of GCHQ staff to take industrial action were likewise forfeited, and as a consequence of banning trade union membership statutory rights accorded to staff at GCHQ were taken away by the Secretary of State issuing certificates under section 121(4) of the Employment Protection Act 1975 and section 138(4) of the Employment Protection (Consolidation) Act 1978. The duty to consult also arose by virtue of a reasonable expectation implied by the course of conduct over nearly 40 years and by contemporaneous events, namely, the promise by Sir Robert Armstrong that consultations would take place over the introduction of the polygraph at GCHQ. 5. Consultation is distinguishable from negotiation; it required no more than a statement of intent by the

A respondent to exercise the power in article 4 and provision for sufficient opportunity for the applicants to express their views or to point to problems or difficulties inherent in, or consequential on, the exercise of the power. Prior consultation would have given the applicants the opportunity to raise the following, among other, matters: (i) proposals for entering into a non-disruption agreement at GCHQ; (ii) representation to the effect that the Government would be in breach of I.L.O. B conventions on freedom of association, including the suggestion that an advisory opinion of the I.L.O. itself should be obtained; (iii) the establishment of a statutory trade union along the lines of the Police Federation.

Under 1: where the Crown's instructions to an individual minister or public body are set out in the form of precise (or defined) instructions, C and one individual minister or public body derives his or her authority from those instructions, the courts will keep the individual minister or public body within the terms of those instructions. (In this case, the Sovereign was giving instructions to one specific minister.) In so doing, the courts will construe the instructions and imply any duties, such as the duty to act fairly, that should be implied as a matter of ordinary principles of administrative law, including the duty to consult in D appropriate circumstances. (There are no circumstances in which there is not a duty to hear the other party.) In an exercise of power by a minister or public body, even when receiving instructions from the Sovereign, there is a duty to act fairly.

In general terms, all prerogative powers are reviewable. Some may not be; the nature of the prerogative determines whether they are or E not. Where the Sovereign has given instructions to a specific minister, the court will say that it will construe it as if it had been statutory. ("Any minister" would do, but it makes the point stronger if it is to a specific minister.) Something like the death penalty would be totally unreviewable in any circumstances.

As to whether orders in council are made under the prerogative and not under statute, see *Halsbury's Laws of England*, 4th ed., vol. 8 F (1974), "Constitutional Law," paras. 1087, 1088; *Reg. v. Secretary of State for War* [1891] 2 Q.B. 326 and *Griffin v. Lord Advocate*, 1950 S.C. 448. All that those two cases decide is that a retired army officer could obtain no remedy from the courts to compel the Secretary of State to carry out the terms of a royal warrant that provided for ex gratia payments, particularly where the Secretary of State was by the warrant G the sole interpreter and administrator of the scheme for ex gratia payments. They did not decide that there was no jurisdiction in the courts to control ministers of the Crown acting within the terms of the warrant: see *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 (see *per* Nigel Bridge, for the board, at p. 871D, etc.) In any event, it is no longer necessary to show that there is a legally enforceable right in order to control a minister's acts by way of H judicial review: *O'Reilly v. Mackman* [1983] 2 A.C. 237. Criminal Injuries Compensation Board cases show how this branch of the law has developed: see *Reg. v. Criminal Injuries Compensation Board, Ex parte Ince* [1973] 1 W.L.R. 1334, 1339 (Lord Denning M.R.); *Reg. v. Criminal*

Injuries Compensation Board, Ex parte Tong [1976] 1 W.L.R. 1237, 1242E (Lord Denning M.R.) and *Reg. v. Criminal Injuries Compensation Board, Ex parte Thompstone* [1984] 1 W.L.R. 1234. *Lain* has been followed in New Zealand: *In re Royal Commission on Thomas Case* [1980] 1 N.Z.L.R. 602.

The applicants make four submissions as to the reviewability of the prerogative. (1) The prerogative power to provide for conditions of service in the Civil Service has been reduced to legislative form by the Order in Council of 1982. (2) If the actions of the Minister are to be lawful actions, they must fall within the provisions of the Order in Council as properly construed. The terms of the Order in Council constitute the mandate given by the Sovereign to the Minister, and the Minister must act only within that mandate. (3) It is for the courts to control the actions of the Minister if those actions are taken outwith the terms of the mandate. (4) Accordingly the courts are free to construe the mandate and to decide whether in any particular situation the duty imposed by it is subject to an implied duty to act fairly, and in so doing they will apply the ordinary principles of administrative law. The position of the Minister administering this Order in Council is reviewable on the principles laid down in *Ex parte Lain* and the decisions following it. [Reference was made to Order in Council, 22 January 1920, art. 6 (the forerunner of art. 4 of the Order in Council of 1982), 7; Civil Service Order in Council 1956, art. 4, explanatory note (4); Civil Service Order in Council 1969, art. 5; Minister for the Civil Service Order 1968 (S.I. 1968 No. 1656); Ministers of the Crown (Transfer of Functions) Act 1946, s. 3 (6) and Ministers of the Crown Act 1964, Sch. 1, para. 5, etc.] The effect of those provisions is that first, the Minister for the Civil Service is recognised and given a separate legal status by a statutory instrument laid before Parliament. Secondly, the prerogative powers to control the Civil Service are transferred to the Minister for the Civil Service not by virtue of the prerogative but by statute: the Act and the statutory instrument made under it. Thirdly, the Minister (it appears) was created by the prerogative but selected by Parliament to perform the functions of controlling the Civil Service. These provisions recognise the Minister statutorily and give her a separate legal basis.

With regard to *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, there is an analogous situation in another branch of the law where the High Court has reviewed judicially a prerogative power on principles of administrative law: see *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766. *Ex parte Lain* is authority for reviewing the exercise of prerogative powers, or the powers exercised by a delegated body. [Reference was made to the Immigration Act 1971, s. 33 (5).] In *Hosenball*, the court was acting in judicial review of a non-statutory prerogative power. If the Home Secretary had acted unfairly, the court would have intervened and quashed his decision. The case also illustrates the court's approach to national security (and there the action was against the mandating, not the mandated, body). The case shows that once cannot just put up the flag of national security: the court is entitled to be supplied with sufficient material to enable it to say that the claim with regard to

A national security is justified. Then, it is a matter for the Secretary of State.

The applicants make two submissions based on *Ex parte Lain* and *Ex parte Hosenball*. (1) *Lain*, and the cases that followed it, established that the courts will keep a delegate within his mandate. Just as the courts will ensure that persons exercising statutory powers do not exceed their powers, so with non-statutory powers. The source of the power does not B matter. (2) It is conceded that the other cases are about judicial functions, but it is illogical to restrict judicial review of non-statutory powers purely to those that may be characterised as judicial in character.

Under 2, the applicants make four main submissions. (1) Prerogative powers (i.e. their exercise) are in general reviewable by the courts. (2) The earlier view that it is the source of the power that determines the C existence of the prerogative and the unreviewability of its exercise is breaking down and should be finally discarded by the House. The proper test for determining the reviewability of the exercise of prerogative powers is the nature or subject matter of the power in question and not its source, be the source the prerogative, other common law powers or statute: see *In re Toohey, Ex parte Northern Land Council* (1981) 38 A.L.R. 439. (3) Many of the old cases on the prerogative indicate that D even the traditional approach to prerogative powers of defence, etc., may in exceptional cases be subject to review: there is no statement excluding any kind of judicial review. In recent years the courts, especially the House of Lords, have been willing to review the exercise of such powers where the rights or interests of citizens have been directly affected, i.e. cases where public immunity has been claimed: E e.g. *Conway v. Rimmer* [1968] A.C. 910 and cases following down to *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394.

There is considerable doubt, even to this day, about precisely what "the prerogative" means. The favoured view is *Dicey's* (*Law of the Constitution*, 8th ed. (1915), p. 421), which effectively encompasses all non-statutory powers. The rival view is that of *Locke* (*Two Treatises of Government*, pp. 421-427). Cases where there has been judicial approval F of Dicey's view are *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, 526 (Lord Dunedin) and *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75 and see *de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), pp. 286-288. The only prerogative power properly in issue in the present case is the power to regulate the terms and conditions of employment of civil servants. That is prerogative G in the Dicey, not the Blackstone [*Commentaries on the Laws of England*, 15th ed. (1809)], sense.

The respondent's printed case carries perhaps a hint that her decision was taken in the exercise of some prerogative power related to the prerogative power to regulate the armed forces or foreign affairs. It comes close to saying that there is a prerogative power to act in the national interest. It is trite law that there is no prerogative power to act H simply because a minister considers that the interest of the state requires it.

Nothing in general is totally unreviewable, though this is subject to exceptions. Even the declaration of war, or the prerogative of mercy,

may be reviewable. The right questions to pose are: (i) is the prerogative power to regulate the terms and conditions of service of civil servants in principle reviewable by the courts? Yes. (ii) If so, do considerations of national security preclude review in the circumstances of this case?

The prerogative here is reflected in article 4 of the Order in Council. Even, however, if the power in article 4 had not been relied on but the matter had been treated as falling under "general prerogative," it would still be reviewable. *de Smith*, at p. 286, gives a good exposition of the modern view that one does not look at the source of the power but at its nature and subject matter; see also *In re Toohey*, 38 A.L.R. 439.

By way of examples: (i) the power to regulate the armed forces: see *China Navigation Co. Ltd. v. Attorney-General* [1932] 2 K.B. 197, 287. (ii) Foreign affairs, especially the treaty-making power: *Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037. This is wholly a matter of state; it does not affect the rights of citizens. (iii) The prerogative of mercy: *Hanratty v. Lord Butler of Saffron Walden,* The Times, 13 May 1971. See also *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 (see *de Smith*, p. 287); *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, where neither Lord Devlin nor Lord Reid contemplated the absolute exclusion of the courts; *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643; *Kamrudin Pirbhai v. Secretary of State for Foreign and Commonwealth Affairs* (unreported), 7 September 1984 and *The Zamora* [1916] 2 A.C 77, 106–107 (Lord Parker of Waddington) (this was taken out of context by Glidewell J. and the Court of Appeal).

Under 3, the exercise of discretion by the minister permits the minister to take matters of national security into account. Such questions are relevant to the exercise of the discretionary power under article 4 and are reviewable by the courts in two separate ways: (i) has the Crown, or the minister under the Order in Council, adduced evidence to show that national security considerations did in fact weigh with the minister when exercising the discretionary power? (ii) If there is such evidence adduced, was the exercise of discretion a proper one? (*The Zamora* is authority for this two-stage approach.) (ii) is really directed to procedure: has the proper procedure been gone through?

On (i), here there is no such evidence at all (see *The Zamora*, at p. 83 (Sir Frederick Smith A.-G. arguendo), etc.). That is qualified by the statement, at pp. 106–107, that "*as a rule*" the fact that the Crown states that it requires the vessel or goods precludes the court from considering whether it was required. It is qualified by the beginning of the paragraph; see also pp. 107–108. The mere uttering of the words "national security" is not absolutely conclusive: see *Chandler v. Director of Public Prosecutions* [1964] A.C. 763. Lord Devlin's speech shows that only as a general rule are the courts ousted from considering matters of national security. They will always require evidence to support the Crown's claim that a matter of national security is involved. [Reference was made to *Church of Scientology Inc. v. Woodward* (1982) 43 A.L.R. 587.] The public interest cases show that the courts will evaluate matters of national security and weigh them against private rights: *Conway v. Rimmer* [1968] A.C. 910; *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090 and *Air Canada v.*

A *Secretary of State for Trade* [1983] 2 A.C. 394. This line of cases demonstrates that it is the nature and subject matter of the power in question that determines whether the court will override any claim to public interest, whether it arises as a discretionary exercise of prerogative power, or of a statutory power, or as a statutory claim to immunity with regard to disclosure of documents. (There is now the approach of Parliament in section 10 of the Contempt of Court Act 1981, reflected in B *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766.)

If prior consultation involves a revelation of information directly affecting national security, the court might conclude that the procedural obligation might have to give way, but it is for the Crown to show that what on the face of it seems harmless would in fact be harmful (see *per* C Lord Pearce in *Conway v. Rimmer*, at p. 987D–E). For the respondent to have consulted prior to making this decision was a harmless duty to perform; the question is whether it would have been rendered harmful by claims of national security.

Under 4, in the exercise of any discretionary power, such as that under article 4 of the Order in Council, the Minister for the Civil Service is under a duty to act fairly. Wherever a minister exercises a D discretionary power that involves a right, perhaps a "fundamental" right, (here, the right was a right to membership of the trade union of the civil servant's choice), the law implies a duty of prior consultation save in circumstances of real urgency that would render consultation impracticable, such as might obtain in the operational sphere of GCHQ. The question here is what rights were affected by the oral direction of 22 E December 1983. It was not one right that was being taken away but a parcel of rights. Nor was it merely an alteration of a contractual term.

The right to belong to a trade union has been recognised as a common law right in dicta in two cases: *United Kingdom Association of Professional Engineers v. Advisory, Conciliation and Arbitration Service* [1981] A.C. 424; *Cheall v. Association of Professional Executive Clerical and Computer Staff* [1983] Q.B. 126, 136B; [1983] 2 A.C. 180, 190G F (Lord Diplock); see also *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520. Regarding the latter case, (i) forfeiture in this context does not have to be the withdrawal or loss of a legal right in the strict sense. (ii) Even if this is not a case of a forfeiture, it falls within Sir Robert Megarry V.-C.'s "intermediate category" (p. 1529) of a legitimate expectation that the right will not be withdrawn or not confirmed, which G is something akin to forfeiture. [Reference was made to *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149; *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629; *Secretary of State for Defence v. Guardian Newspapers Ltd.* [1985] A.C. 339; *H.T.V. Ltd. v. Price Commission* [1976] I.C.R. 170; *Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council* [1982] Q.B. 593 and *Port Louis Corporation v. Attorney-General of Mauritius* [1965] H A.C. 1111.]

The respondent in her printed case, para. 27 (i), says that it was considered that consultation would involve a real risk that it would occasion the very kind of disruption that was a threat to national

security and that it was intended to avoid and that, having regard to those factors, a reasonable minister could properly have taken the decision that she took without consultation. The answer to that is that the question that has to be asked is to what extent national security considerations did impinge on the respondent's duty to consult the employees at GCHQ before removing their right to belong to a trade union. It is clear that Glidewell J. had in the forefront of his mind the evidence given by Sir Robert Armstrong in paragraph 16 of his first affidavit (see post, pp. 403B–D, 422F–G). The idea that prior consultation could not take place because it was feared that any premature disclosure of the Government's intention would lead to the disruption of GCHQ, which in turn would put national security in peril, was not put before him. In the Court of Appeal, the applicants had no notice of it. It was then contended that the sole evidence for the point was in paragraph 16. It was said that that lent support to it. There was nothing else, nor was there any evidence to support it. (The question would then have been whether any reasonable minister could reasonably have come to that conclusion.) Put at its highest, paragraph 16 is ambiguous. Secondly, on the authorities it is for the Crown to produce evidence that the Government's fear was the reason for not consulting: that what is on its face harmless was in fact harmful. Paragraph 16 fails to meet that test. If that was the real reason for not consulting, why did the Crown not say so? In any event, it is not really a reason at all. The question here is not so much whether it is inconceivable that consultation might have led to disruption but whether there is any evidence that the theory of disruption was the reason for no prior consultation.

Robert Alexander Q.C. and *John Mummery* for the Minister for the Civil Service. As to the law with regard to the prerogative, the respondent's essential submission has always been that she was entitled to give this instruction, and to do so without consultation, in the interest of national security. Her action was not taken out of any desire to assert the general unreviewability of the prerogative, but the applicants' challenge to it necessarily involved inviting the court to review the way in which the prerogative was exercised. The applicants contend that the House should assert the right of the courts to depart from the traditional view that the way in which the prerogative was exercised is unreviewable.

There is material showing that the prerogative is in general unreviewable, and that casts considerable doubt on whether it is at all reviewable. Three questions arise: 1. Is the prerogative in general reviewable? 2. If it is, is it reviewable in the field of national security? 3. If it would otherwise be unreviewable, is the position different because it is exercised by someone to whom the power is delegated by order in council?

On 1, the broad point, it is accepted that the courts can inquire into the existence, scope and form of the prerogative itself. That is because the prerogative is part of the common law, and the court can determine what the common law is and what of necessity are its boundaries. The issue is whether it can review the way in which the prerogative is exercised. [Reference was made to *Halsbury's Laws of England*, 4th ed., vol. 1 (1973), "Administrative Law," para. 20, nn. 7, 8; paras. 46, 47;

A *Dicey, Law of the Constitution*, 8th ed., pp. 420, 422; *Blackstone, Commentaries on the Laws of England*, 15th ed., pp. 251-252; *Chitty's Prerogatives of the Crown* (1820), pp. 6-7; *Holdsworth, A History of English Law*, vol. X (1938), pp. 362, 366; *de Smith's Judicial Review of Administrative Action*, 4th ed., p. 137; *Wade, Administrative Law*, 5th ed. (1982), pp. 350-351; *Wade and Phillips, Constitutional and Administrative Law*, 9th ed. (1977), p. 241; *O. Hood Phillips'* B *Constitutional and Administrative Law*, 6th ed. (1978), p. 268 and *Heuston, Essays in Constitutional Law*, 2nd ed. (1964), pp. 62-63.] It would be strange if the prerogative were not reviewable on *Wednesbury* grounds [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223] but were reviewable on the ground of procedural defect.

C *In re Toohey, Ex parte Northern Land Council*, 38 A.L.R. 439 was concerned with whether an action lay against the Crown for non-performance of a power delegated to it by statute. Mason J. analysed the position with regard to the prerogative in order to say that an action did lie. He regarded the prerogative as something of a fiction, but there is nothing in his judgment to indicate that he could review the exercise of the prerogative. [Reference was made to *Laker Airways Ltd. v.* D *Department of Trade* [1977] Q.B. 643 and *Locke, Two Treatises of Government*, paras. 159-168.]

As to specific prerogatives (of mercy, etc.; there are numerous areas), where reviewability has been claimed, it has been rejected. There is no case where the manner of the exercise of the prerogative, or the way in which it has been exercised, has in fact been reviewed: see E *The Zamora* [1916] 2 A.C. 77, 106-107; *China Navigation Co. Ltd. v. Attorney-General* [1932] 2 K.B. 197; *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, where there is nothing in what Lord Reid said to cast doubt on the principle as to national security; *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766, which is a very strong case indicating the limitations that the court accepts regarding issues stated by the Crown to be issues of national F security and *Church of Scientology Inc. v. Woodward*, 43 A.L.R. 587. With regard to *Hanratty v. Lord Butler of Saffron Walden*, The Times, 13 May 1971, see *de Freitas v. Benny* [1976] A.C. 239; *Reg. v. Secretary of State for War* [1891] 2 Q.B. 326 and *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864. *In re Royal Commission on Thomas Case* [1980] 1 N.Z.L.R. 602; [1982] 1 N.Z.L.R. G 252 was a case where a commission had been set up with a quasi-judicial role; it was as much statutory as prerogative. That case does not help, nor does *In re Erebus Royal Commission; Air New Zealand Ltd. v. Mahon (No. 2)* [1981] 1 N.Z.L.R. 618.

As to the Crown privilege line of cases, e.g. *Conway v. Rimmer* [1968] A.C. 910, where the Crown, in claiming its privilege, is a litigant, that gives rise to the need to balance competing public interests. What is H there claimed is public interest immunity. That explains why the Crown can make the claim, but also why others can also make it (see e.g., *D. v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171). It is not special to the Crown: see *per* Lord Pearce in *Conway v.*

Rimmer, at p. 984c. (These cases are not dealing with the prerogative, but they are relevant because they take national security into account in relation to public interest immunity.) A

On 2, the narrow prerogative point (which is only relevant if the respondent is right with regard to general reviewability), see *Crais on Statute Law*, 7th ed. (1971), p. 289 and *Halsbury's Laws of England*, 4th ed., vol. 6 (1974), para. 1040. There is no case to suggest that powers conferred by Order in Council are any narrower or more reviewable than those that are the pure prerogative of the Sovereign. *Attorney-General for Canada v. Cain* [1906] A.C. 542 shows that if all that the Sovereign does by Order in Council is to delegate power without any restriction on its exercise, the court should not read into it any restriction that it would not read into its personal exercise by the Sovereign. [Reference was made to *Halsbury's Laws of England*, 4th. ed., vol. 6, para. 1037.] B C

To summarise the repondent's submissions on the prerogative: 1. It is doubtful whether the courts can examine the way in which the prerogative is exercised. Traditionally, the Sovereign or her minister has been, and remains, accountable to Parliament for such exercise. 2. Undoubtedly, there are certain areas in which the exercise of the prerogative is not reviewable, e.g. the control and disposition of the armed forces, treaty-making and the conduct of foreign affairs and national security. Therefore, where, as in the present case, the substantive decision is accepted to have been taken for national security purposes, the court will not review the decision-making process. 3. The position is not altered because the minister giving an instruction is exercising her power under an Order in Council. 4. The authorities read show that the courts will not go behind the evidence given by or on behalf of the minister that her decision was dictated by considerations of national security. [Reference was made to *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455; *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629; *Salemi v. MacKellar (No. 2)* (1977) 137 C.L.R. 396; *Riordan v. War Office* [1959] 1 W.L.R. 1046; *Ridge v. Baldwin* [1964] A.C. 40, 65 (Lord Reid) and *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 172 (Widgery L.J. echoing Lord Reid in *Ridge v. Baldwin*).] What Devlin L.J. said in *Commissioners of Crown Lands v. Page* [1960] 2 Q.B. 274, 291 must apply to any legitimate expectation that gives rights in public law, so that one should not apply a doctrine of legitimate expectation that conflicts with this well-known principle. In considering whether there is a legitimate expectation, the special position of the Crown and the fact that it has a public duty to perform are of considerable importance. Lord Reid's indication in *Ridge v. Baldwin* is that the person has no right to be heard. That is applicable here to the question whether there was a duty to consult. D E F G

As to the factual situation with regard to legitimate expectation, 1. The general nature of Crown employment does not create or conduce to such an expectation (i.e. that it will never exercise the rights that it undoubtedly possesses) but points the other way. 2. It is accepted that the absence of a contract in private law between the employer and the H

A employee in no way bars a remedy in public law if the legitimate expectation that public law recognises can be established, but the presence of a contract in private law, or a relationship akin to contract, may by its terms contradict the suggested legitimate expectation, in which case it may be difficult to assert a legitimate expectation in public law without eroding the agreement in private law between the parties. 3. In the case of a Crown employee, there can be no legitimate expectation B that the Government will not act contrary to past expectations where they perceive it to be their national duty to do so, or where to act in accordance with the expectation would be contrary to their perception of their duty in the national interest. This applies not only to the national security field but also to, e.g., financial stringency, or fiscal emergency. 4. See paragraph 27 (i) of the respondent's printed case (post, pp. 401H— C 402A). The respondent could reasonably have taken the view that consultation would produce disruption. 5. In the view of the Government, the exclusion of union membership for staff at GCHQ was the only satisfactory solution to problems caused by industrial action at GCHQ. There was no prospect that consultation could have achieved anything useful (this is "the futility point"), and the applicants were not therefore prejudiced by the absence of consultation. There is no breach of the D rules of natural justice where no prejudice has been suffered: *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582, 593 and *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1582, 1595 and 1600, e.g. where the person not consulted or offered a hearing is not prejudiced because nothing that would have been said would have made any difference to the decision.

E The instruction of 22 December 1983 was not an instruction within the terms of the Order in Council.

As to whether it would be right to make a declaration in the exercise of the court's discretion, it should not make an order if it considers it not in the public interest to do so. It should say that there was a defect in procedure but make no order.

Accordingly, in conclusion, (i) this decision is unreviewable; (ii) if it F is reviewable, the facts are such that the respondent could properly have concluded that it would be harmful to the national interest to consult because of the risk that such consultation might lead to disruption and expose the vulnerability of GCHQ, so that a reasonable minister who held that view was entitled (and perhaps it was indeed her duty) to make the decision without consultation.

G The respondent does not wish to address any submissions to the House with regard to the I.L.O. conventions.

[LORD FRASER OF TULLYBELTON. The applicants should concentrate their reply on (i) the difference between the respondent's "wider" and "narrower" grounds; (ii) whether there was evidence on which a reasonable minister could have decided as the respondent did that consultation would be contrary to national security.]

H *Blom-Cooper Q.C.* in reply. It is not so much a question of "wide" or "narrow" but of the different approach because of the Order in Council of 1982. It would have been a reasonable view that it was not necessary to ban trade unions. *Chief Constable of the North Wales Police*

v. Evans [1982] 1 W.L.R. 1155, 1160F-1161A (Lord Hailsham of St. Marylebone L.C.), 1174 (Lord Brightman) shows that the courts are concerned not with whether a correct decision was arrived at but with whether the correct procedure was followed. A

As to reviewability and the prerogative power, the applicants make three main submission. 1. Prerogative powers, in particular those such as article 4 of the Order in Council (which is rightly described as primary legislation), are always subject to judicial review on procedural grounds. B Whatever may be the view as to reviewing the substantive decisions on *Wednesbury* grounds, in relation to procedure they are always open to judicial review. 2. Review of prerogative powers on the basis of a substantive exercise flawed by the consideration of an irrelevant factor may be difficult because of the lack of any indicia as to how the power should be exercised or the factors taken into account: see *In re Toohey, Ex parte Northern Land Council*, 38 A.L.R. 439. 3. No such difficulties C arise in the case of procedural review. The plain language of article 4 is capable of being fairly or unfairly applied (i) because there is no lack of indicia, (ii) because it is controlled by common law principles. [Reference was made to *Ridge v. Baldwin* [1964] A.C. 40, 68–69; *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 and *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 D W.L.R. 766.]

Alternatively, as to the respondent's argument on the "narrow" ground: 1. *Lain* is authority for the proposition that the courts will hold the individual to whom prerogative powers are delegated to the terms of the mandate, and there are additional factors in the present case, namely that the Order in Council of 1982 is (see article 6 (4) and *Craies on Statute Law*, 7th ed., p. 289) akin to a statute, even if it is not a E statute in the ordinary sense. 2. It follows that the court can construe the Order in Council on similar principles to those that it applies when construing a statute, and duties such as the duty to act fairly are derived by the same process as that by which they would be in construing statutory provisions. 3. There are two possible answers: (i) as to the "old authorities," such as *Reg. v. Secretary of State for War* [1891] 2 F Q.B. 326: (*a*) they are old; (*b*) in any event, they are distinguishable because they are concerned with mandamus; (ii) *Lain* is distinguishable. In setting out the terms of the Order in Council, the Sovereign must have intended that the minister would keep within the terms of the mandate as expressed. There is an additional factor here: the Minister for the Civil Service is a creature of statute, or, if she is not, her G functions were transferred to her by Act of Parliament. 4. These principles apply so long as the Order in Council remains in force. The Sovereign in Council, the executive government of the Sovereign and her ministers, can change the Order in Council, but the respondent cannot. So long as the Order in Council subsists, she must act within its terms.

As to national security, *The Zamora* [1916] 2 A.C. 77 is authority for H the proposition of the reviewability of prerogative powers. It is also very clear authority for the proposition that if the Crown seeks to interfere with private rights on grounds of national security it must adduce

A unambiguous evidence to demonstrate that it has in fact acted because of considerations of national security. It is not enough that it might have acted for that reason, or that a reasonable minister might have done so: see at pp. 106–108, 110. As in *The Zamora*, the respondent here fired at the wrong target.

1. Issues relating to national security, it is conceded, are primarily for the executive to judge. 2. The executive, however, must adduce B before the court sufficient and adequate evidence of two matters: (a) that national security considerations did actually affect the mind of the relevant minister; and (b) that (within the evidential limits imposed by the nature of the subject matter) those considerations were capable of justifying the consequence sought to be justified. 3. The applicants' primary submission is as (a). There simply is no evidence adduced by C the respondent that she failed to consult before the oral direction of 22 December 1983 on the grounds of national security: that is, because of a fear that the process of consultation would provoke immediate disruption at GCHQ. 4. It follows that the question of the sufficiency or adequacy of evidence that arises in this case relates to the *reason* for the failure to consult, and does *not* relate to the reason for making the substantive D decision to ban trade union membership at GCHQ. 5. The evidence, which it is said indicates that the reason for non-consultation was the fear of threatened disruption during any consultative process before the decision to ban was made, is to be found exclusively in paragraph 16 of Sir Robert Armstrong's affidavit (post, p. 422F–G). 6. That sentence relates expressly to a fear that official secrets would be exposed to potential disrupters during the process of consultation. It does not E specifically, nor does it by necessary implication, relate to a fear that the national trade unions would, if consulted, have organised a "pre-emptive strike." The fear could not possibly justify a total absence of consultation, because (as Glidewell J. rightly held) forms of consultation could easily be devised so as to avoid any exposure of official secrets; indeed, limited consultation in fact was undertaken immediately, following the F announcement in the House of Commons on 25 January 1984. If the respondent was disposed to (and did in fact) consult *after* the public announcement of the oral direction of 22 December 1983 (when there might have been, but was not in fact, a provoked reaction of industrial action), a fortiori no greater fear of disruptive action could exist *before* the oral direction; indeed, it would be in the interests of the trade unions to desist from taking industrial action during any consultative G process when there was a chance of persuading the executive not to take the drastic action of banning trade union membership. Two questions arise with regard to *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223: could a reasonable minister conclude that there was a risk of disruption during prior consultation, and could she conclude that the danger of exposing vulnerable areas of H operation precluded all forms of consultation? In both cases the answer is "no."

Their Lordships took time for consideration.

22 November. LORD FRASER OF TULLYBELTON. My Lords, Government Communications Headquarters ("GCHQ") is a branch of the public service under the Foreign and Commonwealth Office, the main functions of which are to ensure the security of the United Kingdom military and official communications and to provide signals intelligence for the Government. These functions are of great importance and they involve handling secret information which is vital to the national security. The main establishment of GCHQ is at Cheltenham where over 4,000 people are employed. There are also a number of smaller out-stations one of which is at Bude in Cornwall.

Since 1947, when GCHQ was established in its present form, all the staff employed there have been permitted, and indeed encouraged, to belong to national trade unions, and most of them did so. Six unions were represented at GCHQ. They were all members, though not the only members, of the Council of Civil Service Unions ("CCSU"), the first appellant. The second appellant is the secretary of CCSU. The other appellants are individuals who are employed at GCHQ and who were members of one or other of the unions represented there. A departmental Whitley Council was set up in 1947 and, until the events with which this appeal is concerned, there was a well-established practice of consultation between the official side and the trade union side about all important alterations in the terms and conditions of employment of the staff.

On 25 January 1984 all that was abruptly changed. The Secretary of State for Foreign and Commonwealth Affairs announced in the House of Commons that the Government had decided to introduce with immediate effect new conditions of service for staff at GCHQ, the effect of which was that they would no longer be permitted to belong to national trade unions but would be permitted to belong only to a departmental staff association approved by the director of GCHQ. The announcement came as a complete surprise to the trade unions and to the employees at GCHQ, as there had been no prior consultation with them. The principal question raised in this appeal is whether the instruction by which the decision received effect, and which was issued orally on 22 December 1983 by the respondent (who is also the Prime Minister), is valid and effective in accordance with article 4 of the Civil Service Order in Council 1982. The respondent maintains that it is. The appellants maintain that it is invalid because there was a procedural obligation on the respondent to act fairly by consulting the persons concerned before exercising her power under article 4 of the Order in Council, and she has failed to do so. Underlying that question, and logically preceding it, is the question whether the courts, and your Lordships' House in its judicial capacity, have power to review the instruction on the ground of a procedural irregularity, having regard particularly to the facts (a) that it was made in the exercise of a power conferred under the royal prerogative and not by statute, and (b) that it concerned national security.

It is necessary to refer briefly to the events which led up to the decision on 22 December 1983. Between February 1979 and April 1981 industrial action was taken at GCHQ on seven occasions. The action

A took various forms—one-day strikes, work to rule, and overtime bans. The most serious disruption occurred on 9 March 1981 when about 25 per cent. of the staff went on one-day strike and, according to Sir Robert Armstrong, the Secretary to the Cabinet, who made an affidavit in these proceedings, parts of the operations at GCHQ were virtually shut down. The appellants do not accept the respondent's view on the seriousness of the effects of industrial action upon the work at GCHQ. B But clearly it must have had some adverse effect, especially by causing some interruption of the constant day and night monitoring of foreign signals communications. The industrial action was taken mainly in support of national trade unions, when they were in dispute with the Government about conditions of service of civil servants generally, and not about local problems at GCHQ. In 1981 especially it was part of a C campaign by the national trade unions, designed to do as much damage as possible to government agencies including GCHQ. Sir Robert Armstrong in his affidavit refers to several circular letters and "campaign reports" issued by CCSU and some of its constituent unions, which show the objects of the campaign. One of these is a circular letter dated 10 March 1981 from the Society of Civil and Public Servants. In a paragraph headed "Selective Strikes" the letter states as follows:

D

> "Union members at certain key Government sites are now on permanent strike. This is the first phase of the selective action: it includes naval supplies and dockyards, locations where the Government finance machine can be disrupted, a *Government surveillance centre* and the DHSS contributions records computer." (Emphasis added.)

E

Among the selective strike areas referred to in the list appended to the letter is "GCHQ Bude, Cornwall." The seriousness of the intended challenge to the security system of this country can be gauged from the literature issued at the time by the CCSU, of which the following are examples:

F

> "Our ultimate success depends upon the extent to which revenue collection is upset, defence readiness hampered, and trading relations disrupted by this and future action."
>
> "Walk-outs in key installations have affected Britain's defence capability in general, and crippled the UK contribution to the NATO exercise 'Wintex.' "
>
> "another vital part of the Government's Composite Signals Organisation . . . is to be hit by a strike from Friday, 3 April."
>
> "48-hour walk-outs have severely hit secret monitoring stations belonging to the Composite Signals Organisation. The Government is clearly worried and will be subject to huge pressure from NATO allies."
>
> "Defence plans have been upset by the continuing action at naval supplies depots, dock-yards, and other crucial establishments."

G

H

Approaches were made on behalf of the Government to local union officials, and later to national CCSU officials, to dissuade them from action which would directly adversely affect operations at GCHQ. Some

co-operation was given by the local officials, but none at all by national officers. Sir Brian Tovey (former director of GCHQ) gave evidence to the Employment Committee of the House of Commons on 8 February 1984 and told them that, after one of his subordinates had sought to explain to the general secretary of one of the trade unions the serious consequences that might follow from disruption of certain parts of GCHQ work, the answer was "Thank you. You are telling me where I am hurting Mrs. Thatcher the most."

In 1982 the Government considered whether measures should be taken to prevent the recurrence of such disruptive action. But at that time the intelligence functions of GCHQ had not been publicly acknowledged by the Government, although they had already been referred to in the newspapers, and it was decided that no action which would involve public acknowledgement of the activities should be taken. In May 1983 following the report of the Security Commission in the case of Geoffrey Prime who had been convicted of espionage at GCHQ, the intelligence role of GCHQ was for the first time publicly acknowledged, and the reason for avoiding public action to deal with disruption was thus removed. The report of the Security Commission on the Prime case is also relevant to this appeal in another way, because it recommended that a pilot scheme should be undertaken to test the feasibility of polygraph security screening at intelligence agencies including GCHQ. The CCSU were opposed to this recommendation and several meetings were held between their representatives and the Cabinet Office officials to discuss the matter. CCSU were concerned that the polygraph might be introduced without adequate consultation and on 9 January 1984 Sir Robert Armstrong wrote to the chairman of their general policy committee explaining that before a decision was taken for the definitive introduction of polygraph, as distinct from the experimental pilot scheme, there would certainly need to be consultations. That was the last word on the polygraph question before the announcement on 25 January 1984 that national trade unions were to be excluded from GCHQ. Their exclusion would necessarily prevent their playing any part in further consultations on the polygraph and that was one of their reasons for resenting the decision of 22 December 1983.

Course of the proceedings

The trade unions, and some at least of the employees at GCHQ, objected strongly to the decision made on 22 December 1983 and announced on 25 January 1984. Representatives of the trade unions met the Minister for the Civil Service on two occasions in February 1984 to express their objections. They also met Sir Robert Armstrong several times. They presented a draft agreement to prevent disruption at certain parts of GCHQ but the draft was rejected by the Government and no agreement was reached about changing the Government's decision. Eventually the first and second appellants obtained leave from Glidewell J. on 8 March 1984 to bring proceedings for judicial review against the Minister for the Civil Service in respect of the instruction of 22 December 1983 and against the Foreign Secretary in respect of certificates which he had issued under the Employment Protection Act

A 1975, section 121(4), and the Employment Protection (Consolidation) Act 1978, section 138(4), to give effect to the instruction by discontinuing, on national security grounds, the right of staff to appeal to industrial tribunals. The attack on these certificates has been abandoned, and the attack on the instruction is now limited to seeking a declaration that it is invalid; the remedy of certiorari is no longer sought.

Glidewell J. granted a declaration that

B

> "the instruction purportedly issued by the Minister for the Civil Service on 22 December 1983 that the terms and conditions of service of civil servants serving at GCHQ should be revised so as to exclude membership of any trade union other than a departmental staff association approved by the Director of GCHQ was invalid and of no effect."

C

His reason for granting the declaration was that there had been a procedural irregularity in failing to consult before issuing the instruction. I take this opportunity of expressing my respectful admiration for the carefully reasoned opinion of the learned judge which has substantially assisted me and, I believe, my noble and learned friends.

Against that declaration the respondent appealed. The Court of D Appeal (Lord Lane C.J., Watkins and May L.JJ.) reversed the judge's decision and dismissed the appellants' application for judicial review. They also dismissed a cross-appeal by the appellants.

The appeal raises a number of questions. I shall consider first the question which I regard as the most important and also the most difficult. It concerns the royal prerogative.

E

The Royal Prerogative

The mechanism on which the Minister for the Civil Service relied to alter the terms and conditions of service at GCHQ was an "instruction" issued by her under the Order in Council of 1982, article 4. That article so far as relevant provides as follows:

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> "As regards Her Majesty's Home Civil Service—(*a*) the Minister for the Civil Service may from time to time make regulations or give instructions— . . . (ii) for controlling the conduct of the service, and providing for the classification of all persons employed therein and . . . the conditions of service of all such persons; . . ."

The Order in Council was not issued under powers conferred by any G Act of Parliament. Like the previous Orders in Council on the same subject it was issued by the sovereign by virtue of her prerogative, but of course on the advice of the government of the day. In these circumstances Mr. Alexander submitted that the instruction was not open to review by the courts because it was an emanation of the prerogative. This submission involves two propositions: (1) that prerogative powers are discretionary, that is to say they may be exercised H at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the courts; (2) that an instruction given in the exercise of a delegated power conferred by the sovereign under the

prerogative enjoys the same immunity from review as if it were itself a direct exercise of prerogative power. Mr. Blom-Cooper contested both of these propositions, but the main weight of his argument was directed against the second.

The first of these propositions is vouched by an impressive array of authority, which I do not propose to cite at all fully. Starting with *Blackstone's Commentaries*, 15th ed. (1809), p. 251 and *Chitty's Prerogatives of the Crown* (1820), pp. 6–7 they are at one in stating that, within the sphere of its prerogative powers, the Crown has an absolute discretion. In more recent times the best known definition of the prerogative is that given in *Dicey, Law of the Constitution,* 8th ed. (1915), p. 421 which is as follows:

> "The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his ministers."

Dicey's definition was quoted with approval in this House in *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, 526 by Lord Dunedin and was impliedly accepted by the other Law Lords in that case. In *Burmah Oil Co. Ltd. v. Lord Advocate*, 1964 S.C. (H.L.) 117 Lord Reid, at p. 120, referred to Dicey's definition as being "always quoted with approval" although he said it did not take him very far in that case. It was also referred to with apparent approval by Roskill L.J. (as my noble and learned friend then was) in *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643, 719. As *De Keyser's* case shows, the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities to which I have briefly referred and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts. In the present case the prerogative power involved is power to regulate the Home Civil Service, and I recognise there is no obvious reason why the mode of exercise of that power should be immune from review by the courts. Nevertheless to permit such review would run counter to the great weight of authority to which I have briefly referred. Having regard to the opinion I have reached on Mr. Alexander's second proposition, it is unnecessary to decide whether his first proposition is sound or not and I prefer to leave that question open until it arises in a case where a decision upon it is necessary. I therefore assume, without deciding, that his first proposition is correct and that all powers exercised directly under the prerogative are immune from challenge in the courts. I pass to consider his second proposition.

The second proposition depends for its soundness upon whether the power conferred by article 4 of the Order in Council of 1982 on the

A Minister for the Civil Service of "providing for . . . the conditions of service" of the Civil Service is subject to an implied obligation to act fairly. (Such an obligation is sometimes referred to as an obligation to obey the rules of natural justice, but that is a less appropriate description, at least when applied, as in the present case, to a power which is executive and not judicial.) There is no doubt that, if the Order in Council of 1982 had been made under the authority of a statute, the B power delegated to the Minister by article 4 would have been construed as being subject to an obligation to act fairly. I am unable to see why the words conferring the same powers should be construed differently merely because their source was an Order in Council made under the prerogative. It is all the more difficult in the face of article 6(4) of the Order in Council of 1982 which provides that the Interpretation Act C 1978 shall apply to the Order; it would of course apply to a statutory order. There seems no sensible reason why the words should not bear the same meaning whatever the source of authority for the legislation in which they are contained. The Order in Council of 1982 was described by Sir Robert Armstrong in his first affidavit as primary legislation; that is, in my opinion, a correct description, subject to the qualification that the Order in Council, being made under the prerogative, derives its D authority from the sovereign alone and not, as is more commonly the case with legislation, from the sovereign in Parliament. Legislation frequently delegates power from the legislating authority—the sovereign alone in one case, the sovereign in Parliament in the other—to some other person or body and, when that is done, the delegated powers are defined more or less closely by the legislation, in this case by article 4. E But whatever their source, powers which are defined, either by reference to their object or by reference to procedure for their exercise, or in some other way, and whether the definition is expressed or implied, are in my opinion normally subject to judicial control to ensure that they are not exceeded. By "normally" I mean provided that considerations of national security do not require otherwise.

The courts have already shown themselves ready to control by way F of judicial review the actions of a tribunal set up under the prerogative. *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 was such a case. In that case Lord Parker C.J. said, at p. 881:

> "I can see no reason either in principle or in authority why a board set up as this board was set up is not a body of persons amenable to the jurisdiction of this court. True it is not set up by statute but the G fact that it is set up by executive government, i.e., under the prerogative, does not render its acts any the less lawful. Indeed, the writ of certiorari has issued not only to courts set up by statute but to courts whose authority is derived, inter alia, from the prerogative. Once the jurisdiction is extended, as it clearly has been, to tribunals as opposed to courts, there is no reason why the remedy by way of H certiorari cannot be invoked to a body of persons set up under the prerogative."

That case was concerned with the actions of a board or tribunal exercising functions of a judicial character, but it is now established that

certiorari is not limited to bodies performing judicial functions. In *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766 which was concerned with the actions of the Secretary of State himself in refusing to give information about the reasons for making a deportation order against an alien, the Divisional Court and the Court of Appeal refused to make an order of certiorari because the refusal had been based on grounds of national security but, if it had been made in what Lord Denning M.R., at p. 778, called an "ordinary case"—that is, one in which national security was not involved—the position would have been different. Lord Denning M.R. said, at p. 781:

> "if the body concerned, whether it be a minister or advisers, has acted unfairly, then the courts can review their proceedings so as to ensure, as far as may be, that justice is done."

Accordingly I agree with the conclusion of Glidewell J. that there is no reason for treating the exercise of a power under article 4 any differently from the exercise of a statutory power merely because article 4 itself is found in an order issued under the prerogative.

It follows, in my opinion, that some of the reasoning in *Reg. v. Secretary of State for War* [1891] 2 Q.B. 326 and *Griffin v. Lord Advocate*, 1950 S.C. 448 is unsound, although the decisions themselves might perhaps be supported on the ground that they related to actions by the Crown connected with the armed forces. The former case was of course decided long before the modern development of judicial review and the latter, which was a decision of Lord Sorn in the Outer House, mainly followed it.

The duty to consult

Mr. Blom-Cooper submitted that the Minister had a duty to consult the CCSU, on behalf of employees at GCHQ, before giving the instruction on 22 December 1983 for making an important change in their conditions of service. His main reason for so submitting was that the employees had a legitimate, or reasonable, expectation that there would be such prior consultation before any important change was made in their conditions.

It is clear that the employees did not have a legal right to prior consultation. The Order in Council confers no such right, and article 4 makes no reference at all to consultation. The Civil Service handbook (*Handbook for the new civil servant*, 1973 ed. as amended 1983) which explains the normal method of consultation through the departmental Whitley Council, does not suggest that there is any legal right to consultation; indeed it is careful to recognise that, in the operational field, considerations of urgency may make prior consultation impracticable. The Civil Service Pay and Conditions of Service Code expressly states:

> "The following terms and conditions also apply to your appointment in the Civil Service. It should be understood, however, that in consequence of the constitutional position of the Crown, the Crown has the right to change its employees' conditions of service at any time, and that they hold their appointments at the pleasure of the Crown."

A But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by my noble and learned friend, Lord Diplock, in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and I need not repeat what he has so recently said. Legitimate, or reasonable, B expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Examples of the former type of expectation are *Reg. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299 and *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629. (I C agree with Lord Diplock's view, expressed in the speech in this appeal, that "legitimate" is to be preferred to "reasonable" in this context. I was responsible for using the word "reasonable" for the reason explained in *Ng Yuen Shiu*, but it was intended only to be exegetical of "legitimate".) An example of the latter is *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain* [1979] Q.B. 425 approved by this House in *O'Reilly*, at p. 274D. The submission on behalf of the appellants is that the D present case is of the latter type. The test of that is whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the Government to depart from the practice in this case. Legitimate expectations such as are now under consideration will always relate to a benefit or privilege to which E the claimant has no right in private law, and it may even be to one which conflicts with his private law rights. In the present case the evidence shows that, ever since GCHQ began in 1947, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly in my opinion if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before F issuing the instruction of 22 December 1983. The next question, therefore, is whether it has been shown that consideration of national security supersedes the expectation.

National security

The issue here is not whether the minister's instruction was proper or G fair or justifiable on its merits. These matters are not for the courts to determine. The sole issue is whether the decision on which the instruction was based was reached by a process that was fair to the staff at GCHQ. As my noble and learned friend Lord Brightman said in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, 1173: "Judicial review is concerned, not with the decision, but with the decision-making process."

H I have already explained my reasons for holding that, if no question of national security arose, the decision-making process in this case would have been unfair. The respondent's case is that she deliberately made the decision without prior consultation because prior consultation "would

involve a real risk that it would occasion the very kind of disruption [at GCHQ] which was a threat to national security and which it was intended to avoid." I have quoted from paragraph 27(i) of the respondent's printed case. Mr. Blom-Cooper conceded that a reasonable minister could reasonably have taken that view, but he argued strongly that the respondent had failed to show that that was in fact the reason for her decision. He supported his argument by saying, as I think was conceded by Mr. Alexander, that the reason given in paragraph 27(i) had not been mentioned to Glidewell J. and that it had only emerged before the Court of Appeal. He described it as an "afterthought" and invited the House to hold that it had not been shown to have been the true reason.

The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security. Authority for both these points is found in *The Zamora* [1916] 2 A.C. 77. The former point is dealt with in the well known passage from the advice of the Judicial Committee delivered by Lord Parker of Waddington, at p. 107:

> "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public."

The second point, less often referred to, appears at p. 106 and more particularly at p. 108 where this passage occurs:

> "In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court, but because the judge had before him *no satisfactory evidence* that such a right was exercisable." (Emphasis added.)

What was required was evidence that a cargo of copper in the custody of the Prize Court was urgently required for national purposes, but no evidence had been directed to that point. The claim on behalf of the Crown that it was entitled to requisition the copper therefore failed; considering that the decision was made in 1916 at a critical stage of the 1914–1918 war, it was a strong one. In *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, which was an appeal by persons who had been convicted of a breach of the peace under section 1 of the Official Secrets Act 1911 by arranging a demonstration by the Campaign for Nuclear Disarmament on an operational airfield at Wethersfield, Lord Reid said, at p. 790:

> "The question more frequently arises as to what is or is not in the public interest. I do not subscribe to the view that the Government

A or a minister must always or even as a general rule have the last word about that. But here we are dealing with a very special matter—interfering with a prohibited place which Wethersfield was."

But the court had had before it evidence from an Air Commodore that the airfield was of importance for national security. Both Lord Reid and Viscount Radcliffe, at p. 796, referred to the evidence as being relevant B to their refusal of the appeal.

The evidence in support of this part of the respondent's case came from Sir Robert Armstrong in his first affidavit, especially at paragraph 16. Mr. Blom-Cooper rightly pointed out that the affidavit does not in terms directly support paragraph 27(i), ante pp. 401H—402A. But it does set out the respondent's view that to have entered into prior consultation C would have served to bring out the vulnerability of areas of operation to those who had shown themselves ready to organise disruption. That must be read along with the earlier parts of the affidavit in which Sir Robert had dealt in some detail with the attitude of the trade unions which I have referred to earlier in this speech. The affidavit, read as a whole, does in my opinion undoubtedly constitute evidence that the Minister did indeed consider that prior consultation would have involved D a risk of precipitating disruption at GCHQ. I am accordingly of opinion that the respondent has shown that her decision was one which not only could reasonably have been based, but was in fact based, on considerations of national security, which outweighed what would otherwise have been the reasonable expectation on the part of the appellants for prior consultation. In deciding that matter I must with respect differ from the decision of Glidewell J. but, as I have mentioned, E I do so on a point that was not argued to him.

Minor matters

The judge held that had the prior consultations taken place they would not have been so limited that he could confidently say that they F would have been futile. It is not necessary for me to reach a concluded view on this matter, but as at present advised I am inclined to differ from the learned judge, especially because of the attitude of two of the trade union members of CCSU which declared that they were firmly against any no-strike agreement.

The Court of Appeal considered the proper construction of certain international labour conventions which they cite. I respectfully agree G with Lord Lane C.J. who said that "the correct meaning of the material articles of the Conventions is by no means clear," but I do not propose to consider the matter as the Conventions are not part of the law in this country.

Mr. Blom-Cooper submitted that the oral direction did not qualify as an "instruction" within the meaning of article 4, and that for two H reasons. First he said that there was no sufficient evidence of any instruction. In my opinion there is no substance in this ground. There is ample evidence in a letter dated 7 February 1984 from Sir Robert Armstrong to the Director of GCHQ and also in the General Notice 100/84 and a covering letter issued by the Director to all employees at

GCHQ. Secondly counsel said that the instruction did not sufficiently specify conditions that were being altered, but I agree with Glidewell J., and with the Court of Appeal, that the Minister's direction on 22 December 1983 did give "instructions . . . providing for . . . the conditions of service" of employees at GCHQ in the sense of article 4 of the Order in Council of 1982. There was no obligation to put the instructions in writing, although that might perhaps have been expected in a matter so important as this. Nor was there any obligation to couch the instructions in any particular form. Accordingly I reject this submission.

For these reasons I would dismiss the appeal.

LORD SCARMAN. My Lords, I would dismiss this appeal for one reason only. I am satisfied that the respondent has made out a case on the ground of national security. Notwithstanding the criticisms which can be made of the evidence and despite the fact that the point was not raised, or, if it was, was not clearly made before the case reached the Court of Appeal, I have no doubt that the respondent refused to consult the unions before issuing her instruction of the 22 December 1983 because she feared that, if she did, union-organised disruption of the monitoring services of GCHQ could well result. I am further satisfied that the fear was one which a reasonable minister in the circumstances in which she found herself could reasonably entertain. I am also satisfied that a reasonable minister could reasonably consider such disruption to constitute a threat to national security. I would, therefore, deny relief to the appellants upon their application for judicial review of the instruction, the effect of which was that staff at GCHQ would no longer be permitted to belong to a national trade union.

The point of principle in the appeal is as to the duty of the court when in proceedings properly brought before it a question arises as to what is required in the interest of national security. The question may arise in ordinary litigation between private persons as to their private rights and obligations: and it can arise, as in this case, in proceedings for judicial review of a decision by a public authority. The question can take one of several forms. It may be a question of fact which Parliament has left to the court to determine: see for an example section 10 of the Contempt of Court Act 1981. It may arise for consideration as a factor in the exercise of an executive discretionary power. But, however it arises, it is a matter to be considered by the court in the circumstances and context of the case. Though there are limits dictated by law and common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power.

Let me give three illustrations taken from the case law of the 20th century. First, *The Zamora* [1916] 2 A.C. 77—surely one of the more courageous of judicial decisions even in our long history. In April 1916 a

A question of national security came before the Judicial Committee of the Privy Council sitting in Prize. The Crown's role in the Prize Court was that of a belligerent power having by international law the right to requisition vessels or goods in the custody of its Prize Court. A neutral vessel carrying a cargo of copper (contraband) had been stopped at sea by the Royal Navy and taken to a British port. No decree of condemnation of the cargo had yet been made by the Prize Court, when B the Crown intervened by summons to requisition the cargo then in the custody of the court. Lord Parker of Waddington, who delivered the judgment of the Judicial Committee, concluded, at p. 106:

> "A belligerent power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but C such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to D the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable."

Discussing the first limitation, Lord Parker of Waddington observed that the judge ought, "*as a rule*," to treat the statement of the proper officer of the Crown that the vessel or goods were urgently required for national security reasons as conclusive of the fact. And it was in this E context that he delivered his famous dictum, at p. 107: "Those who are responsible for the national security must be the sole judges of what the national security requires." These words were no abdication of the judicial function, but were an indication of the evidence required by the court. In fact the evidence adduced by the Crown was not sufficient, and the court ruled that the Crown had no right to requisition. The Crown's claim was rejected "because the judge had before him no satisfactory F evidence that such a right was exercisable" (p. 108). The Prize Court, therefore, treated the question as one of fact for its determination and indicated the evidence needed to establish the fact. The true significance of Lord Parker's dictum is simply that the court is in no position to substitute its opinion for the opinion of those responsible for national security. But the case is a fine illustration of the court's duty to ensure G that the essential facts to which the opinion or judgment of those responsible relates are proved to the satisfaction of the court.

My second illustration is *Chandler v. Director of Public Prosecutions* [1964] A.C. 763. In this case the interest of national security came into court as a matter of fact to be established by evidence to the satisfaction of a jury in a criminal case. The appellants were convicted of conspiring to commit a breach of section 1 of the Official Secrets Act 1911, H "namely, for a purpose prejudicial to the safety or interests of the state to enter a Royal Air Force station . . . at Wethersfield." There was evidence from an officer of air rank that the airfield was of importance for national security: and, as my noble and learned friend Lord Fraser

of Tullybelton has pointed out, Lord Reid and Viscount Radcliffe treated his evidence as relevant to the dismissal of the appeal. Lord Devlin developed the point taken in the case on national security in a passage beginning at p. 809 which, with all respect to those who take a different view, I believe to be sound law. Having referred to the undoubted principle that all matters relating to the disposition and armament of the armed forces are left to the unfettered control of the Crown, he made three comments. First, he put the *Zamora* dictum into its true context. Secondly, he observed that, when a court is faced with the exercise of a discretionary power, inquiry is not altogether excluded: the court will intervene to correct excess or abuse. His third and, as he said, his "most significant" comment was as to the nature and effect of the principle. "Where it operates, it limits the issue which the court has to determine; it does not exclude any evidence or argument relevant to the issue" (p. 810).

As I read the speeches in *Chandler's* case, the House accepted that the statute required the prosecution to establish by evidence that the conspiracy was to enter a prohibited place for a purpose prejudicial to the safety or interests of the state. As Parliament had left the existence of a prejudicial purpose to the decision of a jury, it was not the Crown's opinion as to the existence of prejudice to the safety or interests of the state but the jury's which mattered: hence, as Lord Devlin, at p. 811, remarked, the Crown's opinion on that was inadmissible but the Crown's evidence as to its interests was an "entirely different matter." Here, like Lord Parker in the *Zamora*, Lord Devlin was accepting that the Crown, or its responsible servants, are the best judges of what national security requires without excluding the judicial function of determining whether the interest of national security has been shown to be involved in the case.

Finally, I would refer to *Secretary of State for Defence v. Guardian Newspapers Ltd.* [1985] A.C. 339, a case arising under section 10 of the Act of 1981. As in *Chandler's* case, the interest of national security had to be considered in proceedings where it arose as a question of fact to be established to the satisfaction of a court. Though the House was divided as to the effect of the evidence, all their Lordships held that evidence was necessary so that the court could be judicially satisfied that the interest of national security required disclosure of the newspaper's source of information.

My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist: in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the

A judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable: and the limitation is entirely consistent with the general development of the modern case law of judicial review.

My Lords, I would wish to add a few, very few, words on the reviewability of the exercise of the royal prerogative. Like my noble and learned friend Lord Diplock, I believe that the law relating to judicial B review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. Without usurping the role of legal historian, C for which I claim no special qualification, I would observe that the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law: *Prohibitions del Roy* (1608) 12 Co. Rep. 63 and the *Proclamations Case* (1611) 12 Co. Rep. 74. In the latter case he declared, at p. 76, that "the King hath no prerogative, but that which the law of the land allows him." It is, of course, beyond doubt that in Coke's time and thereafter D judicial review of the exercise of prerogative power was limited to inquiring into whether a particular power existed and, if it did, into its extent: *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508. But this limitation has now gone, overwhelmed by the developing modern law of judicial review: *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 (a landmark case comparable in E its generation with the *Proclamations Case*, 12 Co.Rep. 74) and *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766. Just as ancient restrictions in the law relating to the prerogative writs and orders have not prevented the courts from extending the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act, so also has the modern law, a vivid sketch of which my noble and learned friend Lord Diplock has F included in his speech, extended the range of judicial review in respect of the exercise of prerogative power. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.

Subject to these few comments, I agree with the speeches delivered by my noble and learned friends Lord Diplock and Lord Roskill. I am G in favour of dismissing the appeal only because the respondent has established by evidence that the interest of national security required in her judgment that she should refuse to consult the unions before issuing her instruction. But for this I would have allowed the appeal on the procedural ground that the respondent had acted unfairly in failing to consult unions or staff before making her decision.

H LORD DIPLOCK. My Lords, the English law relating to judicial control of administrative action has been developed upon a case to case basis which has virtually transformed it over the last three decades. The principles of public law that are applicable to the instant case are in my

view well established by authorities that are sufficiently cited in the speech that will be delivered by my noble and learned friend, Lord Roskill. This obviates the necessity of my duplicating his citations: though I should put on record that after reading and rereading Lord Devlin's speech in *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, I have gained no help from it, for I find some of his observations that are peripheral to what I understand to be the ratio decidendi difficult to reconcile with the actual decision that he felt able to reach and also with one another.

The only difficulty which the instant case has presented upon the facts as they have been summarised by my noble and learned friend, Lord Fraser of Tullybelton, and expanded in the judgment of Glidewell J. has been to identify what is, in my view, the one crucial point of law on which this appeal turns. It never was identified or even adumbrated in the respondent's argument at the hearing before Glidewell J. and so, excusably, finds no place in what otherwise I regard as an impeccable judgment. The consequence of this omission was that he found in favour of the applicants. Before the Court of Appeal the crucial point was advanced in argument by the Crown in terms that were unnecessarily and, in my view, unjustifiably wide. This stance was maintained in the appeal to this House, although, under your Lordships' encouragement, the narrower point of law that was really crucial was developed and relied on by the respondent in the alternative. Once that point has been accurately identified the evidence in the case in my view makes it inevitable that this appeal must be dismissed. I will attempt to state in summary form those principles of public law which lead me to this conclusion.

Judicial review, now regulated by R.S.C., Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope

A that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences. The recent decision of this House in *In re Findlay* [1985] A.C. 318 presents an example of the latter kind of expectation. "Reasonable" furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)

B For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The C ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of "the prerogative." Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from D local government and in constitutional practice is generally exercised by those holding ministerial rank.

It was the prerogative that was relied on as the source of the power of the Minister for the Civil Service in reaching her decision of 22 December 1983 that membership of national trade unions should in future be barred to all members of the home civil service employed at E GCHQ.

My Lords, I intend no discourtesy to counsel when I say that, intellectual interest apart, in answering the question of law raised in this appeal, I have derived little practical assistance from learned and esoteric analyses of the precise legal nature, boundaries and historical origin of "the prerogative," or of what powers exercisable by executive officers acting on behalf of central government that are not shared by private F citizens qualify for inclusion under this particular label. It does not, for instance, seem to me to matter whether today the right of the executive government that happens to be in power to dismiss without notice any member of the home civil service upon which perforce it must rely for the administration of its policies, and the correlative disability of the executive government that is in power to agree with a civil servant that G his service should be on terms that did not make him subject to instant dismissal, should be ascribed to "the prerogative" or merely to a consequence of the survival, for entirely different reasons, of a rule of constitutional law whose origin is to be found in the theory that those by whom the administration of the realm is carried on do so as personal servants of the monarch who can dismiss them at will, because the King can do no wrong.

H Nevertheless, whatever label may be attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority but

nevertheless have consequences on the private rights or legitimate expectations of other persons which would render the decision subject to judicial review if the power of the decision-maker to make them were statutory in origin. From matters so relatively minor as the grant of pardons to condemned criminals, of honours to the good and great, of corporate personality to deserving bodies of persons, and of bounty from moneys made available to the executive government by Parliament, they extend to matters so vital to the survival and welfare of the nation as the conduct of relations with foreign states and—what lies at the heart of the present case—the defence of the realm against potential enemies. Adopting the phraseology used in the European Convention on Human Rights 1953 (Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)) to which the United Kingdom is a party it has now become usual in statutes to refer to the latter as "national security."

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the

A decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural B rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

My Lords, that a decision of which the ultimate source of power to make it is not a statute but the common law (whether or not the C common law is for this purpose given the label of "the prerogative") may be the subject of judicial review on the ground of illegality is, I think, established by the cases cited by my noble and learned friend, Lord Roskill, and this extends to cases where the field of law to which the decision relates is national security, as the decision of this House itself in *Burmah Oil Co. Ltd. v. Lord Advocate*, 1964 S.C. (H.L.) 117 shows. While I see no a priori reason to rule out "irrationality" as a D ground for judicial review of a ministerial decision taken in the exercise of "prerogative" powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons E for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another—a F balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise.

As respects "procedural propriety" I see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative. Such indeed was one of the G grounds that formed the subject matter of judicial review in *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864. Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of H procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made.

My Lords, in the instant case the immediate subject matter of the decision was a change in one of the terms of employment of civil servants employed at GCHQ. That the executive functions of the Minister for the Civil Service, in her capacity as such, included making a decision to change any of those terms, except in so far as they related to remuneration, expenses and allowances, is not disputed. It does not seem to me to be of any practical significance whether or not as a matter of strict legal analysis this power is based upon the rule of constitutional law to which I have already alluded that the employment of any civil servant may be terminated at any time without notice and that upon such termination the same civil servant may be re-engaged on different terms. The rule of terminability of employment in the civil service without notice, of which the existence is beyond doubt, must in any event have the consequence that the continued enjoyment by a civil servant in the *future* of a right under a particular term of his employment cannot be the subject of any right enforceable by him in private law; at most it can only be a legitimate expectation.

Prima facie, therefore, civil servants employed at GCHQ who were members of national trade unions had, at best, in December 1983, a legitimate expectation that they would continue to enjoy the benefits of such membership and of representation by those trade unions in any consultations and negotiations with representatives of the management of that government department as to changes in any term of their employment. So, but again prima facie only, they were entitled, as a matter of public law under the head of "procedural propriety," before administrative action was taken on a decision to withdraw that benefit, to have communicated to the national trade unions by which they had theretofore been represented the reason for such withdrawal, and for such unions to be given an opportunity to comment on it.

The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.

The executive government likewise decided, and this would appear to be a collective decision of cabinet ministers involved, that the interests of national security required that no notice should be given of the decision before administrative action had been taken to give effect to it. The reason for this was the risk that advance notice to the national unions of the executive government's intention would attract the very disruptive action prejudicial to the national security the recurrence of which the decision barring membership of national trade unions to civil servants employed at GCHQ was designed to prevent.

There was ample evidence to which reference is made by others of your Lordships that this was indeed a real risk; so the crucial point of law in this case is whether procedural propriety must give way to

A national security when there is conflict between (1) on the one hand, the prima facie rule of "procedural propriety" in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason, and (2) on the other hand, action that is needed to be taken in the interests of national B security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is. To that there can, in my opinion, be only one sensible answer. That answer is "Yes."

I agree with your Lordships that this appeal must be dismissed.

C LORD ROSKILL. My Lords, this appeal arises out of the exercise by the respondent, the Minister for the Civil Service, of a specific power vested in her by article 4 of the Civil Service Order in Council 1982. That specific power purported to be exercised orally on 22 December 1983. The terms in which it is claimed to have been exercised are contained in a letter dated 7 February 1984 from Sir Robert Armstrong D writing as Head of the Civil Service to the Director of the Government Communications Headquarters at Cheltenham ("GCHQ"). The exercise of the power took the form of:

> "instructions that the conditions of service under which civil servants are employed as members of the staff of the Government Communications Headquarters shall be varied so as to provide that such civil servants shall not be members of any trade union other E than a departmental staff association approved by yourself."

The making of this change in the conditions of service of civil servants employed at GCHQ was announced in the House of Commons by the Secretary of State for Foreign and Commonwealth Affairs on 25 January 1984 and on the same day he issued certificates under section F 121(4) of the Employment Protection Act 1975 and under section 138(4) of the Employment Protection (Consolidation) Act 1978 certifying that employment at GCHQ was to be excepted from those sections "for the purpose of safeguarding national security." On the same day the Director of GCHQ informed his staff in writing of the decision, of the issue of the certificates and of the various options which were thereafter to remain open to them.

G My Lords, the background to these actions in December 1983 and January 1984 is fully set out in the speech of my noble and learned friend, Lord Fraser of Tullybelton, which I gratefully adopt. It requires no repetition. Nor does the history of the antecedent rights of those concerned to join trade unions. That the instructions thus given and the certificates thus issued drastically altered the trade union rights of those civil servants concerned cannot be doubted. Nor can it be doubted that H the issue of the instructions and of the certificates without prior warning or consultation of any kind with the various trade unions concerned either at a national or at a local level involved a complete departure from the normal manner in which relations between management and

staff had hitherto been conducted and was bitterly resented by some of those immediately involved on the staff side.

My Lords, with matters of that kind your Lordships are in no way concerned. This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, 1174, "is not an appeal from a decision, but a review of the manner in which the decision was made." It is the appellants' case, stated in a sentence, that the oral instruction of 22 December 1983 should be judicially reviewed and declared invalid because of the manner in which the decision which led to those instructions being given was taken, that is to say without prior consultation of any kind with the appellants or indeed others. Initially the respondents also sought judicial review of the two certificates to which I have referred but that claim has been abandoned.

Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described—by no means critically—as an upsurge of judicial activism. Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, *Wednesbury* principles (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). The third is where it has acted contrary to what are often called "principles of natural justice." As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts

A to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.

B My noble and learned friend, Lord Diplock, in his speech has devised a new nomenclature for each of these three grounds, calling them respectively "illegality," "irrationality" and "procedural impropriety"—words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground.

In the present appeal your Lordships are not concerned with the first C two matters already mentioned, with the exercise of a power which does not exist or with *Wednesbury* principles. But this appeal is vitally concerned with the third, the duty to act fairly.

The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or D action preceding the decision complained of and that that "reasonable expectation" was not in the event fulfilled.

The introduction of the phrase "reasonable expectation" into this branch of our administrative law appears to owe its origin to Lord Denning M.R. in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170 (when he used the phrase "legitimate expectation"). Its E judicial evolution is traced in the opinion of the Judicial Committee delivered by my noble and learned friend, Lord Fraser of Tullybelton, in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629, 636–638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective "legitimate" in this context and use it in this speech even though in argument it was the adjective "reasonable" F which was generally used. The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with "a right to be heard." Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to G persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure.

The appellants say that the relationship between management and staff over many years gave rise to a legitimate expectation of consultation before action involving so drastic a curtailment of trade union rights as that taken on 22 December 1983 was decreed. It is of the deprivation of H that legitimate expectation that they now principally complain. They say, that deprivation entitles them to judicial review.

In a judgment which, if I may respectfully say so, I have read and reread with increasing admiration for its thoroughness and clarity,

Glidewell J., while in my view correctly rejecting all the other arguments of the appellants, accepted this submission. The Court of Appeal (Lord Lane C.J., Watkins and May L.JJ.) in a single judgment delivered by the Lord Chief Justice was of a different opinion. But it is right to say that the submission on which Mr. Alexander Q.C. for the respondent finally and principally rested was never advanced at all before Glidewell J. and though advanced for the first time in the Court of Appeal does not seem to have been advanced even there in entirely the same way as in argument before this House for it was advanced there on a considerably wider basis than that upon which Mr. Alexander ultimately came to rest. Mr. Blom-Cooper Q.C. for the appellants understandably made skilful forensic play with this failure to advance this crucial submission before the learned judge. Thus the House has not got the benefit of the views of Glidewell J. upon what I regard as the crucial issue for the determination of this appeal.

My Lords, before considering this issue it is necessary to consider a further important question which arises by reason of the fact that the instructions given under article 4 of the Order in Council of 1982 were by means of the exercise of a prerogative power. The appellants in their printed case invited the House to consider and if necessary to reconsider the reviewability of executive acts done under the prerogative. Mr. Alexander for the respondent understandably did not press the argument that no action taken under the prerogative could ever be the subject of judicial review. But, helpfully, he thought it right to make available to your Lordships a selection from the classic pronouncements of many famous writers in this field from Locke through Blackstone and Chitty to Dicey and from the writings of distinguished modern authorities including de Smith, Wade, Hood Phillips and Heuston designed to show first the historic view that acts done under the prerogative were never reviewable and secondly the extent to which that classic doctrine may at least in this century be said to have been diluted.

Dicey's classic statement in *Law of the Constitution*, 10th ed. (1959), p. 424, that the prerogative is "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" has the weight behind it not only of the author's own authority but also of the majority of this House in *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75: see *per* Lord Reid, at p. 99. But as Lord Reid himself pointed out this definition "does not take us very far." On the other hand the attempt by Lord Denning M.R. in *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643, 705 (obiter since the other members of the Court of Appeal did not take so broad a view) to assert that the prerogative "if . . . exercised improperly or mistakenly" was reviewable is, with great respect, far too wide. The Master of the Rolls sought to support his view by a quotation from *Blackstone's Commentaries*, 15th ed., vol. 1, p. 252. But unfortunately and no doubt inadvertently he omitted the opening words of the paragraph:

> "In the exercise therefore of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that

A exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account."

In short the orthodox view was at that time that the remedy for abuse of the prerogative lay in the political and not in the judicial field.

But fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of B unreality. To speak today of the acts of the sovereign as "irresistible and absolute" when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what Lord Atkin once called, albeit in a different context, the clanking C of mediaeval chains of the ghosts of the past: see *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29. It is, I hope, not out of place in this connection to quote a letter written in 1896 by the great legal historian F. W. Maitland to Dicey himself: "The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law": see D *Richard A. Cosgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1980), p. 177. Maitland was in so stating a greater prophet than even he could have foreseen for it is our legal history which has enabled the present generation to shape the development of our administrative law by building upon but unhampered by our legal history.

My Lords, the right of the executive to do a lawful act affecting the rights of the citizen, whether adversely or beneficially, is founded upon E the giving to the executive of a power enabling it to do that act. The giving of such a power usually carries with it legal sanctions to enable that power if necessary to be enforced by the courts. In most cases that power is derived from statute though in some cases, as indeed in the present case, it may still be derived from the prerogative. In yet other cases, as the decisions show, the two powers may coexist or the statutory F power may by necessary implication have replaced the former prerogative power. If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts G under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. H In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries. In reaching this conclusion I find myself in agreement with my noble and learned friends Lord Scarman and Lord Diplock whose

speeches I have had the advantage of reading in draft since completing the preparation of this speech. A

But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another. B C

In my view the exercise of the prerogative which enabled the oral instructions of 22 December 1983 to be given does not by reason of its subject matter fall within what for want of a better phrase I would call the "excluded categories" some of which I have just mentioned. It follows that in principle I can see no reason why those instructions should not be the subject of judicial review. D

My Lords, I am not conscious of any previous decision of this House which is inconsistent with the principles I have just endeavoured to state. It may well be that there are decisions or dicta of other courts which are inconsistent. *Reg. v. Secretary of State for War* [1891] 2 Q.B. 326 arose in connection with the armed forces with which this appeal is not concerned, but even so, some of the reasoning cannot I think now be supported. There are also passages in the judgments of the Court of Appeal in *Commissioners of Crown Lands v. Page* [1960] 2 Q.B. 274 and in the opinion of Lord Sorn in *Griffin v. Lord Advocate*, 1950 S.C. 448 (to mention but two decisions) which require reconsideration in the light of the decision of this House in this appeal: in the latter case, Lord Sorn mainly followed the first of these three cases. E

I find considerable support for the conclusion I have reached in the decision of the Divisional Court (Lord Parker C.J., Diplock L.J. (as my noble and learned friend then was) and Ashworth J. in *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, the judgments in which may without exaggeration be described as a landmark in the development of this branch of the law. The board had been set up not by statute but by executive action under, as I think and as Lord Parker C.J. stated, the prerogative. It was strenuously argued that the board was not subject to the jurisdiction of the courts since it did not have what was described as legal authority in the sense of statutory authority. This argument by Mr. Nigel Bridge, as he then was, was emphatically and unanimously rejected. I will quote one passage from the judgment of Lord Parker C.J., at p. 881: F G

> "I can see no reason either in principle or in authority why a board set up as this board was set up is not a body of persons amenable to the jurisdiction of this court. True it is not set up by statute but the fact that it is set up by executive government, i.e., under the H

A prerogative, does not render its acts any the less lawful. Indeed, the writ of certiorari has issued not only to courts set up by statute but to courts whose authority is derived, inter alia, from the prerogative. Once the jurisdiction is extended, as it clearly has been, to tribunals as opposed to courts, there is no reason why the remedy by way of certiorari cannot be invoked to a body of persons set up under the prerogative. Moreover the board though set up under the prerogative B and not by statute had in fact the recognition of Parliament in debate and Parliament provided the money to satisfy its awards."

I would also refer, albeit without citation, to the entirety of the judgment delivered by my noble and learned friend, Lord Diplock.

It follows from what I have said thus far that in principle I am of the C clear opinion that the respondent's oral instructions of 22 December 1983 are amenable to judicial review and are not immune from such review because the instructions were given pursuant to prerogative powers.

The next question is whether they are susceptible of successful challenge on the third of the grounds mentioned earlier, namely that the appellants had "a legitimate expectation" of consultation prior to any D such instructions being given which radically affected the long-established rights of the staff at GCHQ to be members of trade unions.

It was common ground before your Lordships, though it was not common ground below, that there was no contractual relationship between the Crown and the staff at GCHQ. Mr. Alexander accepted that the absence of a contractual relationship and thus of a remedy in E private law did not preclude the possibility of a remedy in public law if a legitimate expectation of consultation were established. But he suggested that the absence of such a relationship in private law made it difficult to establish a legitimate expectation justiciable in the field of public law without eroding the basic principle that, at least in theory, civil servants are dismissible by the Crown at will and thus have no remedy in private law. He further argued that even if in principle there were a legitimate F expectation of the nature for which the appellants contended, that legitimate expectation could not exist when the government of the day considered that their duty in the field of national security required them not to give effect to any such legitimate expectation as might otherwise exist. Once, he contended, the respondent on the material before her could conclude that consultations of the kind contended for by the G appellants could and indeed would damage national security, any obligation to consult the appellants prior to taking the decision disappeared. Indeed Mr. Alexander went so far as to contend that in such circumstances the respondent was under a duty not to consult the appellants lest otherwise the very mischief which he feared might arise would arise.

My Lords, if no question of national security were involved I cannot H doubt that the evidence and the whole history of the relationship between management and staff since 1919 shows that there was a legitimate expectation of consultation before important alterations in the conditions of service of civil servants were made. No doubt in strict

theory civil servants are dismissible at will and the various documents shown to your Lordships seek to preserve the strict constitutional position. But in reality the management-staff relationship is governed by an elaborate code to which it is unnecessary to refer in detail. I have little doubt that were management to seek to alter without prior consultation the terms and conditions of civil servants in a field which had no connection whatever with national security or perhaps, though the matter does not arise in this appeal, with urgent fiscal emergency, such action would in principle be amenable to judicial review.

But that is not the present issue. It is asserted on behalf of the respondent that the reason for the instructions being given without prior consultation was that it was feared that so to consult would have given rise to grave risk of industrial action through the reaction of the appellants and others and thus have brought about the very situation which the oral instructions were themselves designed to avoid, namely the risk of industrial action by the staff at GCHQ caused or at least facilitated by a membership of trade unions, and damaging to national security. GCHQ was, it was said, and is, highly vulnerable to industrial action and prior consultation would have revealed to those who had previously organised disruption that high degree of vulnerability.

My Lords, the conflict between private rights and the rights of the state is not novel either in our political history or in our courts. Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the executive. But they have also been obliged to recognise that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security. The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. That that principle exists is I think beyond doubt. In a famous passage in *The Zamora* [1916] 2 A.C. 77, 107 Lord Parker of Waddington, delivering the opinion of the Judicial Committee, said:

> "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public."

The Judicial Committee were there asserting what I have already sought to say, namely that some matters, of which national security is one, are not amenable to the judicial process. The force of the passage I have quoted is in no way diminished by the fact, much relied on by Mr. Blom-Cooper, that in that case the Crown failed because they had failed to adduce before the Prize Court the requisite evidence of urgent necessity, proof of which was essential if the right of angary were to be successfully invoked in relation to a cargo in the custody of the Prize

A Court. This last mentioned fact merely reinforces what I have just said—that evidence and not mere assertion must be forthcoming.

A similar problem arose in *Chandler v. Director of Public Prosecutions* [1964] A.C. 763, a case under section 1 of the Official Secrets Act 1911. Lord Reid, at p. 790, expressly stated that he did not "subscribe to the view that the Government or a minister must always or even as a general rule have the last word" about the safety or interests of the B state. But he agreed, in common with all the other members of the House, that cross-examination was not permissible to challenge the evidence of a senior Air Force officer that a proposed obstruction of an airfield was contrary to the "safety or interests of the state" which were the relevant words of the statute.

> C "The defence of the State from external enemies is a matter of real concern, in time of peace as in days of war. The disposition, armament and direction of the defence forces of the State are matters decided upon by the Crown and are within its jurisdiction as the executive power of the State. So are treaties and alliances with other states for mutual defence. . ." (p. 796).

D The other noble and learned Lords then sitting shared Lord Reid's view, though I venture most respectfully to question one observation of Lord Devlin's, where after referring to *The Zamora* the learned Lord said, at p. 810:

> "It is said that in such cases the minister's statement is conclusive. Certainly: but conclusive of what? Conclusive, in the absence of any allegation of bad faith or abuse, that he does think what he says he E thinks. The court refrains from any inquiry into the question whether the goods are, in fact, necessary, not because it is bound to accept the statement of the Crown that they are, and to find accordingly, but because that is not the question which it has to decide."

F I respectfully suggest that that passage is out of line with the views expressed by the other noble and learned Lords then sitting.

The same problem arose in *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766 where the Court of Appeal and in particular Lord Denning M.R., at p. 778, accepted that if the case had been one "in which the ordinary rules of natural justice were to be observed, some criticism could be directed upon it" but held G that the interests of national security must override the appellants' private rights and that where compliance with the requirements of natural justice would itself have revealed that which it was in the interests of national security not to reveal, private rights must yield to the public interest: see especially pp. 782–783.

My Lords, I venture to think that today this principle cannot be H disputed. The question is whether, on the evidence before your Lordships, the respondent is entitled to assert that it was for fear of revealing the vulnerability of GCHQ to industrial action that it was decided that advance consultation could not take place. Mr. Blom-Cooper did not contest that there was evidence upon which a reasonable

minister might have taken that view or, indeed, that the respondent as a reasonable minister might have taken that view. His main contention was that the submission on behalf of the respondent to be found encapsulated in paragraph 27(i) of the respondent's case thus:

> "It was considered that consultation would involve a real risk that it would occasion the very kind of disruption which was a threat to national security and which it was intended to avoid. Having regard to these factors a reasonable minister could properly take the decision without consultation."

was an afterthought and unjustified by the evidence adduced on the respondent's behalf.

In their judgment, the Court of Appeal set out three of the assertions by or on behalf of the trade unions concerned regarding the possibility of and the effect of disruption at GCHQ by industrial action. There are many other similar statements in the evidence. I refer only to two of these other statements. The first is:

> "Walk-outs in key installations have affected Britain's defence capability in general, and crippled the UK contribution to the NATO exercise 'Wintex.' "

The other, under the heading "Government Communications," is:

> "48-hour walk-outs have severely hit secret monitoring stations belonging to the Composite Signals Organisation. The Government is clearly worried and will be subject to huge pressure from NATO allies. . . ."

Nevertheless, Mr. Blom-Cooper claimed that careful reading of Sir Robert Armstrong's first affidavit, and in particular paragraph 16 of that affidavit, did not support the view that this was a consideration which the respondent had ever had in mind. My Lords, with all respect, paragraph 16 must not be divorced from its contents or read in isolation from the paragraphs which both precede it and follow it. Paragraphs 13 to 18 inclusive must all be read together. In those paragraphs I read Sir Robert as explaining why the possibility of negotiating a non-disruption agreement was considered and rejected. I draw particular attention to the final sentence in paragraph 16 which reads:

> "To have entered such consultations would have served to bring out the vulnerability of areas of operations to those who had shown themselves ready to organise disruption and consultation with individual members of staff at GCHQ would have been impossible without involving the national unions."

Ministers also were of the view that the importance of the decision was such as to warrant its first being announced in Parliament. This passage read in the context of the documentary evidence exhibited to Sir Robert's affidavit to which I have already referred seems to me to make abundantly clear why the respondent and other ministers declined to engage in consultations in advance of issuing the instructions. It was argued that such consultation might have led to a non-disruption agreement such as was later suggested on behalf of the appellants. But

A the draft of that agreement clearly does not achieve that which the respondent sought to achieve by the instructions and the evidence clearly shows that the national unions, without whose co-operation a non-disruption agreement would have been valueless, were not prepared to countenance such an agreement. It was also suggested that if consultation had taken place regarding the polygraph there was no reason why consultation should not take place regarding the intended B instructions. My Lords, the short answer to that is that the two are not comparable.

My Lords, I have therefore reached the clear conclusions, first, that the respondent has established that the work at GCHQ was a matter of grave national security, second, that that security would have been seriously compromised had industrial action akin to that previously C encountered between 1979 and 1981 taken place, third, that consultation with the appellants prior to the oral instructions would have served only further to reveal the vulnerability of GCHQ to such industrial action, fourth, that it was in the interests of national security that that should not be allowed to take place, and fifth, that accordingly the respondent was justified in the interests of national security in issuing the instructions without prior consultation with the appellants.

D That conclusion accords with the conclusion reached by the Court of Appeal and must lead to the result that the appeal should be dismissed. I would only add, again in agreement with the Court of Appeal, that had the matter been argued before the learned judge, as it was in the Court of Appeal and before this House, he might well have reached a different conclusion from that which he reached.

E For the sake of completeness I would add that I reject Mr. Blom-Cooper's separate argument that the oral instructions were in any event bad as insufficiently specific or precise. I am in complete agreement with the views of both courts below on that submission.

I do not find it necessary to say anything about what became known as the "futility argument," that is to say that even if consultation were required it would have been futile because it would have been of no F effect. On the view I take, that matter does not arise for decision.

LORD BRIGHTMAN. My Lords, I also would dismiss this appeal for one reason only, namely, on the ground of national security. The evidence is compelling that the Minister for the Civil Service acted without prior consultation with the unions concerned because she G believed, and reasonably believed, that such process of prior consultation might result in disruption that would pose a threat to the security of the nation. This factor overrode the right in public law which the unions would otherwise have had, on the facts of this particular case, to be consulted before the instruction of 22 December 1983 was given.

There is nothing which I can usefully add to the comprehensive survey which your Lordships have already made of the authorities on H the reviewability of decisions taken under the royal prerogative. There is no difference between the conclusions reached by your Lordships except on one isolated point: whether the reviewability of an exercise of a prerogative power is limited to the case where the power has been

delegated to the decision-maker by Order in Council, so that the decision-making process which is sought to be reviewed arises under and must be exercised in accordance with the terms of that order; or whether reviewability may also extend, in an appropriate case, to a direct exercise of a prerogative power. Like my noble and learned friend, Lord Fraser of Tullybelton, I would prefer to leave the resolution of that question to a case where it must necessarily be determined.

For the reason indicated, I would dismiss this appeal.

Appeal dismissed.
No order as to costs in House of Lords or below.

Solicitors: Lawford & Co.; Treasury Solicitor.

M. G.

[HOUSE OF LORDS]

LIVESEY (formerly JENKINS) . . . . . RESPONDENT

AND

JENKINS . . . . . APPELLANT

[On appeal from JENKINS v. LIVESEY (FORMERLY JENKINS)]

1984 Nov. 12, 13; Dec. 13

Lord Hailsham of St. Marylebone L.C., Lord Scarman, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Brandon of Oakbrook

Husband and Wife—Financial provision—Agreement—Disclosure of material facts—Parties reaching agreement regarding financial provision and property adjustment—Husband to transfer half-share in matrimonial home to wife—Wife's claim for financial provision for herself to be dismissed—Agreement embodied in consent order—Non-disclosure by wife of intention to remarry—Whether under duty of full and frank disclosure—Whether consent order to be set aside—Matrimonial Causes Act 1973 (c. 18), s. 25(1)

The Matrimonial Causes Act 1973 as originally enacted provided by section 25(1):

"It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(*a*), (*b*) or (*c*) or 24 above in relation to a party to the marriage and, if so, in

A House of Lords

Regina (Bancoult) *v* Secretary of State for Foreign and Commonwealth Affairs (No 2)

[2008] UKHL 61

B 2008 June 30; July 1, 2, 3; Oct 22

Lord Hoffmann, Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Lord Carswell, Lord Mance

Crown — Colony — Subordinate legislation — Orders in Council for governance of colony made under royal prerogative — Orders preventing return of exiled citizens — Whether Orders susceptible to judicial review on grounds of illegality, irrationality or procedural impropriety — Whether vires of Orders challengeable on ground of failure to conduce to peace, order and good government — Whether challengeable on ground of repugnancy to fundamental common law principle — Whether Human Rights Convention relevant — Whether Orders resulting from abuse of power — Whether unlawful — Colonial Laws Validity Act 1865 (28 & 29 Vict c 63), ss 2, 3 — British Indian Ocean Territory Order 1965 (SI 1965/1920) — British Indian Ocean Territory (Constitution) Order 2004, s 9 — British Indian Ocean Territory (Immigration) Order 2004

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In 1965 the islands of the Chagos Archipelago in the Indian Ocean, which had been ceded to Great Britain by France in the 19th century, were constituted a separate colony, the British Indian Ocean Territory ("BIOT"), by virtue of the British Indian Ocean Territory Order 1965. Under an Immigration Ordinance made in 1971 by the Commissioner for BIOT as the legislature of the colony, purportedly pursuant to the 1965 Order, the inhabitants of the Chagos Islands were compulsorily removed, mainly to Mauritius, because Diego Garcia, the principal island in the archipelago, was required for a US military base. In 2000 the claimant, a British dependent territory citizen who had been born in the archipelago but had been prevented from returning there since 1971, obtained a Divisional Court order quashing the 1971 Ordinance on the ground that the exclusion of an entire population from its homeland lay outwith the purposes of the parent Order in Council. In a written ministerial statement made at that time, the Foreign Secretary accepted the Divisional Court's ruling and announced that a new Immigration Ordinance would be put in place which would allow the islanders to return to the islands other than Diego Garcia. The Immigration Ordinance No 4 of 2000 accordingly exempted from the need for an entry permit those, including the claimant, with the relevant connection to the islands. However, in June 2004 the Government decided to reintroduce immigration controls so that the islanders would no longer be allowed to reintroduce the outer islands without a permit. In accordance with that decision and without consulting the islanders or having recourse to Parliament, ministers drafted two Orders in Council, the British Indian Ocean Territory (Constitution) Order 2004[1] and the British Indian Ocean Territory (Immigration) Order 2004, which removed any right of abode and disentitled the islanders from entry or presence on the islands without specific permission. The draft Orders were placed before Her Majesty in Council who, on the advice of her ministers, without debate in Council, and exercising her prerogative powers, gave her formal assent to the Orders. The claimant issued judicial review proceedings seeking, among other relief, a declaration that the Orders were unlawful in that they (i) without the authority of Parliament purported to remove his right to enter and reside in BIOT, and (ii) frustrated the islanders' legitimate expectation, which had been raised by the ministerial statement

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[1] British Indian Ocean Territory (Constitution) Order 2004, s 9: see post, para 1.

given in 2000, that their right of abode would not be taken away, if at all, without prior consultation and the opportunity for parliamentary discussion. The Secretary of State resisted the claim on the grounds, inter alia, that the Orders were immune from judicial scrutiny, having been made by the Queen exercising her sovereign powers in respect of the governance of a colony, and that in any event, by virtue of sections 2 and 3 of the Colonial Laws Validity Act 1865[2], the Orders were only susceptible to review by the courts on the basis that they were repugnant to an imperial statute extending to the colony, which was not the case. The Divisional Court rejected the Secretary of State's submissions and granted the declaration. The Court of Appeal, dismissing his appeal, affirmed the Divisional Court's order.

On appeal by the Secretary of State—

Held, (1) that there was no reason in principle why prerogative legislation should not, like other prerogative acts, be reviewable by the courts on ordinary principles of legality, rationality and procedural impropriety; that the Crown's prerogative power to legislate by Order in Council on the advice of its ministers in relation to a territory such as BIOT was therefore susceptible to judicial review; and that (Lord Rodger of Earlsferry and Lord Carswell dissenting) since the British Indian Ocean Territory (Constitution) Order 2004 was not only part of the local law of BIOT but, as imperial legislation, was made in the interests of the undivided realm of the United Kingdom and its non-self-governing territories, it was not "a colonial law" for the purposes of the 1865 Act and that Act, accordingly, presented no obstacle to the review jurisdiction of the United Kingdom courts (post paras 34–41, 68, 71, 105, 122, 141–142).

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL(E) applied.

Campbell v Hall (1774) 1 Cowp 204 considered.

(2) Per Lord Hoffmann, Lord Rodger of Earlsferry, Lord Carswell and Lord Mance that, since BIOT had become a new political entity in 1965 to which the Convention for the Protection of Human Rights and Fundamental Freedoms had not been extended, the Convention had no application there and the Crown's actions there could not infringe the provisions of the Human Rights Act 1998 (post, paras 64–65, 116, 131, 142).

(3) Per Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell, that the Crown's prerogative power to legislate for a ceded territory, although expressed in customary terms, was not limited by the requirement that legislation should be for the peace, order and good government or other benefit of the inhabitants of the colony, and might properly be exercised in the wider interests of the United Kingdom; and that it was not open to the courts to strike down legislation enacted under a power so described on the ground that it did not conduce to those objects (post, paras 48–51, 107–109, 127–130).

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067, DC overruled.

(4) Allowing the appeal (Lord Bingham of Cornhill and Lord Mance dissenting), that the vires of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 could not be challenged on the ground of its repugnancy to any fundamental principle of English common law in respect of the rights of abode of the Chagos Islanders as "belongers" in the islands; that, having regard to the factors taken into account by the Secretary of State, in particular, the feasibility of resettlement in the context of long-term prior depopulation, together with the requirements of public expenditure and the state's security and diplomatic interests, which lay peculiarly within the competence of the executive, the decision to reimpose immigration control and prevent resettlement was neither unreasonable nor an abuse of power; that the statement made by the Secretary of State when revoking immigration controls in 2000 did not amount to a clear and unambiguous promise that the

[2] Colonial Laws Validity Act 1865, ss 2, 3: see post, para 36.

A Chagos Islanders would be allowed to return and settle permanently on the outer islands; and that, accordingly, no legitimate expectation had been created on which they might rely (post, paras 44–45, 53–58, 61, 67, 102, 110–115, 117–118, 126, 132–134, 136).

Decision of the Court of Appeal [2007] EWCA Civ 498; [2008] QB 365; [2007] 3 WLR 768 reversed.

B The following cases are referred to in the opinions of the Committee:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Attorney General v De Keyser's Royal Hotel Ltd [1919] 2 Ch 197, CA; [1920] AC 508, HL(E)
Attorney General for Canada v Cain [1906] AC 542, PC
Auld v Murray (unreported) 1864
C *British Broadcasting Corpn v Johns* [1965] Ch 32; [1964] 2 WLR 1071; [1964] 1 All ER 923, CA
Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372
Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75; [1964] 2 WLR 1231; [1964] 2 All ER 348, HL(Sc)
Campbell v Hall (1774) 1 Cowp 204
D *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB); The Times, 10 October 2003; [2004] EWCA Civ 997; The Times, 21 September 2004, CA
Chenard & Co v Arissol [1949] AC 127, PC
Colenso, In re (1865) 3 Moo PC NS 115, PC
Co-operative Committee on Japanese Canadians v Attorney General for Canada [1947] AC 87, PC
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1984] 3 All ER 935, HL(E)
E *Croft v Dunphy* [1933] AC 156, PC
Doherty v Birmingham City Council [2008] UKHL 57; [2009] 1 AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
Duffy v Ministry of Labour and National Insurance [1962] NI 6, CA(NI)
Edwards v Cruickshank (1840) 3 D 282, Ct of Sess
Entick v Carrington (1765) 19 State Tr 1029
F *Fabrigas v Mostyn* (1774) 20 State Tr 82
Gallagher v Lynn [1937] AC 863; [1937] 3 All ER 598, HL(NI)
Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641
Ibralebbe v The Queen [1964] AC 900; [1964] 2 WLR 76; [1964] 1 All ER 251, PC
Kodeeswaran v Attorney General of Ceylon [1970] AC 1111; [1970] 2 WLR 456, PC
Liversidge v Anderson [1942] AC 206; [1941] 3 All ER 338, HL(E)
G *Liyanage v The Queen* [1967] 1 AC 259; [1966] 2 WLR 682; [1966] 1 All ER 650, PC
M v Home Office [1994] 1 AC 377; [1993] 3 WLR 433; [1993] 3 All ER 537, HL(E)
Madzimbamuto v Lardner-Burke [1969] 1 AC 645; [1968] 3 WLR 1229; [1968] 3 All ER 561, PC
Phillips v Eyre (1870) LR 6 QB 1
Proclamations Case (1611) 12 Co Rep 74
H *R v Bhagwan* [1972] AC 60; [1970] 3 WLR 501; [1970] 3 All ER 97, HL(E)
R v Burah (1878) 3 App Cas 889, PC
R v Governor of Pentonville Prison, Ex p Azam [1974] AC 18; [1973] 2 WLR 949; [1973] 2 All ER 741, CA
R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545; [1990] 1 All ER 91, DC

R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136; [2006] 2 WLR 772; [2006] 2 All ER 741, HL(E) A
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 740; [1996] 1 All ER 257, CA
R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850, CA
R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, CA B
R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74; [1983] 2 WLR 321; [1983] 1 All ER 765, HL(E)
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473; [2003] QB 1397; [2003] 3 WLR 80, CA
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067; [2001] 2 WLR 1219, DC C
R (Bibi) v Newham London Borough Council [2001] EWCA Civ 607; [2002] 1 WLR 237, CA
R (Mullen) v Secretary of State for the Home Department [2004] UKHL 18; [2005] 1 AC 1; [2004] 2 WLR 1140; [2004] 3 All ER 65, HL(E)
R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363; The Times, 14 December 2005, CA D
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57; [2006] 1 AC 529; [2005] 3 WLR 837; [2006] 3 All ER 111, HL(E)
R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2002] UKHL 8; [2003] 1 WLR 348; [2002] 4 All ER 58, HL(E)
Riel v The Queen (1885) 10 App Cas 675, PC
Ruding v Smith (1821) 2 Hag Con 371 E
Sammut v Strickland [1938] AC 678; [1938] 3 All ER 693, PC
Trustees Executors and Agency Co Ltd v Federal Comr of Taxation (1933) 49 CLR 220
Ulster Transport Authority v James Brown & Sons Ltd [1953] NI 79
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1
Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong [1985] AC 733; [1985] 2 WLR 786; [1985] 3 All ER 17, PC
Zabrovsky v General Officer Commanding Palestine [1947] AC 246, PC F

The following additional cases were cited in argument:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)
A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221; [2005] 3 WLR 1249; [2006] 1 All ER 575, HL(E) G
Ashbury v Ellis [1893] AC 339, PC
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)
Attorney General for Canada v Attorney General for Ontario [1937] AC 326, PC
Attorney General for Ontario v Attorney General for Canada [1912] AC 571, PC
Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629; [1983] 2 WLR 735; [1983] 2 All ER 346, PC H
Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette (unreported) 26 July 2000, PC
Bates v Lord Hailsham of St Marylebone [1972] 1 WLR 1373; [1972] 3 All ER 1019
Behluli v Secretary of State for the Home Department [1998] Imm AR 407, CA

A *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215
British Airways Board v Laker Airways Ltd [1984] QB 142; [1983] 3 WLR 544; [1983] 3 All ER 375, CA
Buck v Attorney General [1965] Ch 745; [1965] 2 WLR 1033; [1965] 1 All ER 882, CA
Chandler v Director of Public Prosecutions [1964] AC 763; [1962] 3 WLR 694; [1962] 3 All ER 142, HL(E)
B *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161, CA
Chung Chi Cheung v The King [1939] AC 160; [1938] 4 All ER 786, PC
Commercial and Estates Co of Egypt v Board of Trade [1925] 1 KB 271, CA
Cook v Sprigg [1899] AC 572, PC
Durham Holdings Pty Ltd v State of New South Wales (1999) 47 NSWLR 340; [2001] HCA 7; 205 CLR 399
Environment Agency v Anglian Water Services Ltd [2002] EWCA Civ 5; The Times, 18 February 2002, CA
C *Findlay, In re* [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)
Hodge v The Queen (1883) 9 App Cas 117, PC
Hughes v Department of Health and Social Security [1985] AC 776; [1985] 2 WLR 866, HL(E)
International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158; [2003] QB 728; [2002] 3 WLR 344, CA
D *Jefferys v Boosey* (1854) 4 HLCas 815, HL(E)
Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening) [2006] UKHL 26; [2007] 1 AC 270; [2006] 2 WLR 1424; [2007] 1 All ER 113, HL(E)
Joyce v Director of Public Prosecutions [1946] AC 347; [1946] 1 All ER 186, HL(E)
Li Hong Mi v Attorney for Hong Kong [1920] AC 735, PC
McKerr, In re [2004] UKHL 12; [2004] 1 WLR 807; [2004] 2 All ER 409, HL(NI)
E *Macleod v Attorney General for New South Wales* [1891] AC 455, PC
Maritime Bank of Canada (Liquidators of) v Receiver General of New Brunswick [1892] AC 437, PC
Mortensen v Peters (1906) 8 F (J) 93
Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services) [2001] 2 SCR 281
Mutasa v Attorney General [1980] QB 114; [1979] 3 WLR 792; [1979] 3 All ER 257
F *Nyali Ltd v Attorney General* [1956] 1 QB 1; [1955] 2 WLR 649; [1955] 1 All ER 646, CA
Oloniluyi v Secretary of State for the Home Department [1989] Imm AR 135, CA
Operation Dismantle Inc v The Queen [1985] 1 SCR 441; 18 DLR (4th) 481
Post Office v Estuary Radio Ltd [1968] 2 QB 740; [1967] 1 WLR 1396; [1967] 3 All ER 679, CA
Powell v Apollo Candle Co Ltd (1885) 10 App Cas 282, PC
G *R v Attorney General, Ex p Lake* (unreported) 17 July 2002, St Helena Sup Ct
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, HL(E)
R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd [1999] 2 AC 418; [1998] 3 WLR 1260; [1999] 1 All ER 129, HL(E)
R v Customs and Excise Comrs, Ex p Kay & Co Ltd [1996] STC 1500
R v Devon County Council, Ex p Baker [1995] 1 All ER 73; 91 LGR 479, CA
H *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; [1999] 3 WLR 175; [1999] 4 All ER 801, DC; [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Earl of Crewe, Ex p Sekgome [1910] 2 KB 576, CA
R v Falmouth and Truro Port Health Authority, Ex p South West Water Ltd [2001] QB 445; [2000] 3 WLR 1464; [2000] 3 All ER 306, CA

R v Her Majesty's Treasury, Ex p Smedley [1985] QB 657; [1985] 2 WLR 576; [1985] 1 All ER 589, CA
R v Inland Revenue Comrs, Ex p Preston [1985] AC 835; [1985] 2 WLR 836; [1985] 2 All ER 327, HL(E)
R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681, CA
R v Jockey Club, Ex p RAM Racecourses Ltd [1993] 2 All ER 225, DC
R v Keyn (1876) 2 Ex D 63, CCR
R v Liverpool City Council, Ex p Liverpool Taxi Fleet Operators' Association [1975] 1 WLR 701; [1975] 1 All ER 379, DC
R v Lord Chancellor, Ex p Witham [1998] QB 575; [1998] 2 WLR 849; [1997] 2 All ER 779, DC
R v Lord Saville of Newdigate, Ex p A [2000] 1 WLR 1855; [1999] 4 All ER 860, CA
R v Lyons [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028, HL(E)
R v Ministry of Defence, Ex p Walker [2000] 1 WLR 806; [2000] 2 All ER 917, HL(E)
R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521; [1990] 3 WLR 898; [1990] 3 All ER 589, HL(E)
R v Secretary of State for the Environment, Ex p Nottinghamshire County Council [1986] AC 240; [1986] 2 WLR 1; [1986] 1 All ER 199, HL(E)
R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349; [2001] 2 WLR 15; [2001] 1 All ER 195, HL(E)
R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514; [1987] 2 WLR 606; [1987] 1 All ER 940, HL(E)
R v Secretary of State for the Home Department, Ex p Chaumun [1999] INLR 479
R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513; [1995] 2 WLR 464; [1995] 2 All ER 244, HL(E)
R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906; [1997] 1 All ER 397, CA
R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839; [1997] 3 All ER 961, HL(E)
R v Secretary of State for the Home Department, Ex p Thakrar [1974] QB 684; [1974] 2 WLR 593; [1974] 2 All ER 261, CA
R v Secretary of State for the Home Department, Ex p Turgut [2001] 1 All ER 719, CA
R v Secretary of State for the Home Department, Ex p Venables [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97, HL(E)
R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd [1988] AC 858; [1988] 2 WLR 654; [1988] 1 All ER 961, HL(E)
R v Uxbridge Magistrates' Court, Ex p Adimi [2001] QB 667; [2000] 3 WLR 434; [1999] 4 All ER 520, DC
R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598; [2003] UKHRR 76, CA
R (Aggregate Industries UK Ltd) v English Nature [2002] EWHC 908 (Admin); [2003] Env LR 83
R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
R (B) v Secretary of State for Foreign and Commonwealth Affairs [2004] EWCA Civ 1344; [2005] QB 643; [2005] 2 WLR 618, CA
R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139, CA; [2008] UKHL 27; [2008] AC 1003; [2008] 2 WLR 1073; [2008] ICR 659, HL(E)

A *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening) [2003] EWCA Civ 666; [2004] QB 811; [2004] 2 WLR 147; [2003] 4 All ER 247, CA; [2004] UKHL 55; [2005] 2 AC 1; [2005] 2 WLR 1; [2005] 1 All ER 527, HL(E)
R (Hurst) v London Northern District Coroner [2007] UKHL 13; [2007] 2 AC 189; [2007] 2 WLR 726; [2007] 2 All ER 1025, HL(E)
B *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262; [2005] 3 WLR 733; [2005] 4 All ER 1253, HL(E)
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
R (ProLife Alliance) v British Broadcasting Corpn [2003] UKHL 23; [2004] 1 AC 185; [2003] 2 WLR 1403; [2003] 2 All ER 977, HL(E)
R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 2 AC 368; [2004] 3 WLR 58; [2004] 3 All ER 821, HL(E)
C *Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, In re (1998) 161 DLR (4th) 385
Rowland v Environment Agency [2003] EWCA Civ 1885; [2005] Ch 1; [2004] 3 WLR 249, CA
D *Secretary of State for the Home Department v Zeqiri* [2002] UKHL 3; [2002] Imm AR 296, HL(E)
Sobhuza II v Miller [1926] AC 518, PC
Thornton v The Police [1962] AC 339; [1962] 2 WLR 1141; [1962] 3 All ER 88, PC
Trendtex Trading Corpn v Central Bank of Nigeria [1977] QB 529; [1977] 2 WLR 356; [1977] 1 All ER 881, CA
Union Government (Minister of Lands) v Estate Whittaker 1916 AD 194
Zamora, The [1916] 2 AC 77, PC

E

APPEAL from the Court of Appeal

The Secretary of State for Foreign and Commonwealth Affairs appealed, with leave of rhe Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell) granted on 23 October 2007, from the decision of the Court of Appeal (Sir Anthony Clarke MR, Waller and Sedley LJJ) dated 23 May 2007 dismissing his appeal F from the Divisional Court of the Queen's Bench Division (Hooper LJ and Creswell J) which, by orders sealed on 16 May and 23 June 2006, had allowed a claim by the claimant, Louis Olivier Bancoult, for judicial review and, in particular, had quashed section 9 of the British Indian Ocean (Constitution) Order 2004.

The facts are stated in the opinions of Lord Hoffmann and Lord Mance.

G

Jonathan Crow QC and *Kieron Beal* (instructed by the *Treasury Solicitor*) for the Secretary of State.

The claim to have a right of abode or to enjoy some other relevant right as "a belonger" in the British Indian Ocean Territory ("BIOT") is ill-founded. The claimant has no such rights as must be respected by Her Majesty's legislation. The concept of a "belonger" is a creature of legislation, it has no H independent existence in the common law and cannot found any legally enforceable right. There is no case law authority for the claimant's proposition and the word is not found in legal dictionaries. In any event the concept is incapable of sufficiently certain and uniform definition for its application or the consequences if it were to apply. Although the words

"belong" and belonger" are used, and defined, in legislation (see *Plender, International Migration Law*, 2nd ed (1988)), they have no independent existence in the general law, and as a result, unless and until they are used and defined expressly in legislation, they have no application or meaning: see *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) at [380]. Similarly, rights of entry and abode in relation to any part of Her Majesty's dominions only exist in municipal law by virtue of express enactment. They form no part of the common law: see *Halsbury's Laws of England*, 4th ed, 2002 reissue, vol 4(2), para 44.

A British overseas territory citizen does not have a legal right of entry and abode in a particular British overseas territory which can override, irremovably, the constitution of that territory. It is the constitution of a territory, and/or any immigration law duly made from it, which defines rights of entry and abode. The position is now defined exhaustively by statute in relation to the United Kingdom: see the Immigration Act 1971. Absent any express statutory enactment, a British citizen's right of entry into the United Kingdom may have existed only as a matter of public international law, not as a private law right enforceable by the individual against the state. Any state is entitled, as a matter of international law, to expel aliens; and accordingly there is a concomitant obligation on the state of which he is a national to receive him, if no other state will do so. But those complementary rights and obligations appear to exist only as between states in public international law: see *R v Secretary of State for the Home Department, Ex p Thakrar* [1974] QB 684, 702, 708–710 and *Thornton v The Police* [1962] AC 339. Accordingly the state is entitled to exclude British citizens from entering particular British possessions. Any decision about who is permitted to enter which territory is a matter of policy, to be implemented by legislation; it is not a matter of overriding law to be determined by the court and imposed on the legislator.

The authorities relied on by the claimant do not support his case: the right, preserved since Magna Carta and explained in *Blackstone's Commentaries on the Laws of England*, 15th ed (1809) and *Chitty's Prerogatives of the Crown* (1820) not to suffer exile except "by the law of the land", and the proposition that every state must admit its own nationals to its territory (see *Plender, International Migration Law*, 2nd ed, pp 133, 138 and 142–143) are not in point. Similarly, *R v Bhagwan* [1972] AC 60 is not in point and dicta in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, para 39 are irrelevant, wrong and obiter.

The relationship between an individual and the state, including any right of abode, is defined by its constitution. Here, the constitution of BIOT is contained in the British Indian Ocean (Constitution) Order 2004. That instrument is the only source of a person's right of entry; the claimant cannot have a constitutional right of entry or abode when the constitution specifically says that he has not (see *R v Lord Chancellor, Ex p Witham* [1998] QB 575, 585) and he cannot identify any other source for his assertion of such a right. The 2000 Immigration Ordinance did not "recognise" any such right. No recognition can be inferred from section 4 of the Ordinance or from the continuance it provided of the absolute prohibition on entry to Diego Garcia. In those circumstances it is impossible to interpret the instrument as recognising a right to enter and remain when

A the wording expressly flouted it. Since all land in BIOT is owned by the Crown, and the Chagos Islanders themselves own none, they commit trespass to the extent that they claim a right to enter and settle. The 2004 Orders are not therefore unlawful on the basis that they violate any substantive legal right to enter or reside there.

The constitutional relationship between the United Kingdom and its overseas territories is a matter of public law; it is not determined by the B private law of the territory in question: see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 721. The Crown's power to provide a constitution to a ceded colony such as BIOT derives from the royal prerogative which is a creature of the common law. Its existence and scope are matters for the courts to determine but only for Parliament to cut down, if it decides to do so: see *Roberts-Wray, Commonwealth and Colonial Law* (1966), p 157; C *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Proclamations Case* (1611) 12 Co Rep 74; *Sammut v Strickland* [1938] AC 678 and *Attorney General v De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197.

The prerogative power to constitute a ceded colony is not circumscribed by the expression "peace, order and good government". Those words are a legislative formula used regularly to define the scope of a colonial D legislature's authority. They are not part of the common law and do not define the royal prerogative. As such they do not limit the Crown's constituent power in relation to an overseas territory. As a matter of principle, the enactment of legislation for a ceded colony is an expression of the sovereign legislative authority of the state. It remains so unless and until the royal prerogative is cut down by Parliament or by conferring E representative government in the territory without reservation of powers. Different territories have been constituted for different purposes: in each case the underlying purpose for which the territory is constituted will inform any assessment of what might be regarded as conducive to its peace, order and good government. But the formula cannot itself define, or limit, the constituent power: see *Roberts-Wray, Commonwealth and Colonial Law*, p 157 and *Chenard & Co v Arissol* [1949] AC 127.

F However, if those words do define the prerogative constituent power, they describe, but do not limit, the legislative authority of a fully sovereign state: see *Jennings & Young, Constitutional Laws of the British Empire* (1938), p 29; *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co Ltd* (1885) 10 App Cas 282; *Riel v The Queen* (1885) 10 App Cas 675; *R v Earl of Crewe, Ex p Sekgome* G [1910] 2 KB 576; *Attorney General for Ontario v Attorney General for Canada* [1912] AC 571; *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735; *Croft v Dunphy* [1933] AC 156; *Ibralebbe v The Queen* [1964] AC 900; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 and *Durham Holdings Pty Ltd v State of New South Wales* (1999) 47 NSWLR 340; (2001) 205 CLR 399.

H The United Kingdom may lawfully constitute a ceded colony in exercise of the royal prerogative, and there are no substantive legal limits which preclude the territory being constituted for particular purposes, including those relating purely to the interests of the United Kingdom itself, such as defence: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and*

Commonwealth Affairs [2006] 1 AC 529; *Dicey, An Introduction to the Study of the Law of the Constitution*, 8th ed (1915), pp 42, 48, 67. The availability of the royal prerogative as a tool for enacting legislation for ceded colonies is an important and well-established feature of colonial governance; and, although now limited in practice, Parliament has chosen to leave the prerogative power of constituent legislation intact in that area and the courts should respect that judgment.

The royal prerogative by Order in Council has regularly been used to confer constitutions on former colonies when they attain independence. Since the prerogative cannot confer authority it does not itself embody, and, since it is used to confer sovereign independence in those circumstances, its power is as extensive as the scope of Her Majesty's authority in Parliament: see *Roberts-Wray, Commonwealth and Colonial Law*, p 157 and *Halsbury's Laws of England*, 4th ed, 2003 reissue, vol 6, para 823. Two constraints only have been held to apply to the exercise of the royal prerogative power to constitute ceded colonies: see *Campbell v Hall* (1774) 1 Cowp 204. The first, that Her Majesty's power was limited by the terms of cession, cannot survive subsequent authority: see *Cook v Sprigg* [1899] AC 572, 578; *Sobhuza II v Miller* [1926] AC 518, 528–529 and *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733. The second constraint, that the monarch could not make laws contrary to "fundamental principles", cannot survive the enactment of the Colonial Laws Validity Act 1865 and *Liyanage v The Queen* [1967] 1 AC 259. Her Majesty's prerogative power in relation to conquered or ceded colonies has always been regarded as unlimited (see *Nyali Ltd v Attorney General* [1956] 1 QB 1) and, in particular, not limited by the concept of "peace, order and good government".

With regard to the reviewability of the royal prerogative, the exercise of the prerogative constituent power is not in principle immune from judicial scrutiny by reference to allegations of ultra vires. The courts retain their power to determine whether any purported exercise of the prerogative falls within an area of legislative activity where the prerogative is still recognised. But where, as here, the scrutiny of the constitution of an overseas territory is in issue, the courts can have no relevant function in judicially reviewing prerogative constituent legislation by reference to allegations of illegality because there are no substantive limits to the royal prerogative in that regard. Nor has the court a relevant function in judicially reviewing the constitution by reference to allegations of irrationality or procedural impropriety.

The enactment of the 2004 Constitution Order is a legislative measure, not an executive act. Therefore within the framework of the conventional tripartite separation of powers the 2004 Order is the foundational law of BIOT; it did not involve any exercise of executive authority and, although in line with constitutional practice it was implemented on the advice of Her Majesty's ministers, it was not thereby an act of the executive branch of government, but rather it is an expression of Her Majesty's legislative sovereignty: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 19, 64 and 79. As distinct from being made under an Order in Council, such as is empowered by statute to make subordinate legislation, the 2004 Order is a prerogative Order in Council and, thereby, is a piece of primary legislation: see

A *Bradley & Ewing, Constitutional and Administrative Law*, 14th ed, (2006), p 680; section 21(1) of the Human Rights Act 1998; section 1 of the Statutory Instruments Act 1946 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 399.

It is inappropriate and unprecedented for the 2004 Order to be susceptible to judicial review. The court should respect the separation of powers and any attempt at judicial scrutiny would offend against that B principle: see *R (ProLife Alliance) v British Broadcasting Corpn* [2004] 1 AC 185, paras 75–76. The remedy for an "unconstitutional" exercise of prerogative legislation is political, not judicial (despite the modern "upsurge of judicial activism"). As a matter of constitutional principle, therefore, the courts never make prerogative orders against the Crown, though they may make them against ministers: see *M v Home Office* [1994] 1 AC 377; C *Chandler v Director of Public Prosecutions* [1964] AC 763; *Blackstone, Commentaries on the Laws of England*, 15th ed, p 251 and *Wade & Forsyth, Administrative Law*, 9th ed (2004), pp 45–47. That analysis has been confirmed by the Human Rights Act 1998 (see section 21) and is unaffected by the *Council of Civil Service Unions* case [1985] AC 374.

In any event the 2004 Order is particularly inapt for judicial scrutiny. The test of legality requires a decision-maker to understand and correctly D apply the law which regulates his decision-making power; but, in the present context, there are no objective criteria by reference to which the substantive lawfulness of any colonial constitution can be tested against allegations of illegality. Whether the courts have no jurisdiction, or will not exercise their powers in such areas, the subject matter does not lend itself to challenge by reference to allegations of irrationality, just as certain other areas of state E activity do not readily lend themselves to judicial scrutiny: see *Jennings & Young, Constitutional Laws of the British Empire*, pp 29–30; *R v Burah* 3 App Cas 889, 904–905; *Hodge v The Queen* 9 App Cas 117, 132; *Chenard & Co v Arissol* [1949] AC 127, 132; *Nyali Ltd v Attorney General* [1956] 1 QB 1, 16; *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* (unreported) 26 July 2000, para 29 and F *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76, para 106. [Reference was also made to *Buck v Attorney General* [1965] Ch 745.]

The formulation of the constitution of any territory is driven by considerations of pure policy. The subject matter does not lend itself to legal evaluation since there are no legal principles by reference to which competing policy considerations can be tested. Any judicial attempt to G assess a constitution's rationality would go beyond the court's function; the power to constitute a ceded colony is so fundamentally a matter of open policy that there can be no informed role for the court in assessing its rationality. The position is further compounded here since the constitution of BIOT is driven by defence interests in respect of which the courts are reluctant to second-guess the informed assessment of government.

In any event the judicial process is itself inappropriate since the H procedures available to the court render it unsuitable to conduct a review of the competing policy considerations that require evaluation in enacting a constitution. In any event the Privy Council is the ultimate appellate court in relation to colonial law; the principles applicable to the interpretation of colonial constitutions are sui generis and the consequence of allowing such a

review in the English courts is that an appeal will ultimately be heard not before the Privy Council but the Appellate Committee of the House of Lords. Accordingly prerogative Orders in Council are not subject to judicial review and, in particular, constituent legislation is inapt for judicial scrutiny by reference to allegations of illegality or irrationality or procedural impropriety.

If, however, judicial process is appropriate the Order is not unlawful on grounds either of illegality or irrationality. The threshold test for irrationality is high: see *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240; *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696. The court is rightly cautious about conducting any review of the royal prerogative involving considerations of defence and national security or in respect of foreign affairs; it should also be cautious where its assessments might involve issues relating to the distribution of public funds, or the balancing of competing societal interests: see the *Council of Civil Service Unions* case [1985] AC 374, 411; *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 556; *British Airways Board v Laker Airways Ltd* [1984] QB 142; *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418; *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349.

It is not appropriate to replace the established criteria of illegality, irrationality and procedural impropriety with the more generalised principle of "abuse of power" which imports a subtle but important difference and leads to uncertainty and subjectivity: see [2008] QB 365 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; The Times, 14 December 2005. If such a category is to apply, it will only be in cases of exceptional unfairness: see *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681 and *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397. Given the number of competing interests to be balanced, objective weight could not be attributed to each consideration and it would have been impossible for a court fairly to reach a conclusion that the 2004 Order was irrational.

Any attempt to challenge the 2004 Order by means of judicial review would be defeated by the Colonial Laws Validity Act 1865. The purpose and effect of the 1865 Act is to preclude any legal challenge to a colonial law, expressly and deliberately defined as including an Order in Council (see section 1), on the ground that it is repugnant to English law other than on the basis that it is repugnant to an Act of the Westminster Parliament. The claim that the 2004 Order is susceptible to judicial review and can be impugned as being repugnant to the law of England is precisely what the 1865 Act prohibits; under that Act the courts cannot deploy English common law principles of review to invalidate a colonial law. The Act only prevents a challenge being made to colonial laws by reference to English law, leaving unaffected the possibility of legislation being challenged by reference to the law of the territory in question, but the challenge here is to the 2004 Order, not a piece of local legislation, and the basis of the challenge is that the Order

A is unlawful by reference to English law. That is why the 1865 Act precludes such a claim: see John Finnis, "Common Law Constraints: Whose Common Good Counts?" (2008) Oxford Legal Studies Research Paper No 10/2008; *O'Connell & Riordan, Opinions on Imperial Constitutional Law* (1971), pp 60–73 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, para 47. Were the claim available, it would deprive the Act of all effect: see *Liyanage v The Queen* [1967] B 1 AC 259, 284–286; *Phillips v Eyre* (1870) LR 6 QB 1, 20; *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735, 737; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, 747 and *Macleod v Attorney General for New South Wales* [1891] AC 455.

A legitimate expectation may be founded on an express promise or representation that a policy will not be changed. In deciding whether such C an expectation has arisen the court has to consider the precise terms of the promise or representation, the circumstances in which it was made and the nature of the particular statutory or other discretion. The essential question is how, on a fair reading, the alleged representation would have been understood by those to whom it was directed: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] D QB 1397, para 56 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 56.

The legitimate expectation may entail either (1) no more than that the decision-maker will take his existing policy into account, or (2) an obligation on the decision-maker to consult those affected before changing his policy, or (3) an obligation for the decision-maker to confer a substantive benefit on an identified person or group. Those categories represent an E ascending hierarchy which must be reflected in the precision, clarity and irrevocability of any alleged representation or promise on which the expectation is said to be based. To rely successfully on a substantive expectation a claimant must be able to show that the promise was unambiguous, clear and devoid of relevant qualification, that it was made in favour of an individual or small group of persons affected; that it was reasonable for the claimant to rely on it; and that he did rely on it generally, F but not invariably, to his detriment: see *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73, 88–89; *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1124, 1131, 1134; *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348; *R (Bibi) v Newham London Borough Council* G [2002] 1 WLR 237, paras 27–30; the *Coughlan* case [2001] QB 213, paras 64, 70–71; *R v Falmouth and Truro Port Health Authority, Ex p South West Water Ltd* [2001] QB 445, 459–460; *R v Ministry of Defence, Ex p Walker* [2000] 1 WLR 806, 813 and *R v Jockey Club, Ex p RAM Racecourses Ltd* [1993] 2 All ER 225, 236–237.

A substantive expectation will only be upheld where not to do so would be equivalent to a breach of contract or an abuse of power; but it can H lawfully be frustrated if there is an overriding public interest which justifies that course. Whether the test of overriding interest is one of proportionality or irrationality, the court's supervision in assessing any justification in the macro-political field will be less intrusive and even where an expectation is found to arise, the decision-maker will not necessarily be required to honour

a promise where to do so would be to assume executive powers: see *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 866–867; *Secretary of State for the Home Department v Zeqiri* [2002] Imm AR 296, para 44; the *Coughlan* case [2001] QB 213, paras 57, 59 and 82; *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]–[69]; *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, paras 58–62 and *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, paras 23, 41.

The doctrine of substantive legitimate expectation, as developed in relation to administrative decision-making, is either inapplicable to prerogative, primary legislation or applies in such an attenuated form as not to be relevant in the present case: see *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, 1378; *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 339; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, para 55; *Sobhuza II v Miller* [1926] AC 518, 528–529; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733; *R v Customs and Excise Comrs, Ex p Kay & Co Ltd* [1996] STC 1500, 1528; *R v Secretary of State for the Home Department, Ex p Chaumun* [1999] INLR 479, 487; *R (Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83, para 117 and *Environment Agency v Anglian Water Services Ltd* [2002] EWCA Civ 5 at [29]–[33]; The Times, 18 February 2002. Other common law jurisdictions have been reluctant to give effect to the doctrine: see *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281.

In the present context there is no basis for reliance on any such legitimate expectation or for challenging the enactment of the 2004 Order as involving an abuse of power. A public authority is entitled to change its policy; a decision-maker cannot lawfully fetter his discretion and he does not need to justify any change by reference to an overriding public interest: see *In re Findlay* [1985] AC 318, 337–338; *Hughes v Department of Health and Social Security* [1985] AC 776, 788; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906, 918; *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 496–497 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76, para 86.

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Although Mauritius and its dependencies, including the Chagos Archipelago, were "ceded" to the British Crown and accordingly BIOT has been classified as a "ceded" rather than a "settled" colony (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067), there is now little significance in that classification: see *Campbell v Hall* 1 Cowp 204, 208 and *Forsyth, Cases and Opinions on Constitutional Law* (1869), pp 326–328. As British subjects the inhabitants owed the Crown allegiance and were owed a reciprocal duty of protection by the Crown: see *Joyce v Director of Public Prosecutions* [1946] AC 347 and *Mutasa v Attorney General* [1980] QB 114. The constitutional relationship between the subject and the Crown is governed by English common law; while private law in Mauritius was French, public law was English and the supreme legislative power over the colony is not the monarch but the

A Parliament of the United Kingdom. In accordance with those principles the extent of the royal prerogative in a ceded, conquered or settled colony is a matter of English law which applies throughout the Queen's dominions, including BIOT: see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 721–722; *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194; *Kodeeswaran v Attorney General of Ceylon* [1970] AC 1111; B *Ruding v Smith* (1821) 2 Hag Con 371; *Sammut v Strickland* [1938] AC 678, 697 and *Liquidators of the Maritime Bank of Canada v Receiver General of New Brunswick* [1892] AC 437, 441.

The constitution of Mauritius, granted by the Queen in Council in 1964 and applied to the Chagos Archipelago as part of Mauritius, recognised and declared the existence and continuance of certain fundamental rights and freedoms there; they included the right to reside in any part of the territory C and to enter and to leave with immunity from expulsion: see Chapter 1 and section 12. Those rights, applicable to all who belonged there, were subject to restrictions reasonably required in the interests of defence, public safety and public order, any such restriction being reasonably justifiable in a democratic society. When BIOT became a separate colony in 1965 the Order in Council provided for the continuation of laws in force at its date in any of the islands comprising the territory, including section 12 of the D Constitution of Mauritius: see section 15 of the 1965 Order.

The Queen in Parliament has supreme and unquestionable legislative power over all British colonies or dependencies; that has not been true of Her Majesty in Council since the 16th century. The power to legislate for a colony exercised by the Queen in Council is "primary" in the sense that it is not derived from a statute. Parliamentary legislation is immune from E judicial review not because it is primary, but because the common law as applied by the courts recognises the supremacy of Parliament: see *R (Jackson) v Attorney General* [2006] 1 AC 262, paras 102, 177. The scope of judicial review of the royal prerogative includes review of its exercise on grounds of unreasonableness, abuse of power, procedural impropriety and breach of legitimate expectations: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Operation Dismantle Inc v* F *The Queen* [1985] 1 SCR 441, 504; *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215, 230–231 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. Prerogative acts, being in reality acts of the executive, may be subject to judicial review if they directly affect the rights or legitimate expectations of citizens, or in some cases, inhabitants generally. The 2004 Orders fall into that category.

G Certain common law rights are recognised as "fundamental rights" despite the vagueness and uncertainty referred to in *Liyanage v The Queen* [1967] 1 AC 259, 271. A citizen's right of abode in and return to the territory of his citizenship is such a right: see *R v Lord Chancellor, Ex p Witham* [1998] QB 575; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554–555; *R v Secretary of State for the Home* H *Department, Ex p Brind* [1991] 1 AC 696; *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 and *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728. As a citizen of the United Kingdom and Colonies by reason of his birth in and connection with BIOT the claimant has retained his right

of abode there, including the right not to be excluded or exiled from BIOT. That is a fundamental right of citizenship. The right of entry and abode in relation to any part of Her Majesty's dominion is part of the common law of England and does not exist only by virtue of express enactment: see the *Bancoult* case [2001] QB 1067, para 39. The right is an ancient one; the Crown never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it: see Magna Carta, ch 29; *Holdsworth, History of English Law*, vol 10 (1981), p 393; *R v Bhagwan* [1972] AC 60, 74 and *R v Governor of Pentonville Prison, Ex p Azam* [1974] AC 18. Although in relation to specific territories within the Empire or Commonwealth, laws might be passed which controlled the entry of British subjects from other British territories, there is no example of any law prohibiting a British subject or citizen who belonged to a particular territory from entering or remaining in it except in the cases of the Antarctic, which is uninhabited, and BIOT (see *Plender, International Migration Law*, 2nd ed, pp 142–143) and *Thornton v The Police* [1962] AC 339 is not in point. The fact that the islanders did not own real estate on the islands cannot affect their position in public or constitutional law: see *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB).

The 2004 Orders are not valid in so far as they purport to remove the right of abode. The only authority claimed for them is the royal prerogative. However, the prerogative is the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown: see *Dicey, An Introduction to the Study of the Law of the Constitution*, 8th ed, p 421. It is for the courts to determine whether a prerogative exists and if so its extent: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513. No new prerogative power can be recognised, even if grounded on state necessity: see *British Broadcasting Corpn v Johns* [1965] Ch 32, 79 and *Entick v Carrington* (1765) 19 State Tr 1029, 1066. The courts' role has been, historically, to limit the Crown's powers and, in modern society, to guard the rule of law under a system of democratic government. When a new question arises for decision the court examines the extent to which, as a matter of precedent, the prerogative has previously been used: see *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 524, 538–539, 552, 563, 573 and *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 99, 101. There is no precedent for use of the prerogative in the present context of removing and excluding the entire population of British subjects from their homes and places of birth. The absence of such precedent should be decisive.

Her Majesty in Council has power to legislate for British colonies, but the prerogative power is not unfettered. In the case of settled colonies the Crown had formal power to grant a constitution but not to make other laws; in ceded or conquered colonies the power extended to both classes of legislation: see *Sammut v Strickland* [1938] AC 678 and *In re Colenso* (1865) 3 Moo PC NS 115. Accordingly, in respect of the prerogative of colonial legislation, the courts scrutinise the claims to prerogative power as they do other claims to prerogative power and the Crown must establish a recognised historical basis for legislation such as that contained in sections 9 and 15 of the 2004 Order. Those provisions have no special or superior status and were beyond the law-making powers of Her Majesty.

A The prerogative does not remain in its pristine condition unless cut down by Parliament. It may be changed by developments such as the expansion in the Commonwealth of representative democracy, the evolution to its modern form of judicial review, the recognition of the rule of law and the principle of legality as a governing principle of public administration. Part of that process is the recognition that some rights are fundamental so that even the most general words in a statute will be read as being subject to B the basic rights of the individual: see *Ex p Simms* [2001] 2 AC 115, 131. The same principles are to be applied to define the scope of prerogative powers in the absence of evidence of an accepted precedent for the particular exercise claimed; the vires of the Orders in Council, as acts of the executive, are now to be examined by the courts in the light of the state's international obligations: see *In re McKerr* [2004] 1 WLR 807; *R (European Roma Rights* C *Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1 and *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221. There should therefore be some compelling reason of state for removing the fundamental rights of the inhabitants of a dependent territory that could be legally enacted by the Westminster Parliament.

D In modern times the Queen in Council has never claimed under the prerogative of colonial legislation a legislative power as wide and unlimited as that of Parliament. With regard to conquered or ceded colonies such prerogative power is to make laws for the peace, order and good government of the territory in question: those are the terms in which the monarch's legislative powers are reserved. In conferring legislative powers on a colonial legislature Her Majesty in Council customarily used the same terms E and such powers have been described by the courts as "plenary" or "the widest law-making powers appropriate to a sovereign": see *Ibralebbe v The Queen* [1964] AC 900, 923. But in no case was the colonial law under consideration comparable with the purported laws exiling the claimant and his fellow islanders and a colonial legislature will have plenary powers only within the limits which circumscribe those powers: see *R v Burah* 3 App Cas 889; *Hodge v The Queen* 9 App Cas 117; *Powell v Apollo Candle Co Ltd* F 10 App Cas 282; *Riel v The Queen* 10 App Cas 675; *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576; *Attorney General for Ontario v Attorney General for Canada* [1912] AC 571; *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735; *Croft v Dunphy* [1933] AC 156 and *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733.

"Peace, order and good government" are not words of limitation in the G sense that only such laws can be made as conduce, factually, to peace, order and good government. That is not an inquiry into which a court may go: but the laws must be capable of so conducing to those ends. A law excluding the whole permanent population of the colony could not do that: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067; *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220; *Ibralebbe v The Queen* [1964] AC 900; H *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Ashbury v Ellis* [1893] AC 339; *Croft v Dunphy* [1933] AC 156; *Macleod v Attorney General for New South Wales* [1891] AC 455; *Attorney General for Canada v Cain* [1906] AC 542 and the British Settlements Act 1887

(50 & 51 Vict c 54). *Union Steamship Co of Australia Pty Ltd v King* 166 CLR 1; *Jefferys v Boosey* (1854) 4 HL Cas 815 and *Durham Holdings Pty Ltd v State of New South Wales* 205 CLR 399 do not assist the Secretary of State. A

It is a misreading of the Colonial Laws Validity Act 1865 to interpret it as providing that no challenge may be made to the validity of any colonial law, including the 2004 Order, save on the ground of repugnancy to an enactment of the Westminster Parliament. Section 2 of the 1865 declares only the extent to which a colonial law shall be declared void in the event of repugnancy; that is confirmed by the wording of section 3. The question whether a colonial law is otherwise within the powers conferred on a colonial legislation or of the Queen in Council is not answered by the Act: it depends on the terms in which the power is conferred, or the extent of Her Majesty's legislative power: see *R v Burah* 3 App Cas 889, 904. The prior question is therefore one of the limits on power; repugnancy is a different question. Further, by asserting that the Orders are susceptible to judicial review, the claimant does not impugn them on the basis of repugnancy to the law of England contrary to the 1865 Act. The term "repugnant" connotes inconsistency or incompatibility; when a law, regulation or executive decision is judicially reviewed and held to be invalid it would be a distortion of language to say that it is so because it is incompatible with the principles of judicial review. Those principles and the subject matter of the impugned law or decision are not pari materia. The Secretary of State's reliance on John Finnis, "Common Law Constraints: Whose Common Good Counts?" (2008) Oxford Legal Studies Research Paper No 10/2008 is misplaced. B C D

The courts below were correct to hold that the subject matter of the Orders in Council was not an area which is not amenable to judicial review within the principles set out in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and that the Orders were reviewable as executive acts directly affecting the subject in respect of the removal of his rights of abode: see pp 408, 410–411, 416–418, 420–421, 423. It is not inapt for the courts to subject the making of the Orders to scrutiny on the ground of irrationality, nor should the court adopt "a light touch" so as only to find the decision-maker irrational when it could be said that "he had taken leave of his senses". Where a measure affects fundamental human rights or has particularly intrusive effects the courts will employ the anxious scrutiny test, requiring the public body to demonstrate that the most compelling justification existed for such a measure: see *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554; *R v Lord Saville of Newdigate, Ex p A* [2000] 1 WLR 1855, paras 33, 36–37; *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531; *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 867; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 125–131; *R v Secretary of State for the Home Department, Ex p Turgut* [2001] 1 All ER 719, 729 and *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368. E F G H

Where a right under the European Convention for the Protection of Human Rights and Fundamental Freedoms or a fundamental constitutional right recognised by the common law is in play, the proportionality approach is appropriate which invites response to the threefold question: whether the

A objective is sufficiently important to justify limiting the right, whether the measure is rationally connected to that objective and whether the means used impair the right in a way that is no more than necessary: see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 21, 28, 35, 36. The court's review is not removed because the subject matter in issue is defence: see *A v Secretary of State for the Home Department* [2005] 2 AC 68; *Council of Civil Service Unions v Minister for the Civil Service* B [1985] AC 374; *Chandler v Director of Public Prosecutions* [1964] AC 763 and *The Zamora* [1916] 2 AC 77. Given the profound effect of the Orders overwhelming justification for them must be shown. The findings of the courts below correctly show that the interests of the islanders were not taken into account and that the Orders cannot be justified whether on grounds of illegality, irrationality, proportionality, unreasonableness, conspicuous C unfairness or as an abuse of power: see *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, para 26 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [67].

If the claimant's submissions are otherwise rejected, he has a valid claim to relief under the European Convention since it has, at all material times, D applied to the Chagos Islands by virtue of the declaration extending rights to the territory made pursuant to article 56 (ex article 63), and the absence of any denunciation under article 58 (ex article 65) of that declaration. The Order creating BIOT cannot be read as diminishing the inhabitants' rights. The Crown, having conferred those rights on them and having entered into an international obligation under the Convention to respect E them and refrain from withdrawing them is obliged to secure them.

Further, having regard to the legislative arrangements made for BIOT under the 1965 and 1976 Orders and sections 3 and 4 of the Courts Ordinance 1983, in the absence of a declaration by the commissioner applying or disapplying a statute which alters the law of England, it is for the court to determine whether a statute is received into the law of BIOT by section 3 of the 1983 Ordinance. In consequence the Human Rights Act F 1998 has had effect in BIOT since it came into force in England in 2000. It was therefore in force when the 2004 Orders in Council were made. Although the 1998 Act might require modification to take account of local circumstances (see section 3 of the 1983 Ordinance) any adaptations could not be so extensive as to disapply the Act in BIOT. Her Majesty in Council, making laws for BIOT, acted as a public authority under the 1998 Act as G applied to BIOT and she could not have power under the prerogative to make laws for BIOT in conflict with the Convention. The 2004 Orders may therefore be held incompatible under the Act: see *R v Attorney General, Ex p Lake* (unreported) 17 July 2002.

Exclusion of the entire population from its traditional home is an infringement of the United Kingdom's treaty obligations to respect the islanders' rights to self-determination under, inter alia, the United Nations H Charter and customary international law. It is an infringement of the United Kingdom's duties under article 73 of the Charter which requires recognition of the principle that the interests of the inhabitants are paramount, and acceptance, as a sacred trust, of the duty to promote their well-being to the utmost. As a matter of public international law the rules of jus cogens have a

peremptory quality and are absolutely binding on all states: see article 53 of the Vienna Convention on the Law of Treaties (1969) (Cmnd 4140) and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. The English common law has long recognised that customary international law is part of the law of England and changes in international law may have direct consequences for national law: see *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529 and *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858. As a matter of public international law the right to self-determination is jus cogens: see the United Nations Charter, articles 2(2), 55, 73–74; *Oppenheim's International Law*, 9th ed (1992), vol 1, pp 282–295; *Brownlie, Principles of Public International Law*, 6th ed (2003), pp 488–490, 553–555 and *In re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada* (1998) 161 DLR (4th) 385. On the assumption that the population of a non-self-governing overseas territory constitute a people entitled to self-determination, the prerogative should not be recognised as including a power to legislate in a manner contradictory of that right.

Bradley following.

The concept of substantive legitimate expectations is a recent and evolving area of public law which has developed from case law relating to the procedural protection of such expectations: see *R v Liverpool City Council, Ex p Liverpool Taxi Fleet Operators' Association* [1975] 1 WLR 701; *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213; *In re Findlay* [1985] AC 318; *Hughes v Department of Health and Social Security* [1985] AC 776; *R v Ministry of Defence, Ex p Walker* [2000] 1 WLR 806; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906; *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681; *Oloniluyi v Secretary of State for the Home Department* [1989] Imm AR 135; *Rowland v Environment Agency* [2005] Ch 1; *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348; *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 and *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] AC 1003, per Lord Rodger of Earlsferry and Lord Mance. In all cases of legitimate expectation, whether substantive or procedural, the court must determine (1) to what the public authority, whether by practice or by promise, has committed itself; and (2) whether the authority has acted or proposed to act unlawfully in relation to its commitment: see *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237. Wherever a legitimate expectation arises as a result of an assurance or promise the court must decide whether that affects the legality of the action subsequently taken by the authority and, depending on the circumstances, it may decide that the authority need only bear in mind its previous policy or representation, giving weight to it as the authority thinks fit. In such a case the court's review will be restricted to the *Wednesbury* criteria: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. Alternatively the court may consider that the promise or practice induces a legitimate expectation such as to give rise to a duty of consultation; in which case an opportunity for consultation

A must be given unless there is an overriding reason to resile from it. In such a case the court will assess the adequacy of the reasons by reference to the requirements of fairness or, more broadly, good administration: see *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363. Finally, if the court considers that a lawful promise has induced a legitimate expectation of a substantive benefit, it may, where appropriate, conclude that to frustrate the expectation is so unfair that to B take a different course would amount to an abuse of power.

The Court of Appeal were correct to conclude that such was the case: that the Secretary of State's statement was clear, unambiguous and devoid of relevant qualification and that it gave rise to reasonable and legitimate expectations amounting to an assurance which could not be ignored: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] C QB 213; *R v Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Detriment, although not a necessary ingredient as it would be in private law estoppel, does exist here in the form of the reliance placed by the islanders on resettlement.

It is not correct that the principles of substantive legitimate expectation D do not apply to prerogative legislation, or that, if they do, they only do so in so attenuated a form as not to apply here. Judicial review is not limited to administrative action but extends to the review of legislative measures taken under the prerogative. While considerations of fairness do not affect primary legislation (see *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373) such immunity is not extended to other forms of legislation: E see *R v Her Majesty's Treasury, Ex p Smedley* [1985] QB 657 and *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at [33]. Parliamentary legislation, even if contrary to prior ministerial assurances, cannot be reviewed by the courts; but prerogative orders, being primary legislation only in the sense that the authority under which they are made is not derived from other legislation, are made solely as a result of an executive, not a legislative, process. Although a public F authority can change its policy if it lawful for it to do so, that principle cannot apply in the present case. The Secretary of State's action was an executive act and breach of the legitimate expectation relied on by the islanders occurred when the Orders in Council were drafted and submitted to the Privy Council for formal endorsement.

Crow QC in reply.

G The notification by the United Kingdom in 1953 of the Convention rights under article 56 (ex article 63) to Mauritius and the Seychelles did not refer in terms to the Chagos Islands and lapsed in respect of the islands when BIOT was created. No separate extension of the Convention has ever been notified in relation to BIOT. The United Kingdom is not therefore responsible for alleged violations there of any rights guaranteed by the Convention. In any event notification applies to a legal entity; the effect of H the United Kingdom's notification in respect of Mauritius was to make the United Kingdom responsible for any violations of the Convention in the territory of that colony; the effect of the creation of the legal entity of BIOT was that the islands ceased to be part of the legal entity in respect of which notification had been made and the notification ceased to apply to them.

BIOT was a new and separate legal entity in respect of which no notification was ever made. In 1968, after the grant of independence to Mauritius, the United Kingdom, being no longer responsible for its international relations, the 1953 notification lapsed in its entirety. On no footing, therefore, could the Convention extend to BIOT.

Even if the Convention had been extended to BIOT under article 56 (ex article 63) the position would be no different. Since the claimant's challenge is to the 2004 Orders' interference with his ability to return to BIOT, and since he was in Mauritius when the Orders were made, he was not within the "legal space" to which it might be assumed the Convention extends. His complaint, being that he may not enter the territory to which he claims the Convention extends, cannot engage such rights. Even if he owned property there the imposition of immigration controls which would prevent enjoyment of his property rights there would not involve an interference under article 1 of the First Protocol. The claimant wishes to enter BIOT to begin enjoying rights there; but that is not a right protected by the Convention since the right to freedom of movement protected by the Fourth Protocol has not been ratified by the United Kingdom.

Doctrines such as "effective control" of a territory which are in principle capable of extending the application of the state's responsibility under the Convention outside its national territory are inapplicable to dependent territories such as BIOT where article 56 (ex article 63) is the only route: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 and *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153.

If there is no claim under the Convention there can be no claim under the Human Rights Act 1998. The purpose of the latter was to give effect to the former by providing a remedial structure in domestic law: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 44; the *Quark* case, paras 25, 34–36, 43, 62, 93–95 and the *Al-Skeini* case at paras 58–59, 134. That conclusion is unaffected by the BIOT (Courts) Ordinance 1983. Under section 3 of the Ordinance the 2004 Constitution Order is a "specific law" which would override the 1998 Act (on the assumption that it applied at all) and could not be impugned by it since that would reverse the effect of the wording of section 3. In any event the 1998 Act clearly relates to the United Kingdom: see section 21(1). Sections 4, 6 and 7, in referring to a "court", a "public authority" and the "appropriate court or tribunal" respectively cannot sensibly refer to BIOT. *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 does not affect that position. Accordingly the claimant cannot rely on the 1998 Act.

International agreements do not give rise to enforceable legal rights, except in so far as they have been incorporated into domestic law: see *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Lyons* [2003] 1 AC 976 and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499–500. The same applies in relation to overseas territories: see *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326. Thus rights recognised in treaties of cession do not override any subsequent exercise of the royal prerogative and the latter may be exercised in disregard of international agreements: see *Sobhuza II v Miller* [1926] AC 518; *Nyali Ltd v Attorney General*

A [1956] 1 QB 1; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733 and *Post Office v Estuary Radio Ltd* [1968] 2 QB 740.

The prerogative constituent power is not constrained by any obligation not to legislate inconsistently with the United Kingdom's treaty obligations: see *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189; *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161 and *Behluli v Secretary of State for the Home Department* [1998] Imm AR 407. B Cases to the contrary were decided per incuriam on this point: see *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] QB 811 and *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667.

As an abstract statement of principle a rule of customary international law is capable of being incorporated into domestic law, if it is accepted as C forming part of the common law: see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270 and *R v Jones (Margaret)* [2007] 1 AC 136. However principles of customary international law are not, in general, automatically incorporated into common law. Any such practice would be contrary to principle: see *Cook v Sprigg* [1899] AC 572; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; D *Mortensen v Peters* (1906) 8 F (J) 93; *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271; *Chung Chi Cheung v The King* [1939] AC 160; *R v Lyons* [2003] 1 AC 976 and *R v Keyn* (1876) 2 Ex D 63.

The Committee took time for consideration.

E 22 October 2008. **LORD HOFFMANN**

1 My Lords, this appeal concerns the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitution Order"):

> "(1) Whereas the territory was constituted and is set aside to be available for the defence purposes of the Government of the United F Kingdom and the Government of the United States of America, no person has the right of abode in the territory.
>
> "(2) Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory."

2 The constitution was made by prerogative Order in Council. G The Divisional Court (Hooper LJ and Cresswell J) held section 9 to be invalid and this decision was affirmed by the Court of Appeal (Sir Anthony Clarke MR and Waller and Sedley LLJ). The Secretary of State appeals to your Lordships' House.

3 The British Indian Ocean Territory ("BIOT") is situated south of the equator, about 2,200 miles east of the coast of Africa and 1,000 miles south-west of the southern tip of India. It consists of a group of coral atolls H known as the Chagos Archipelago of which the largest, Diego Garcia, has a land area of about 30 km^2. Some distance to the north lie Peros Banhos (13 km^2) and the Salomon Islands (5 km^2).

4 The islands were a dependency of Mauritius when it was ceded to the United Kingdom by France in 1814 and until 1965 were administered as part

of that colony. Their main economic activity was gathering coconuts and extracting and selling the copra or kernels. In 1962, when the plantations were acquired by a Seychelles company called Chagos Agalega Ltd ("the company") the settled population was a very small community (less than 1,000 on the three islands) who called themselves Ilois (Creoles des Iles) and whose families had in some cases lived in the islands for generations. With the assistance of contract labour from the Seychelles and Mauritius, the Ilois were mainly employed in tending the coconut trees and producing the copra.

5 The evidence suggests that the Ilois, who now prefer to be called Chagossians, lived an extremely simple life. The company, whose managers acted as justices of the peace, ran the islands in feudal style. Each family had a house with a garden and some land to provide vegetables, poultry and pigs to supplement the imported provisions supplied by the company. They also did some fishing. There was work in the copra industry as well as some construction, boat building and domestic service for the women. No one was involuntarily unemployed. Most of the Chagossians were illiterate and their skills were confined to those needed for the activities on the islands. But they had a rich community life, the Roman Catholic religion and their own distinctive dialect derived (like those of Mauritius and the Seychelles) from the French.

6 Into this innocent world there intruded, in the 1960s, the brutal realities of global politics. In the aftermath of the Cuban missile crisis and the early stages of the Vietnam War, the United States felt vulnerable without a land based military presence in the Indian Ocean. A survey of available sites suggested that Diego Garcia would be the most suitable. In 1964 it entered into discussions with Her Majesty's Government which agreed to provide the island for use as a base. At that time the independence of Mauritius and the Seychelles was foreseeable and the United States was unwilling that sovereignty over Diego Garcia should pass into the hands of an independent "non-aligned" government. The United Kingdom therefore made the British Indian Ocean Territories Order 1965 ("the BIOT Order") which, under powers contained in the Colonial Boundaries Act 1895 (58 & 59 Vict c 34), detached the Chagos Archipelago (and some other islands) from the colony of Mauritius and constituted them a separate colony known as BIOT. The order created the office of Commissioner of BIOT and conferred upon him power to "make laws for the peace, order and good government of the territory". Those inhabitants of BIOT who had been citizens of the United Kingdom and Colonies by virtue of their birth or connection with the islands when they were part of Mauritius retained their citizenship. When Mauritius became independent in 1968 they acquired Mauritian citizenship but, by an exception in the Mauritius Independence Act 1968, did not lose their UK citizenship.

7 At the end of 1966 there was an exchange of notes between Her Majesty's Government and the Government of the United States by which the United Kingdom agreed in principle to make BIOT available to the United States for defence purposes for an indefinitely long period of at least 50 years. It subsequently agreed to the establishment of the base on Diego Garcia and to allow the United States to occupy the other islands of the Archipelago if they should wish to do so.

8 In 1967 the United Kingdom Government bought all the land in the Archipelago from the company but granted the company a lease to enable it

A to continue to run the coconut plantations until the United States needed vacant possession. It took some time for the US Defence Department to obtain Congressional approval but in 1970 it gave notice that Diego Garcia would be required in July 1971. After receiving this notice the Commissioner of BIOT, using his powers of legislation under the BIOT order, made the Immigration Ordinance 1971. It provided in section 4(1) B that "no person shall enter the territory or, being in the territory, shall be present or remain in the territory, unless he is in possession of a permit . . . [issued by an immigration officer]".

9 Between 1968 and 1971 the United Kingdom Government secured the removal of the population of Diego Garcia, mostly to Mauritius and the Seychelles. A small population remained on Peros Banhos and the Salomon Islands, but they were evacuated by the middle of 1973. No force was used C but the islanders were told that the company was closing down its activities and that unless they accepted transportation elsewhere, they would be left without supplies. The whole sad story is recounted in detail in an appendix to the judgment of Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB); The Times, 10 October 2003.

10 My Lords, it is accepted by the Secretary of State that the removal and resettlement of the Chagossians was accomplished with a callous D disregard of their interests. For the most part, the community was left to fend for itself in the slums of Port Louis. The reasons were to some extent the usual combination of bureaucracy and Treasury parsimony but very largely the Government's refusal to acknowledge that there was any indigenous population for which the United Kingdom had a responsibility. The Immigration Ordinance 1971, denying that anyone was entitled to enter E or live in the islands, was part of the legal façade constructed to defend this claim. The Government adopted this position because of a fear (which may well have been justified) that the Soviet Union and its "non-aligned" supporters would use the Chagossians and the United Kingdom's obligations to the people of a non-self-governing territory under article 73 of the United Nations Charter to prevent the construction of a military base in the Indian Ocean.

F 11 When the Chagossians arrived in Mauritius they found themselves in a country with high unemployment and considerable poverty. Their conditions were miserable. There was a long period of negotiation between the Governments of Mauritius and the United Kingdom over payment for the cost of resettlement, but eventually in September 1972 the two Governments agreed on a payment of £650,000, which was paid in March G 1973. The Mauritius Government did nothing with the money until 1977 when, depleted by inflation, it was distributed in cash to 595 Chagossian families.

12 The Chagossians sought support and legal advice. In February 1975 Michael Vencatessen, who had left Diego Garcia in 1971, issued a writ in the High Court in London against the Foreign and Defence Secretaries and the Attorney General. His proceedings were funded by legal aid and he H received the advice of distinguished counsel. The claim was for damages for intimidation and deprivation of liberty in connection with his departure from Diego Garcia, but the proceedings came to be accepted on both sides as raising the whole question of the legality of the removal of the Chagossians from the islands.

13 Negotiations took place between the UK Government and Mr Vencatessen and his advisers, who were treated as acting on behalf of the Chagossians as a whole. In 1979 an agreement was reached with Mr Vencatessen and his advisers for a payment of £1·25m in settlement of all the claims of the Chagossians. His solicitor went to Mauritius to seek the approval of the community but was unable to obtain it. Further negotiations, in which the Government of Mauritius participated, took place over the next three years. Finally in July 1982 it was agreed that the UK Government would pay £4m into a trust fund for the Chagossians, set up under a Mauritian statute. The agreement was signed by the two Governments in the presence of Chagossian representatives and provided for individual beneficiaries to sign forms renouncing all their claims arising out of their removal from the islands. About 1,340 did so, but a few did not.

14 At that point the UK Government might have thought that, however badly its predecessors in office may have behaved in securing the removal of the Chagossians from the islands, the matter was now settled and a line could be drawn under this unfortunate episode. Any such hope would have been disappointed. Sixteen years later, on 30 September 1998 Mr Bancoult, the applicant in these proceedings, applied for judicial review of the Immigration Ordinance 1971 and a declaration that it was void because it purported to authorise the banishment of British Dependent Territory citizens from the territory and a declaration that the policy which prevented him from returning to and residing in the territory was unlawful.

15 The Government's reaction to the institution of these proceedings was to commission an independent feasibility study to examine whether it would be possible to resettle some of the Chagossians on the outer islands of Peros Banhos and the Salomon Islands. There was no question of their return to Diego Garcia, which the United States was entitled to occupy until at least 2016. It must have been clear to both parties that the challenge to the validity of the 1971 Ordinance was largely symbolic. There was no evidence that it had ever been used to expel anyone from the islands. The islanders who left between the time it was made and the final evacuation in 1973 did so because they were left with the alternative of being abandoned without support or supplies. Nor would its revocation have any practical effect on whether the Chagossians could go back and reside there. That would require an investment in infrastructure and employment which the Chagossians could not themselves provide. As was demonstrated by subsequent actions, the judicial review proceedings were only a part of a new campaign by the Chagossians to obtain UK Government support for their resettlement to right the wrongs of 1968–1973.

16 On 3 November 2000 the Divisional Court (Laws LJ and Gibbs J) gave judgment in favour of Mr Bancoult: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 ("*Bancoult (No 1)*") They decided that a power to legislate for the "peace, order and good government" of the territory did not include a power to expel all the inhabitants. The relief granted was an order quashing section 4 of the Immigration Ordinance 1971 as ultra vires.

17 After the judgment had been given, the Foreign Secretary (Mr Robin Cook) issued a press release:

> "Following the judgment in the BIOT Case on 3 November, Foreign Secretary Robin Cook issued the following statement: 'I have decided to

A accept the court's ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations. This Government has not defended what was done or said 30 years ago. As B Laws LJ recognised, we made no attempt to conceal the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the court and praised the openness of today's Foreign Office.' "

18 On the same day, the commissioner revoked the 1971 Immigration Ordinance and made the Immigration Ordinance 2000. This largely C repeated the provisions of the previous Ordinance but contained a new section 4(3) which provided that the restrictions on entry or residence imposed by section 4(1) should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT.

19 As was to be expected, the change in the law made no practical D difference. Some Chagossians made visits to the outer islands to tend family graves or simply to see and try to recognise their former homeland, but such visits had been made by permit under the old Ordinance and were invariably funded by the BIOT. No one went to live there. They awaited the report of the feasibility study.

20 In April 2002, before the production of the report, a group action was commenced on behalf of the Chagos Islanders against the Attorney E General and other ministers, claiming compensation and restoration of the property rights of the islanders and declarations of their entitlement to return to all the Chagos Islands and to measures facilitating their return. On 9 October 2003 Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 struck out this action on the grounds that the claim to more compensation after the settlement of the Vencatessen case was an F abuse of process, that the facts did not disclose any arguable causes of action in private law and that the claims were in any case statute-barred.

21 The importance of this judgment was that it unequivocally affirmed the validity of the 1982 settlement. The UK Government had discharged its obligations to the Chagossians by payment in full and final settlement.

22 On 22 July 2004, the Court of Appeal (Dame Elizabeth Butler-Sloss P, Sedley and Neuberger LJJ) [2004] EWCA Civ 997 refused leave to appeal. G Sedley LJ, who gave the judgment of the court, ended by saying, at para 54:

"This judgment brings to an end the quest of the displaced inhabitants of the Chagos Islands and their descendants for legal redress against the state directly responsible for expelling them from their homeland. They have not gone without compensation, but what they have received has done little to repair the wrecking of their families and communities, to H restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record. Their claim in this action has been not only for damages but for declarations securing their right to return. The causes of action, however, are geared to the recovery of damages, and no separate claims to declaratory relief have

been developed before us. It may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not of adjudication."

23 The question of economic resources was of course what the feasibility study had been commissioned to investigate. The report was produced in June 2002. It concluded that "agroforestal production would be unsuitable for commercial ventures". So there could be no return to gathering coconuts and selling copra. Fisheries and mariculture offered opportunities although they would require investment. Tourism could be encouraged, although there was nowhere that aircraft could land. It might only be feasible in the short term to resettle the islands, although the water resources were adequate only for domestic rather than agricultural or commercial use. But looming over the whole debate was the effect of global warming which was raising the sea level and already eroding the corals of the low lying atolls. In the long term, the need for sea defences and the like would make the cost of inhabitation prohibitive. On any view, the idyll of the old life on the islands appeared to be beyond recall. Even in the short term, the activities of the islanders would have to be very different from what they had been.

24 There followed discussion of the report between the Government (represented by Baroness Amos, Parliamentary Under-Secretary of State at the Foreign Office) and the applicant Mr Bancoult, his advisers and other representatives of the Chagossians. The Government was unwilling to commit itself one way or the other to a definite policy on resettlement until the Chagos Islanders action, which was claiming a legal entitlement to resettlement, had been resolved. But it resisted attempts on the part of the islanders to claim that the Foreign Secretary's press announcement and the revocation of the 1971 Immigration Ordinance amounted already to the adoption of a policy of resettlement. That decision would have to await the outcome of the litigation.

25 The judgment of Ouseley J in October 2003 in *Chagos Islanders v Attorney General* [2003] EWHC 2222 made it clear that there was no legal obligation upon the United Kingdom, whether by way of additional compensation or otherwise, to fund resettlement. The Government did not make any immediate statement, presumably because until 22 July 2004 there was still the possibility of an appeal. Before then, however, there was a development which gave the Government concern. Newspaper articles appeared in Mauritius suggesting that the Chagossians and their supporters (principally a political group in Mauritius calling itself LALIT) were planning some form of direct action by landings on the islands. A "flotille de la paix" would be assembled to take some of the Chagossians to Diego Garcia or the outer islands. As might be expected, the various participants in this project had somewhat different aims. For LALIT, it was part of an anti-American campaign to close the base at Diego Garcia. Mr Bancoult did not want the base closed (he hoped it might employ resettled Chagossians) but was willing to lead a landing on the outer islands. In either case, since permanent resettlement on the islands was impractical without substantial investment, the landings, even if followed by temporary camps, could be no more than gestures in furtherance of the respective political aims of the parties, designed to attract publicity and embarrass the Governments of the United Kingdom and the United States. (On 12 March 2008 the "Guardian"

A reported that two British "human rights campaigners" had been arrested off Diego Garcia. They said that they were part of a group called the People's Navy which has been seeking to highlight the plight of the Chagossians and to protest against the military use of the islands.)

26 The Foreign Office was advised by its High Commission in Mauritius that the possibility of landings on the islands in the autumn of 2004 should be taken seriously. The United States also informed the UK Government of B its concern at any action which might compromise what it regarded as the unique security of Diego Garcia. The Government had decided that in view of the feasibility report, it would not support resettlement of the islands. It therefore decided to restore full immigration control. On 10 June 2004 Her Majesty made the Constitution Order which revoked the BIOT Order and granted a new constitution including section 9, which I quoted at C the commencement of my speech. At the same time, another Order in Council, the British Indian Ocean Territory (Immigration) Order 2004 (the "Immigration Order") was made dealing with the details of immigration control. In a written statement to the House of Commons on 15 June 2004 the Foreign Office Under Secretary of State Mr Bill Rammell explained that in the light of the feasibility report it would be "impossible for the Government to promote or even permit resettlement to take place. After D long and careful consideration, we have therefore decided to legislate to prevent it" (Hansard (HC Debates), col 32WS).

27 The minister went on to say that there had been "developments in the international security climate" since the judgment in *Bancoult (No 1)* to which "due weight has had to be given". He did not mention the threatened landings which precipitated the decision to legislate, but the Foreign E Secretary, in a letter dated 9 July 2004 to the chairman of the Foreign Affairs Committee of the House of Commons explaining why the committee had not been shown the Constitution Order in draft before it was made, said that "we needed to preserve complete confidentiality if we were to avoid the risk of an attempt by the Chagossians to circumvent the Orders before they came into force".

F **28** These proceedings were commenced by a claim for judicial review dated 24 August 2004, applying for section 9 of the Constitution Order and the Immigration Order to be quashed. The Divisional Court [2006] EWHC 1038 (Admin) at [120]–[122] accepted an argument that the Orders were irrational because their rationality had to be judged by the interests of BIOT. That meant the people who lived or used to live on BIOT. The Orders were not made in the interests of the Chagossians but in the interests of the G United Kingdom and the United States and were therefore irrational.

29 This reasoning was not adopted, at any rate in quite the same form, by the Court of Appeal [2008] QB 365. Sedley LJ came nearest when he said that the removal or subsequent exclusion of the population "for reasons unconnected with their collective wellbeing" could not be a legitimate purpose of the power of colonial governance exercisable by Her Majesty in Council. It was an abuse of that power. He also considered that the Foreign H Secretary's press statement after the judgment in *Bancoult (No 1)* and the Immigration Ordinance 2000 were promises to the Chagossians which gave rise to a legitimate expectation that, in the absence of a relevant change of circumstances, their rights of entry and abode in the islands would not be revoked. There had been no such change.

30 Sir Anthony Clarke MR and Waller LJ agreed that the applicant was entitled to succeed on the ground of a legitimate expectation. The Master of the Rolls also agreed with Sedley LJ that the Orders were an abuse of power because (see para 123) "they did not have proper regard for the interests of the Chagossians".

31 Before your Lordships the case has been most ably argued by Mr Jonathan Crow for the Crown and Sir Sydney Kentridge for the respondent. It is common ground that as BIOT was originally ceded to the Crown, Her Majesty in Council has plenary power to legislate for the territory. The law is stated in *Halsbury's Laws of England*, 4th ed reissue, vol 6 (2003), para 823:

> "In a conquered or ceded colony the Crown, by virtue of its prerogative, has full power to establish such executive, legislative, and judicial arrangements as the Crown thinks fit, and generally to act both executively and legislatively, provided the provisions made by the Crown do not contravene any Act of Parliament extending to the colony or to all British possessions. The Crown's legislative and constituent powers are exercisable by Order in Council, Letters Patent or Proclamation . . ."

32 Authority for these propositions will be found in Lord Mansfield's judgment in *Campbell v Hall* (1774) 1 Cowp 204, 211 ("no question was ever started before, but that the King has a right to a legislative authority over a conquered country"). This appeal requires your Lordships to determine the limits of that power.

33 On this point, both sides put forward what I would regard as extreme propositions. On the one hand, Mr Crow argued the courts had no power to review the validity of an Order in Council legislating for a colony. This was either because it was primary legislation having unquestionable validity comparable with that of an Act of Parliament, or because review was excluded by the terms of the Colonial Laws Validity Act 1865. On the other hand, Sir Sydney submitted that a right of abode was so sacred and fundamental that the Crown could not in any circumstances have power to remove it. Only an Act of Parliament could do so. I would reject both of these propositions.

34 It is true that a prerogative Order in Council is primary legislation in the sense that the legislative power of the Crown is original and not subordinate. It is classified as primary legislation for the purposes of the Human Rights Act 1998: see paragraph (f)(i) of the definition in section 21(1). That means that it cannot be overridden by Convention rights. The court can only make a declaration of incompatibility under section 4.

35 But the fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone. Until the decision of this House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it may have been assumed that the exercise of prerogative powers was, as such, immune from judicial review. That objection being removed, I see no reason why prerogative legislation should

A not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action. Mr Crow rightly pointed out that the *Council of Civil Service Unions* case was not concerned with the validity of a prerogative order but with an executive decision made pursuant to powers conferred by such an order. That is a ground upon which, if your Lordships were inclined to distinguish the case, it would be open to you to do so. But I see no reason for making B such a distinction. On 21 February 2008 the Foreign Secretary told the House of Commons that, contrary to previous assurances, Diego Garcia had been used as a base for two extraordinary rendition flights in 2002 (Hansard (HC Debates), cols 547–548). There are allegations, which the US authorities have denied, that Diego Garcia or a ship in the waters around it have been used as a prison in which suspects have been tortured. The idea C that such conduct on British territory, touching the honour of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.

36 The argument based on the Colonial Laws Validity Act 1865 is rather more arcane. The background to the Act is the statement of Lord Mansfield in *Campbell v Hall* 1 Cowp 204, 209 that although the King had power to introduce new laws into a conquered country, he could not make D "any new change contrary to fundamental principles". If the King's power did not extend to making laws contrary to fundamental principles (presumably, of English law) in conquered colonies, it was regarded as arguable, in the first half of the 19th century, that the same limitation applied to the legislatures of settled colonies. It was never altogether clear what counted as fundamental principles and the Colonial Laws Validity Act E was intended to put the question to rest by providing that no colonial laws should be invalid by reason of repugnancy to any rule of English law except a statute extending to the colony. In section 1 it defined "colonial law" as a law made for a colony by its legislature or by Order in Council. It defined "colony" as "all of Her Majesty's possessions abroad in which there shall exist a legislature". It then provided:

F "2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

G "3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

37 Mr Crow submits that BIOT is a colony with a legislature, namely, the Commissioner. The Constitution Order is a law made for the colony by H Order in Council and therefore a "colonial law". It therefore cannot be void or inoperative by reason of its repugnancy to English common law doctrines of judicial review.

38 The Court of Appeal rejected this argument on the ground that the 1865 Act was concerned with the repugnancy of otherwise valid colonial

laws to the law of England. The principles of judicial review, on the other hand, determined whether the Order in Council was valid in the first place. No question of repugnancy arose because, if the Order in Council was beyond the powers of Her Majesty in Council, there was no colonial law which could be repugnant to anything.

39 In a paper written for the Oxford Law Faculty "Common Law Constraints: Whose Common Good Counts?" (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628) Professor Finnis of University College has persuasively argued that this is a slippery argument because repugnancy to English law (or fundamental principles of English law) can be regarded, and was regarded in the first half of the 19th century, as limiting the *powers* of colonial legislatures rather than as being an independent ground for invalidating laws otherwise validly made. I agree that a distinction between initial invalidity for lack of compliance with doctrines of English public law and invalidity for repugnancy to English law is too fine to be serviceable.

40 Nevertheless, I would reject the argument based on the Colonial Laws Validity Act 1865 for a different reason. In my opinion the Act was intended to deal with the validity of colonial laws (whether made by the local legislature or by Her Majesty in Council) from the perspective of their forming part of the local system of laws administered by the local courts. Section 3 made it clear that in considering the validity of such laws, the courts were not to concern themselves with the law of England, although they might well apply local principles of judicial review identical with those existing in English law. But these proceedings are concerned with the validity of the Order, not simply as part of the local law of BIOT but, as Professor Finnis says, as imperial legislation made by Her Majesty in Council in the interests of the undivided realm of the United Kingdom and its non-self-governing territories. The Constitution Order created the BIOT legislature, in the form of the Commissioner, and it seems to me to illustrate the amphibious nature of the Order in Council, as both British and colonial legislation, that the legislature which is said to bring BIOT within the definition of a colony for the purposes of the Act was created by the very Order which is said to be a law "made for a colony". The fact is that Parliament in 1865 would simply not have contemplated the possibility of an Order in Council legislating for a colony as open to challenge in an English court on principles of judicial review. It was concerned with the law applicable by colonial courts, not English courts.

41 It therefore seems to me that from the point of view of the jurisdiction of the courts of the United Kingdom to review the exercise of prerogative powers by Her Majesty in Council, the Constitution Order is not a colonial law, although it may well have been from the point of view of a BIOT court applying BIOT law.

42 Sir Sydney's proposition that the Crown does not have power to remove an islander's right of abode in the territory is in my opinion also too extreme. He advanced two reasons. The first was that a right of abode was a fundamental constitutional right. He cited the 29th chapter of Magna Carta: "No freeman shall be taken, or imprisoned . . . or exiled, or any otherwise destroyed . . . but by the lawful judgment of his peers, or by the law of the land."

43 "But . . . by the law of the land" are in this context the significant words. Likewise Blackstone (*Commentaries on the Laws of England*,

A 15th ed (1809), vol 1, p 137): "But no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will; no, not even a criminal."

44 That remains the law of England today. The Crown has no authority to transport anyone beyond the seas except by statutory authority. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases: see *R v* B *Bhagwan* [1972] AC 60. The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not empowered the Crown to change English common or statute law. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land.

45 What these citations show is that the right of abode is a creature of C the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] D 2 AC 115, 131–132. But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer. The importance of the right to the individual is also something which must be taken into account by the Crown in exercising its legislative powers—a point to which I shall in due course return. But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the E legislative powers of the Crown simply cannot touch it.

46 Next, Sir Sydney submitted that the powers of the Crown were limited to legislation for the "peace, order and good government" of the territory. Applying the reasoning of the Divisional Court in *Bancoult (No 1)*, he said that meant that the law had to be for the benefit of the inhabitants, which could not possibly be said of a law which excluded them F from the territory.

47 There are two answers to this submission. The first is the prerogative power of the Crown to legislate for a ceded colony has never been limited by the requirement that the legislation should be for the peace, order and good government or otherwise for the benefit of the inhabitants of that colony. That is the traditional formula by which legislative powers are conferred upon the legislature of a colony or a former colony upon the attainment of G independence. But Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom and will act in the interests of her undivided realm, including both the United Kingdom and the colony: see *Halsbury's Laws of England*, 4th ed reissue, vol 6, para 716:

> H "The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown . . . To the extent that a dependency has responsible government, the Crown's representative in the dependency acts on the advice of local ministers responsible to the local legislature, but in respect of any dependency of the United Kingdom (that is, of any British overseas territory) acts of

Her Majesty herself are performed only on the advice of the United Kingdom Government." A

48 Having read Professor Finnis's paper, I am inclined to think that the reason which I gave for dismissing the cross-appeal in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 551 was rather better than the reason I gave for allowing the Crown's appeal and that on this latter point Lord Nicholls of Birkenhead was right. B

49 Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians. C

50 My second reason for rejecting Sir Sydney's argument is that the words "peace, order and good government" have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality implied in the words "of the territory", they have always been treated as apt to confer plenary law-making authority. For this proposition there is ample authority in the Privy Council: *R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900) and the High Court of Australia *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the territory. So far as *Bancoult (No 1)* departs from this principle, I think that it was wrongly decided. D E

51 Sir Sydney placed great reliance upon a statement of Evatt J in *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220, 234 that the question was "whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned". But this statement must not be wrenched from the context in which it was made. The judge was concerned with the principle of territoriality (the case was about whether Australian estate duty could be levied on movables situated abroad) and the emphasis was on the words "of the Dominion concerned". There was no suggestion that if the law satisfied the principle of territoriality (as this law and the Immigration Ordinance 1971 in *Bancoult (No 1)* obviously did) the courts could inquire into whether its objects could be said to be peace, order and good government. F G

52 Having rejected the extreme arguments on both sides, I come to what seems to me the main point in this appeal, namely the application of ordinary principles of judicial review. On this question there was a radical difference in the approaches advocated by the parties. Mr Crow said that because the Crown was acting in the interests of the defence of the realm, diplomatic relations with the United States and the use of public funds in supporting any settlement on the islands, the courts should be very reluctant H

A to interfere. Judicial review should be undertaken with a light touch and the Order set aside only if it appeared to be wholly irrational. Sir Sydney, on the other hand, said that because the Order deprived the Chagossians of the important human right to return to their homeland, the Order should be subjected to a much more exacting test. As he said in his printed case, at para 137:

B "Where a measure affects fundamental rights, or has profoundly intrusive effects, the courts will employ an 'anxious' degree of scrutiny in requiring the public body in question to demonstrate that the most compelling of justifications existed for such measures."

53 I would not disagree with this proposition, which is supported by a quotation from the judgment of Sir Thomas Bingham MR in *R v Ministry of* C *Defence, Ex p Smith* [1996] QB 517, 554. However, I think it is very important that in deciding whether a measure affects fundamental rights or has "profoundly intrusive effects", one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been D done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British Government is unwilling to provide and which does not appear to be forthcoming from any other source. During the four years that the Immigration Ordinance 2000 was in E force, nothing happened. No one went to live on the islands. Thus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the Government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177 "the continuation of protest by other means". No one denies the importance of the right to protest, but when one considers the rights in issue in this case, which have to be weighed F in the balance against the defence and diplomatic interests of the state, it should be seen for what it is, as a right to protest in a particular way and not as a right to the security of one's home or to live in one's homeland. It is of course true that a person does not lose a right because it becomes difficult to exercise or because he will gain no real advantage by doing so. But when a legislative body is considering a change in the law which will deprive him G of that right, it cannot be irrational or unfair to consider the practical consequences of doing so. Indeed, it would be irrational not to.

54 My Lords, I think that if one keeps firmly in mind the practical effect of section 9 of the Constitution Order, the issues in this appeal fall into place. The Government does not consider that it is in the public interest that an unauthorised settlement on the islands should be used as a means of exerting pressure to compel it to fund a resettlement which it has decided would be H uneconomic. That is a view it is entitled to take. In the Court of Appeal, Sedley LJ treated the question of funding as irrelevant. The applicant was not asking for an order that the Government fund resettlement. To focus on the logistics of resettlement was, he said, at p 407, to miss the point: "The point is that the two Orders in Council negate one of the most

fundamental liberties known to human beings, the freedom to return to one's own homeland, however poor and barren the conditions of life . . ." A

55 I respectfully think that this misses the point. Funding is the subtext of what this case is about. The Chagossians have, not unreasonably, shown no inclination to return to live Crusoe-like in poor and barren conditions of life. The action is, like *Bancoult (No 1)*, a step in a campaign to achieve a funded resettlement. The attempt to achieve that through domestic litigation foundered before Ouseley J. But that does not mean that the Secretary of State is bound to assume that these expensive proceedings are purely academic. The Secretary of State is surely entitled to take into account that once a vanguard of Chagossians establishes itself on the islands in poor and barren conditions of life, there may be a claim that the United Kingdom is subject to a sacred trust under article 73 of the United Nations Charter to "ensure . . . [the] economic, social and educational advancement" of the residents and to send reports to the Secretary-General. B C

56 It is true that the Chagossians will now require immigration consent even to visit the islands. But the Government have made it clear that such visits, to tend graves and so forth, will be allowed, and since in practice they are funded by the BIOT administration, immigration consent will be no more than an additional formality. Furthermore, there is no reason why, if at some time in the future, circumstances should change, the controls should not be lifted. D

57 In addition, as Mr Rammell told the House of Commons, the Government had to give due weight to security interests. The United States had expressed concern that any settlement on the outer islands would compromise the security of its base on Diego Garcia. A representative of the State Department wrote a letter for use in these proceedings, giving details of the ways in which it was feared that the islands might be useful to terrorists. Some of these scenarios might be regarded as fanciful speculations but, in the current state of uncertainty, the Government is entitled to take the concerns of its ally into account. E

58 Policy as to the expenditure of public resources and the security and diplomatic interests of the Crown are peculiarly within the competence of the executive and it seems to me quite impossible to say, taking fully into account the practical interests of the Chagossians, that the decision to reimpose immigration control on the islands was unreasonable or an abuse of power. F

59 The applicant's alternative ground for judicial review was that the Foreign Secretary's press announcement after the judgment in *Bancoult (No 1)*, accompanied by the revocation of immigration controls by the 2000 Ordinance, was a promise which created a legitimate expectation that the islanders would be free from such controls. In the absence of a change in relevant circumstances, the Crown should be required to keep its promise. G

60 The relevant principles of administrative law were not in dispute between the parties and I do not think that this is an occasion on which to re-examine the jurisprudence. It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is "clear, unambiguous and devoid of relevant qualification": see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration H

A in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called "the macro-political field": see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131.

61 In my opinion this claim falls at the first hurdle, that is, the requirement of a clear and unambiguous promise. The Foreign Secretary B said that the Crown accepted the decision in *Bancoult (No 1)* that the 1971 Immigration Ordinance was outwith the powers the BIOT Order and that a new Ordinance would be made which would allow "the Ilois to return to the outer islands". This was done. Nothing was said about how long that would continue. But the background to the statement was the ongoing study "on the feasibility of resettling the Ilois". If that resulted in a decision to C resettle, then one would expect the right of abode of the Chagossians on the outer islands to continue. On the other hand, if it did not, the whole situation might need to be reconsidered. It was obvious that no one contemplated the resettlement of the Chagossians unless the Government, taking into account the findings of the feasibility study, decided to support it. If they did not, a new situation would arise. The Government might decide that little harm would be done by leaving the Chagossians with a theoretical D right to return to the islands and for two years after the feasibility report, that seems to have been the view that was taken. But the Foreign Secretary's press statement contained no promises about what, in such a case, would happen in the long term.

62 No doubt the Chagossians saw things differently. As we have seen, they tried to persuade the Government that the press statement amounted to E the adoption of a policy of resettlement. They realised that what mattered was whether the Government was willing to fund resettlement. Otherwise they had secured an empty victory. But the question is what the statement unambiguously promised and in my opinion it comes nowhere near a promise that, even if there could be no resettlement, immigration control would not be reimposed.

F **63** Even if it could be so construed, I consider that there was a sufficient public interest justification for the adoption of a new policy in 2004. For this purpose it is relevant that no one acted to their detriment on the strength of the statement, that the rights withdrawn were not of practical value to the Chagossians and that the decision was very much concerned with the "macro-political field".

64 That leaves two points which were not considered by the Divisional G Court or the Court of Appeal and which were lightly touched upon in argument but upon which the House is invited to rule. They are whether, in principle, the validity of the Constitution Order may be affected by the Human Rights Act 1998 or by international law. I do not think that the Human Rights Act 1998 has any application to BIOT. In 1953 the United Kingdom made a declaration under article 56* of the European Convention H on Human Rights extending the application of the Convention to Mauritius as one of the "territories for whose international relations it is responsible". That declaration lapsed when Mauritius became independent. No such declaration has ever been made in respect of BIOT. It is true that the

* *Reporter's note.* Article 56 is now article 63 of the amended Convention.

territory of BIOT was, until the creation of the colony in 1965, part of Mauritius. But a declaration, as appears from the words "for whose international relations it is responsible" applies to a political entity and not to the land which is from time to time comprised in its territory. BIOT has since 1965 been a new political entity to which the Convention has never been extended.

65 If the Convention has no application in BIOT, then the actions of the Crown in BIOT cannot infringe the provisions of the Human Rights Act 1998: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529. The applicant points out that section 3 of the BIOT Courts Ordinance 1983 provides that the law of England as in force from time to time shall apply to the territory. So, they say, the Human Rights Act, when enacted, became part of the law of the territory. So be it. But the Act defines Convention rights (in section 21(1)) as rights under the Convention "as it has effect for the time being in relation to the United Kingdom". BIOT is not part of the United Kingdom and the Human Rights Act, though it may be part of the law of England, has no more relevance in BIOT than a local government statute for Birmingham.

66 As for international law, I do not understand how, consistently with the well-established doctrine that it does not form part of domestic law, it can support any argument for the invalidity of a purely domestic law such as the Constitution Order.

67 I would allow the appeal, set aside the orders of the Divisional Court and the Court of Appeal and dismiss the application.

LORD BINGHAM OF CORNHILL

68 My Lords, the issue in this appeal is whether section 9 of the British Indian Ocean Territory (Constitution) Order 2004 is lawful. The courts below held it to be unlawful. For reasons given by my noble and learned friend, Lord Mance, which I would respectfully endorse and adopt, I agree with that conclusion. Without wishing to detract from or contradict my noble and learned friend's reasoning and analysis in any way, I would state in briefest summary what seem to me the key factors pointing to the unlawfulness of the section. I gratefully adopt and need not repeat the summary of the factual background given by my noble and learned friends, Lord Hoffmann and Lord Mance.

69 Section 9 was given effect in exercise (or purported exercise) of the royal prerogative to legislate by Order in Council. The royal prerogative, according to Dicey's famous definition (*An Introduction to the Study of the Law of the Constitution*, 8th ed (1915), p 420)), is "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown". It is for the courts to inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398E. Over the centuries the scope of the royal prerogative has been steadily eroded, and it cannot today be enlarged: *British Broadcasting Corpn v Johns* [1965] Ch 32, 79E. As an exercise of legislative power by the executive without the authority of Parliament, the royal prerogative to legislate by Order in Council is indeed an anachronistic survival. When the existence or effect of the royal prerogative is in question the courts must conduct an historical inquiry to ascertain whether there is

A any precedent for the exercise of the power in the given circumstances. "If it is law, it will be found in our books. If it is not to be found there, it is not law": *Entick v Carrington* (1765) 19 State Tr 1030, 1066. Such an inquiry was carried out by the Court of Appeal [1919] 2 Ch 197 and the House [1920] AC 508, 524–528, 538–539, 552–554, 563, 573 in *Attorney General v De Keyser's Royal Hotel Ltd*. In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101, Lord Reid said:

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> "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?"

70 The House was referred to no instance in which the royal C prerogative had been exercised to exile an indigenous population from its homeland. Authority negates the existence of such a power. Sir William Holdsworth, *A History of English Law*, (1938), vol X, p 393, states: "The Crown has never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it." Laws LJ, in para 39 of his *Bancoult (No 1)* judgment which the Secretary of State accepted, cited further authority:

D

> "For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in *Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137: 'But no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will; no, not even a E criminal.' Compare *Chitty, A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. *Plender, International Migration Law*, 2nd ed (1988), ch 4, p 133 states: 'The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute . . .' and cites authority of the European Court of F Justice in *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 378–379 in which the court held that 'it is a principle of international law . . . that a state is precluded from refusing its own nationals the right of entry or residence'. Dr Plender further observes, *International Migration Law*, p 135: 'A significant number of modern national constitutions characterise the right to enter one's own country as a fundamental or human right', and a long list is given. And I should cite this passage, G at pp 142–143: 'Without exception, the remaining dependencies of the United Kingdom impose systems of immigration control applicable to British citizens coming from the United Kingdom and to those from other dependencies. In two very exceptional cases, immigration control is applied to all persons whatever. Elsewhere, a distinction is drawn between those who belong to the territory and are accordingly immune H from immigration control and those who do not belong. In several instances, the statute uses the very word 'belonger'. Thus, a person has the right to land in Hong Kong if he is a 'Hong Kong belonger'. Dr Plender's 'two very exceptional cases' are the British Antarctic Territory and BIOT. The British Antarctic Territory has no belongers. BIOT has."

This is not a surprising conclusion, since the relationship between the citizen and the Crown is based on reciprocal duties of allegiance and protection and the duty of protection cannot ordinarily be discharged by removing and excluding the citizen from his homeland. It is not, I think, suggested that those whose homes are in former colonial territories may be treated in a way which would not be permissible in the case of citizens in this country. Hence the disingenuous pretence, in the 1960s–1970s, that there was no population which belonged to the outer islands of the Chagos Archipelago, to which alone this dispute relates. It is unnecessary to consider whether some power such as that claimed might be exercisable in the event of natural catastrophe or acute military emergency, since none such existed. Nor is it to the point that the Queen in Parliament could have legislated to the effect of section 9: it could, but not without public debate in Parliament and democratic decision.

71 I accordingly conclude that there was no royal prerogative power to make an Order in Council containing section 9, and it is accordingly void. But if (contrary to that conclusion) there was power to make it, I agree with my noble and learned friends that the section is susceptible in principle to review by the courts. Applying familiar judicial review principles, I am satisfied that section 9 was unlawful on two main grounds.

72 First, section 9 was irrational in the sense that there was, quite simply, no good reason for making it. (1) It is clear that in November 2000 the re-settlement of the outer islands (let alone sporadic visits by Mr Bancoult and other Chagossians) was not perceived to threaten the security of the base on Diego Garcia or national security more generally. Had it been, time and money would not have been devoted to exploring the feasibility of resettlement. (2) The United States Government had not exercised its treaty right to extend its base to the outer islands. (3) Despite highly imaginative letters written by American officials to strengthen the Secretary of State's hand in this litigation, there was no credible reason to apprehend that the security situation had changed. It was not said that the criminal conspiracy headed by Osama bin Laden was, or was planning to be, active in the middle of the Indian Ocean. In 1968 and 1969 American officials had expressly said that they had no objection to occupation of the outer islands for the time being. (4) Little mention was made in the courts below of the rumoured protest landings by LALIT. Even now it is not said that the threatened landings motivated the introduction of section 9, only that they prompted it. Had the British authorities been seriously concerned about the intentions of Mr Bancoult and his fellow Chagossians they could have asked him what they were. (5) Remarkably, in drafting the 2004 Constitution Order, little (if any) consideration appears to have been given to the interests of the Chagossians whose constitution it was to be. (6) Section 9 cannot be justified on the basis that it deprived Mr Bancoult and his fellows of a right of little practical value. It cannot be doubted that the right was of intangible value, and the smaller its practical value the less reason to take it away.

73 Secondly, section 9 contradicted a clear representation made by the then Secretary of State in his press release of 3 November 2000. There was no representation that the outer islands would be resettled irrespective of the findings of the feasibility study, or that Her Majesty's Government would finance resettlement, and it was implicitly acknowledged that observance of its Treaty obligations might in future oblige the Government to close the

A outer islands. But there was in my opinion a clear and unambiguous representation, devoid of relevant qualification, that (1) the Government would not be challenging the Divisional Court's decision that Mr Bancoult and his fellow Chagossians had been unlawfully excluded from the outer islands for nearly 30 years, (2) the Government would introduce a new Immigration Ordinance which would allow the Chagossians to return to the outer islands unless or until the United Kingdom's treaty obligations might B at some later date forbid it, and (3) the Government would not persist in treating the Chagossians as it had reprehensibly done since 1971. This representation was clearly addressed to Mr Bancoult and those associated with him in the litigation. It was fortified by the making, on the same day, of the Immigration Ordinance 2000 which made special provision for persons (like Mr Bancoult and the Chagossians) who were British Dependent C Territories citizens under the British Nationality Act 1981 by virtue of their connection with the British Indian Ocean Territory, together with their spouses and dependent children. Mr Bancoult and his fellows were clearly intended to think, and did, that for the foreseeable future their right to return was assured. The Government could not lawfully resile from its representation without compelling reason, which was not shown. It is not in such circumstances necessary for the representee to show that he has relied D on or suffered detriment in reliance on the representation. In any event, by analogy with the law of estoppel, it is enough if the representee would suffer detriment if the representor were to resile from his representation (*Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641).

74 I would for my part dismiss the appeal.

E **LORD RODGER OF EARLSFERRY**

75 My Lords, the unhappy—indeed, in many respects, disgraceful—events of 40 years ago which have ultimately led to this appeal are described in detail in various court decisions and, in particular, in the appendix to the judgment of Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB). The speech of my noble and learned friend, Lord Hoffmann, includes a briefer, but vivid, description of the islanders' way of F life and of how they came to leave the Chagos Archipelago. He has also explained the course of the various litigations. It would serve no useful purpose for me to repeat what he has said. It all forms the background to the legal issue which the House has to decide, viz, whether section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitution Order") is valid. It is common ground that, if section 9 is invalid, the same G must go for the relevant provisions of the British Indian Ocean Territory (Immigration) Order 2004 ("the Immigration Order").

76 In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 there was a dispute as to the capacity in which Her Majesty in Council had given an instruction to the Commissioner of South Georgia and the South Sandwich Islands. At the hearing of the present appeal, however, it was common ground that H the Constitution Order was made by Her Majesty in right of the United Kingdom.

77 The ultimate source of much of the argument of Sir Sydney Kentridge on behalf of Mr Bancoult was chapter 29 of Magna Carta, one of the few provisions of the charter which is still on the statute book for

England and Wales. It provides inter alia: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled . . . but by lawful judgment of his peers, or by the law of the land." Starting from there, Sir Sydney first argued that, while Parliament could pass a law exiling the Chagossians from the islands, the Queen in Council had no power to do so under the royal prerogative. In any event, he submitted, when making the Order, the Secretary of State who advised Her Majesty had failed to take account of the interests of the islanders, as he was required to do. Further, following the judgment of the Divisional Court in 2000 [2001] QB 1067, the then Foreign Secretary, Mr Cook, had made a statement which gave rise to a legitimate expectation on the part of the Chagossians that they would be allowed to return to live on the outer islands. There were no sufficient policy reasons to entitle the Secretary of State to defeat that legitimate expectation by advising Her Majesty to enact the Constitution Order containing section 9.

78 On behalf of the Secretary of State Mr Crow sought to head off these challenges with two fundamental arguments. First, he said that the Constitution Order was primary legislation enacted by Her Majesty in Council under the royal prerogative and that, as such, it was not open to review by the courts. Secondly, he argued that, in any event, a challenge was precluded by sections 2 and 3 of the Colonial Laws Validity Act 1865 which provide:

> "2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> "3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

79 The Chagos Archipelago, along with Mauritius, was formerly a French dependency. Under the Treaty of Paris 1814, the French King ceded them to the British Crown. It follows that Mauritius and its dependencies, including the Archipelago, were a ceded colony: *Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law* (1966), p 727. That remains the legal position so far as BIOT is concerned. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* ("*Bancoult (No 1)*") [2001] QB 1067, 1102, para 52, Laws LJ so held and, at the hearing before the House, both parties proceeded on that basis.

80 The division of colonies into settled and conquered or ceded colonies has been described as "arcane" and Professor Tomkins was disappointed that in *Bancoult (No 1)* Laws LJ had relied on "such ancient and formal niceties": Adam Tomkins, "Magna Carta, Crown and Colonies" [2001] PL 571, 579. Laws LJ was surely right to do so, however. Just like much of the rest of our law, colonial law has developed over centuries. What makes it different is that, for obvious reasons, courts are rarely called upon to apply it today and so there are comparatively few

A modern cases. Nevertheless, when Parliament has not intervened to alter them, the rule of law requires courts to apply the established principles—such as the readily comprehensible distinction between ceded and settled colonies—on which the whole body of colonial law rests. I should add that, precisely because the case raises questions of colonial law, in the discussion I have referred to "colonies" etc, even though, of course, in today's terminology, BIOT is one of the small number of British Overseas B Territories.

81 The classification into settled and ceded colonies matters in this case because it has been settled law since the decision of Lord Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp 204 that the King (without the concurrence of Parliament) can legislate for a ceded colony, unless he has granted it a representative legislature. See also *In re Colenso* (1865) 3 Moo PC NS 115. C In the present case, there is, of course, no representative legislature: apart from Her Majesty in Council, the only person who can legislate for the territory is the Commissioner, acting under section 10 of the Constitution Order.

82 In *Campbell v Hall* Lord Mansfield described the King's power of legislation in the case of a ceded colony in this way, 1 Cowp 204, 209:

D "The sixth, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the E power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put."

What matters at the moment is that the King's power to legislate for a ceded colony without the concurrence of Parliament is only subordinate, i e, subordinate to his legislative power with the concurrence of Parliament. It follows that, without the concurrence of Parliament, the King cannot F legislate for the colony in a way that would conflict with the provisions of any Act of Parliament extending to the colony.

83 In settled colonies the common law of England and "such statutes as have been passed in affirmance of the common law previous to their acquisition, are in force there . . .": *William Forsyth, Cases and Opinions on Constitutional Law* (1869), p 18. Therefore, if Mauritius had been a G settled colony, it would be highly arguable that Magna Carta had "followed the flag" and had formed part of the common law of the island and its dependencies from the time of their settlement.

84 In fact, however, Mauritius was ceded to the British Crown in 1814 and, in accordance with the terms of the Treaty of Paris, French law continued to apply. The relevant principle is that "the laws of a conquered country continue in force, until they are altered by the conqueror": H *Campbell v Hall* 1 Cowp 204, 209. At no time while Mauritius was a colony was legislation passed to replace the existing law of the island or its dependencies, wholesale, with the law of England. Therefore, when the Chagos Archipelago was separated from Mauritius in 1965, chapter 29 of Magna Carta formed no part of its statute law.

85 On 1 February 1984, however, section 3 of the British Indian Ocean Territory Courts Ordinance 1983 came into force and provided that the law of the territory was to be the law of England as from time to time in force:

> "Provided that the said law of England shall apply in the territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary."

The change in law was to be subject to, inter alia, prerogative Orders in Council which applied or extended to BIOT.

86 Mr Crow did not argue that chapter 29 of Magna Carta was not applicable or suitable to the circumstances of BIOT. So I proceed on the basis that it applies and that no-one can be exiled from BIOT "but by the law of the land". Prima facie, however, the law of BIOT includes both the Constitution Order and the Immigration Order. So, unless they can be said to be invalid for some reason, there is nothing in the terms of chapter 29 of Magna Carta which would make any banishment of the Chagossians by virtue of these Orders unlawful.

87 Of course, Sir Sydney contended that the Orders were indeed invalid. In the words of Lord Mansfield in *Campbell v Hall* 1 Cowp 204, 209, Her Majesty had no power to legislate by Order in Council "contrary to fundamental principles" of English common law. And, he submitted, the right of a "belonger" not to be excluded from the territory to which he belonged was just such a fundamental principle. As support for its existence, in addition to chapter 29 of Magna Carta, Sir Sydney cited the statement of Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137, that "no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will; no, not even a criminal". I accept that both of these point to the existence of such a principle.

88 Although not cited by counsel, there are two other passages which might tend to support the view that the right not to be banished from a British colony is indeed a fundamental principle of English law. In his *British Rule and Jurisdiction beyond the Seas* (1902), p 6, Sir Henry Jenkyns said that, while in a ceded or conquered colony the existing law is usually presumed to continue until altered, nevertheless "any laws contrary to the fundamental principles of English law, e g torture, banishment, or slavery, are ipso facto abrogated". Among the authorities cited in support of that proposition is a passage from the judgment of Lord de Grey CJ in *Fabrigas v Mostyn* (1774) 20 State Tr 82. In 1771 Minorca was a ceded colony of the British Crown. The Governor, General Mostyn, apparently fearing that Fabrigas would stir up danger for the garrison, committed him to the worst prison on the island, with no bed and only bread and water, and with no contact with his family. He then confined him "on board a ship, under the idea of a banishment to Carthagena". Fabrigas sued General Mostyn for damages in the King's Bench. Upholding the award of £3,000 as damages against him, Lord de Grey said, at col 181:

> "I do believe Mr Mostyn was led into this, under the old practice of the island of Minorca, by which it was usual to banish: I suppose the old Minorquins thought fit to advise him to this measure. But the governor knew that he could no more imprison him for a 12-month, than he could

A inflict the torture; yet the torture, as well as the banishment, was the old law of Minorca, which fell of course when it came into our possession. Every English governor knew he could not inflict the torture; the constitution of this country put an end to that idea. This man is then dragged on board a ship, with such circumstances of inhumanity and hardship, as I cannot believe of General Mostyn; and he is carried into a foreign country, and of all countries the worst; for I believe there are B directions given, that no persons should go to Spain, or be permitted to quit the port of Carthagena."

See also, generally, *Forsyth, Cases and Opinions on Constitutional Law*, p 13.

89 On the basis of these various authorities it appears to me certainly arguable that there is a "fundamental principle" of English law that no C citizen should be exiled or banished from a British colony and sent to a foreign country. Assume that section 9 of the Constitution Order is inconsistent with that principle, by reason of declaring that no-one who used to live in the Archipelago now has a right of abode in BIOT. Is the section void as purporting to change the law of BIOT in a way that is inconsistent with that fundamental principle?

D 90 Although the passage from the judgment of Lord Mansfield in *Campbell v Hall* 1 Cowp 204, 209 has regularly been cited for the proposition that the King cannot legislate contrary to fundamental principles of that kind, I suspect that this is to read too much into his remark. The passage may be more readily understood if the punctuation is modernised in this way:

E "The sixth, and last proposition is that, if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the F power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put."

All the examples of "fundamental principles" which Lord Mansfield gives are classic examples of ways in which, before 1689, the King—without the concurrence of Parliament—used the dispensing power of the Crown in relation to statutes. So what Lord Mansfield appears to be saying is that the G King cannot use his power to legislate for a ceded colony without the concurrence of Parliament so as to exempt an inhabitant of the colony from the laws of trade, or from some Act of Parliament or to give him some exclusive privilege. Such legislation would amount to a revival of the dispensing power, which it had been one of the achievements of the Glorious Revolution to abolish.

H 91 There is no point in exploring Lord Mansfield's meaning further, however, since, as a matter of historical fact, in the first half of the 19th century, the passage in his judgment was interpreted by some lawyers as authority for the wider proposition that the King could not make changes in the law that were contrary to "fundamental principles". The obvious problem was that, if the examples given by Lord Mansfield were simply

examples of fundamental principles of an unspecified nature, it was difficult to identify the "many other instances" of those principles. So legislation by the King for ceded colonies was apparently open to challenge if it could be said to be contrary to a principle which was "fundamental". If that were established, the King would have had no power to make the law in question, whether by letters patent or by Order in Council.

92 The main problem was slightly different. The King did not usually legislate for most colonies. They were given a legislature of some kind which made the laws for the colony—but the instrument creating the legislature gave it power, for example, to make laws "not contrary or repugnant to the lawes and statutes of this our realme of England" (Massachusetts Bay Charter, 1629) or required that the laws should not be "repugnant to the law of England": section 29 of the Australian Constitutions Act 1842 (5 & 6 Vict c 76). In the case of settled colonies, provisions of this kind had the potential to cause acute difficulties. For one thing, it was hard to tell how much of the statute law, technically in force in England, had been carried into the colony at its settlement. Moreover, the very point of establishing a legislature in any kind of colony was that it should pass appropriate new laws to suit the conditions of the colony, even though the new laws were different from English law. So a view emerged, for all colonies, that the colonial legislature could make laws which were different from English law, provided that they were not repugnant to the "fundamental principles" of English law.

93 The possibility that some provision of a statute passed by a colonial legislature was repugnant to an imperial statute applying to the colony or to some fundamental principle of English law was not only, or indeed principally, of concern to the courts. Some colonial statutes were reserved for the assent of His Majesty, while all of them could be disallowed by His Majesty by Order in Council within a year. So copies of all the thousands of statutes passed by colonial legislatures were sent back to London where they were scrutinised, inter alia for repugnancy, by lawyers working for the Colonial Office. In practice, even where doubts arose, relatively few provisions were disallowed since, if the colonial legislature persisted, the Colonial Office found that it tended to lose the resulting ping-pong of legislation and disallowance. The problem of scrutinising legislation by reference to "fundamental principles" was described by "Mr Over-Secretary Stephen" of the Colonial Office, Sir James Stephen, in a memorandum in 1834:

> "To have required, on pain of nullity, an adherence to the fundamental principles of English legislation would, I think, have involved more than one absurdity. It may very reasonably be doubted whether these principles have any real and definite existence, and even if, by a great effort of abstraction and subtlety, our written or unwritten law could be made to yield a body of fundamental maxims pervading the whole mass, it would have been strange if Parliament had required a rigid observance of those maxims in a society of which all the material circumstances, and the whole elementary character differ essentially from what has ever been known in the Parent State."

The passage is quoted at p 57 of D B Swinfen's masterly study, *Imperial Control of Colonial Legislation 1813–1865* (1970), to which I am generally indebted. The difficulties to which Sir James refers are easy to see when it is

A recalled that, until shortly before, slavery had formed part of the law of many colonies in the West Indies and statutes were not infrequently passed by local legislatures dealing with different aspects of slavery.

94 Two decades later, one of Sir James Stephen's successors, Sir Frederic Rogers, writing a memorandum on a South Australian Act designed to legalise the marriage of a man with his deceased wife's sister, described the position in this way:

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> "But a question not infrequently occurs whether there are not, in the English law, certain fundamental enactments of statute or principles of common law of so binding a nature that the legislation of all British Dependencies must be conformable to them, and that colonial laws which are not so conformable are void; either in virtue of the general relations between a British colony and the Mother Country, or as being at variance with some positive Instructions or Acts of Parliament which require that Colonial Laws shall not be 'repugnant to the laws of England'. This seems to have been the doctrine of former times, and as late as 1843, doubts seem to have been entertained whether a colonial law passed to admit unsworn testimony would not be repugnant to the law of England, and therefore null and void. But in practice the tendency has long been to consider Colonial Legislatures as legally competent to pass almost any law, which they are not precluded from passing by some Imperial Statute intended by Parliament to be binding in the colony—the Crown remaining at liberty to intervene by way of disallowance or otherwise in order to prevent the enactment of laws manifestly at variance with the fundamental principles of English legislation. In the larger colonies, the prevailing, if not universal opinion is said to be (as might be expected) that most favourable to the pretensions of their own Legislature. This I am aware is a very vague statement, but I do not know that the present state of the law can be laid down with greater precision."

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See *Swinfen, Imperial Control of Colonial Legislation 1813–1865*, pp 62–63.

95 This was the situation around the time when a member of the South Australian Supreme Court, Boothby J, began to issue decisions holding that various statutes passed by the local colonial legislature were void on the ground of repugnancy to the law of England. In 1862 the Law Officers agreed that laws which were contrary to fundamental principles of British law, "as by denying the sovereignty of Her Majesty, by allowing slavery or polygamy, by prohibiting Christianity, by authorising the infliction of punishment without trial, or the uncontrolled destruction of aborigines, etc" would unquestionably be repugnant, but added: "We are unable to lay down any rule to fix the dividing line between fundamental and non-fundamental rules of English law . . ." See *D P O'Connell, A Riordan, Opinions on Imperial Constitutional Law* (1971), pp 62–64. As their successive opinions show, between 1862 and 1865 the Law Officers became convinced that the only way to remedy the state of uncertainty caused by Boothby J's various pronouncements was to pass legislation similar to section 3 of the British North America Act 1840 and—to forestall similar problems elsewhere—to extend it to all of the colonies: *O'Connell, Riordan, Opinions on Imperial Constitutional Law*, pp 60–71.

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96 The result was the Colonial Laws Validity Act 1865. The terms of section 3 could not be clearer: no colonial law was to be void or inoperative

on the ground of repugnancy to the law of England, unless it was repugnant to the provisions of some Act of Parliament which was made applicable to the colony by express words or necessary intendment.

97 This explicit provision applied to Orders in Council since, by section 1, the term "colonial law" includes laws made for any colony by Her Majesty in Council. While it is unclear why letters patent were not included, this cannot detract from the fact that Orders in Council are expressly included—and the significance of their inclusion cannot be wished away as being only for the sake of completeness. Nor can I discern any reason to say that, for purposes of the 1865 Act, the Constitution Order might be a colonial law from the point of view of a BIOT court applying BIOT law but not for a court in the United Kingdom. Such an interpretation would leave the status of the law in limbo—valid in the the courts of the colony, but open to challenge in the English courts—where, of course, such challenges could be and were, in practice, mounted. See, for instance, *Phillips v Eyre* (1870) LR 6 QB 1, 20–23. Leaving this room for uncertainty would have been inconsistent with the whole purpose of the 1865 Act, which was to remove the possibility of challenges by reference to general principles of English law and to confine the doctrine of repugnancy to repugnancy to an Act of the Imperial Parliament extending to the colony. Equally, I would readily conclude that sections 2 and 3 were intended to cover legislation establishing a constitution for a colony since the decision of Boothby J in *Auld v Murray* (unreported) 1864, relating to a Constitution Act passed by the local legislature, was one of those which had caused uncertainty. See *Swinfen, Imperial Control of Colonial Legislation 1813–1865*, pp 177–178.

98 Sedley LJ considered that, despite the terms of sections 2 and 3 of the 1865 Act, courts in this country would surely always have struck down an Order in Council permitting the use of torture to obtain evidence and that the same would have almost certainly been the case with an Order in Council abolishing all recourse to law in a colony or introducing forced labour. Professor Finnis describes this as a "parade of horribilia": *Common Law Constraints: Whose Common Good Counts?*, para 13. So it is. But the challenge has to be confronted. In my view, it is clear that, as Professor Finnis argues, the whole purpose of the 1865 Act was indeed to prevent challenges in the courts on any ground of repugnancy other than repugnancy to the provisions of an imperial statute extending to the colony in question. So, unless there were statutes extending to the colony, to which the horribilia were repugnant, the validity of the provisions could not be challenged for repugnancy in the courts. This would not mean that nothing could have been done about any such hypothetical provision: in particular, on being sent back to London and scrutinised by the Colonial Office lawyers, it would presumably have been immediately disallowed by Her Majesty in Council, on the advice of the Colonial Secretary. Apart from that, the policy was, precisely, to trust the legislatures and to leave control not to the courts, but to the legislatures and, ultimately, to the electorates, both at home and, where appropriate, in the colony concerned. If anything, that policy might have been expected to apply, a fortiori, to legislation by Order in Council countersigned by the Colonial Secretary himself.

99 In *Bancoult (No 1)* [2001] QB 1067, para 43, Laws LJ referred to "the wintry asperity" of the Privy Council authority, *Liyanage v The Queen* [1967] 1 AC 259. The decision itself was, in fact, far from wintry and the

A aspect to which Laws LJ was referring was correct, indeed inevitable, in the light of the 1865 Act.

100 The appellant, who had been involved in an attempted coup in Ceylon, sought to argue that a retroactive law relating to his trial was void. The board upheld that argument on the basis that the separation of powers inherent in the Constitution had been infringed. The appellant's conviction was quashed.

B 101 The board rejected another argument, however, to the effect that the law in question was void because it was repugnant to the fundamental principles of justice. Starting from *Campbell v Hall* 1 Cowp 204, 209, the contention for the appellant was that, since the Crown had had no power to make laws for the colony of Ceylon which offended against fundamental principles, at independence it could not hand over to Ceylon a higher power C than it possessed itself. The board quoted *A B Keith, The Sovereignty of the British Dominions* (1929), pp 45–46, who said of the 1865 Act:

> "The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial Act . . . The boon thus conferred was enormous; it was now necessary only for the colonial legislator to D ascertain that there was no Imperial Act applicable, and his field of action and choice of means became unfettered."

The board continued [1967] AC 259, 284–285:

> "Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice. The E terms of the Colonial Laws Validity Act and especially the words 'but not otherwise' in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy. Morover, their Lordships doubt whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former. F Whatever may have been the possible arguments in this matter prior to the passing of the Colonial Laws Validity Act, they are not maintainable at the present date. No case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has been founded on that portion of Lord Mansfield's judgment."

Pace Sedley LJ [2008] QB 365, 392–393, para 28, it is loyalty to the terms of G sections 2 and 3 of the 1865 Act, rather than any mid-20th-century lack of appreciation of what might count as "fundamental principles", which ultimately drives Lord Pearce's reasoning.

102 I am accordingly satisfied that neither section 9 of the Constitution Order nor the Immigration Order is open to challenge in the English courts on the ground that it is repugnant to any "fundamental principle" of English common law that a "belonger" cannot be sent out of the territory and so has H a right to return there.

103 But, just as the whole history of the developments leading to the 1865 Act shows that a challenge based on repugnancy to fundamental principles is unsustainable, it also shows—equally clearly—that the 1865 Act was concerned only with repugnancy to statute and to fundamental

principles, which had been said to make legislation ultra vires the legislature, whether Her Majesty in Council or the colonial legislature. There is nothing to suggest that in 1865 anyone contemplated the need to head off a challenge to the validity of legislation by either the Queen in Council or another colonial legislature acting intra vires or ultra vires for some other reason.

104 It is therefore important to notice that Sir Sydney's other challenges to section 9 of the Constitution Order and to the Immigration Order were not based on some unspecified fundamental principle of the law to which the provisions of the Orders were said to be repugnant. Rather, he contended, first, that, in making the Orders, Her Majesty in Council acted ultra vires, because the legislation was not "for the peace, order and good government of the territory". Next, he contended that Her Majesty failed to have regard to the interests of the Chagos islanders or acted in defiance of their legitimate expectation created by the statement of the Foreign Secretary in November 2000. The provisions of sections 2 and 3 of the 1865 Act do not constitute a bar to these challenges—any more than they constitute a bar to a challenge to legislation, purporting to apply outside the colony or state concerned, as not being for the peace, order and good government of that colony or state.

105 Mr Crow contended that, even without the 1865 Act, any exercise of the royal prerogative to make a legislative Order in Council could not be reviewed by the courts. I would reject that submission. In *Campbell v Hall* 1 Cowp 204 Lord Mansfield was prepared to hold that the Crown had no power to make the letters patent imposing the tax on Grenada. He would surely have done the same if the tax had been imposed by Order in Council: the precise form of the legislation was of no significance for that purpose. The court was, in effect, reviewing the legality of the letters patent. Nowadays, a broader form of review of other prerogative acts is established: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Therefore, like Lord Hoffmann, I see no reason in principle why, today, prerogative legislation, too, should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety. Any challenge of that kind must, of course, be based on a ground that is justiciable.

106 Nor am I impressed by Mr Crow's argument—little more than a makeweight—that judicial review of an Order in Council would trespass against the rule that prerogative orders are regularly made against ministers in their official capacity, but never against the Crown: *M v Home Office* [1994] 1 AC 377, 407. That is nothing more than a rule of English procedural law: it does not reach the substance of the challenge. Under the Crown Suits (Scotland) Act 1857 (20 & 21 Vict c 44) the Advocate General for Scotland represents the Crown in right of the United Kingdom. There would therefore be nothing, for instance, to prevent Mr Bancoult bringing proceedings for judicial review in the Court of Session against the Advocate General, as representing the Crown, and, if successful, having the orders quashed. The realistic approach to such matters was identified by Lord President Hope in the old case, *Edwards v Cruickshank* (1840) 3 D 282. Referring to the jurisdiction of supreme courts, he said, at pp 306–307:

> "With regard to our jurisdiction, and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty—persons whether single or corporate; and, in our noble constitution,

A I maintain—though at first sight it may appear to be a startling proposition—the law can compel the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty. Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or if he exceed his duty to the injury of the subjects, the law gives redress. In England the B court would proceed, according to the nature of the case, by injunction or mandamus, or a writ of quo warranto. In this country a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law."

Admittedly, the Lord President's understanding of the position of the English courts turned out to be unduly optimistic. But, on Scots Law, on C general principle, and on the substance of the matter, he was surely absolutely right.

107 Sir Sydney submitted that both the Constitution Order and the Immigration Order are unlawful because Her Majesty's full power to legislate is confined to making "laws for the peace, order and good government of the territory". These are undoubtedly the customary terms in D which Her Majesty's reserved legislative powers are described, for instance, in section 15(1) of the Constitution Order. Section 15(1)(b) goes on to provide that: "no such provision shall be deemed to be invalid except to the extent that it is inconsistent with the status of the territory as a British overseas territory or otherwise as provided by the Colonial Laws Validity Act 1865." Section 15 therefore provides the measure of the legislative powers available to Her Majesty when making the Immigration Order E but, when enacting the Constitution Order itself, She was exercising her prerogative power after revoking the British Indian Ocean Territory Orders 1976 to 1994, in accordance with the power reserved under section 15 of the 1976 Order. The formula in section 15(1) is, of course, classical, but there is no authority which defines the prerogative power of legislation in those terms. Nevertheless, I am content to accept them as a description of the F prerogative power, provided that they are interpreted and applied in accordance with the equally well known and well settled jurisprudence relating to them.

108 The classical case law was summarised by the High Court of Australia in a unanimous judgment in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. Their Honours were considering the scope of G the power conferred by section 5 of the Constitution Act 1902 (NSW) to make laws "for the peace, welfare, and good government of New South Wales". Referring to similar provisions in other constitutions, the High Court said, at pp 9–10:

"Lord Selborne, speaking for the Judicial Committee in *R v Burah* (1878) 3 App Cas 889, said that the Indian legislature 'has, and was intended to have, plenary powers of legislation, as large, and of the same H nature, as those of Parliament itself'. Later, Sir Barnes Peacock in *Hodge v The Queen* (1883) 9 App Cas 117, speaking for the Judicial Committee, stated that the legislature of Ontario enjoyed by virtue of the British North America Act 1867 (Imp): 'authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the

plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament . . .' In *Riel v The Queen* (1885) 10 App Cas 675, Lord Halsbury LC, delivering the opinion of the Judicial Committee, rejecterd the contention that a statute was invalid if a court concluded that it was not calculated as a matter of fact and policy to secure the peace, order and good government of the territory. His Lordship went on to say that such a power was 'apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to'. In *Chenard & Co v Arissol* [1949] AC 127, Lord Reid, delivering the opinion of the Judicial Committee, cited *Riel* and the comments of Lord Halsbury LC with evident approval. More recently Viscount Radcliffe, speaking for the Judicial Committee, described a power to make laws for the peace, order and good government of a territory as 'connot[ing], in British constitutional language, the widest lawmaking powers appropriate to a Sovereign': *Ibralebbe v The Queen* [1964] AC 900. These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words 'for the peace, order and good government' are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a state, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score."

This authoritative statement of the position in Australia must be preferred to the opinion of Street CJ in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 383 which was the one that Sedley LJ found the most illuminating: [2008] QB 365, 400–401, para 53.

109 Assuming, then, that Her Majesty's constituent power can properly be described as a power to make "laws for the peace, order and good government of the territory", such a power is equal in scope to the legislative power of Parliament. As the statements in *Riel v The Queen* 10 App Cas 675, *Chenard & Co v Arissol* [1949] AC 127 and *Union Steamship Co of Australia Pty Ltd v King* 166 CLR 1 show, it is not open to the courts to hold that legislation enacted under a power described in those terms does not, in fact, conduce to the peace, order and good government of the territory. Equally, it cannot be open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. This is simply because such questions are not justiciable. The law cannot resolve them: they are for the determination of the responsible ministers rather than judges. In this respect, the legislation made for the colonies is in the same position as legislation made by Parliament for this country, as the High Court of Australia pointed out. In both cases, the sanction for inappropriate

A use of the legislative power is political, not judicial. The difference—and it is, of course, very important—is that Orders in Council are made without the concurrence of Parliament or of any other representative legislature and so the political control is less direct. That lack of direct political control over them may well be considered undesirable in today's world. If so, the appropriate remedy is for Parliament, not the courts, to get involved in scrutinising the substance of such Orders in Council.

B **110** Section 9 of the Constitution Order removes any right of abode on the Chagos Archipelago which the claimant or anyone else may have had. It is a stark provision. But the Secretary of State's decision to have it enacted and the effect of that decision have to be judged against the circumstances at the time it was taken. No-one was then actually living on the outer islands and, even though the islanders had enjoyed a right to return since November C 2000, none of them had done so. They were "instead seeking support from the UK and US Governments to financially assist their return or alternatively to provide compensation": *Feasibility Study Phase 2B*, Executive Summary, para 1.1. More importantly, there was no prospect that anyone would be able to live on the outer islands, except on a subsistence basis, in the foreseeable future: *Feasibility Study Phase 2B*, Executive Summary, para 1.11. Sir Sydney did not dispute this, but contended that it was D irrelevant. In other words, the position was just the same as if people had actually been living on the islands when the Orders were made. I am unable to accept that submission. The impact of the legislation on the people concerned would be very different in the two situations. In my view, in reviewing the Secretary of State's decision to remove the right of abode, it is relevant that there was actually no prospect of the Chagossians being able to E live on the outer islands in the foreseeable future. The Government accepts, of course, that they can apply for permits to visit the islands and that an unreasonable refusal could be judicially reviewed. Such visits have taken place in the past.

111 Against that background, can it be said that no reasonable Secretary of State could have decided to have section 9 enacted?

F **112** On 15 June 2004 a junior minister, Mr Rammell, made a written statement to Parliament. His good faith has not been impugned by the respondent. The statement shows that, in deciding to legislate to prevent people resettling on the outer islands, the Government took into account the fact that the economic conditions and infrastructure which had once supported the way of life of the Chagossians had ceased to exist. Something new would have to be devised. The advice was that the cost of providing the G necessary support for permanent resettlement was likely to be prohibitive and that natural events were likely to make life difficult for any resettled population. Human interference within the atolls was likely to exacerbate stress on the marine and terrestrial environment and would accelerate the effects of global warming. Flooding would be likely to become more frequent and would threaten the infrastructure and the freshwater aquifers and agricultural production. Severe events might even threaten life. H The minister recorded that, for these reasons, the Government had decided to legislate to prevent resettlement. Although he made no mention of it, the decision to legislate and to introduce immigration controls at that particular time appears to have been prompted by the prospect of protesters attempting to land on the islands. In addition, Mr Rammell said that restoration of full

immigration control over the entire territory was necessary to ensure and maintain the availability and effective use of the territory for defence purposes. He referred to recent developments in the international security climate since November 2000 when such controls had been removed.

113 The ministerial statement indicates that a decision to legislate was taken on the basis of the experts' (second) report on the difficulties and dangers of resettling the islands—these difficulties and dangers being dangers and difficulties which would affect the Chagossians themselves, if they were to try to live on the outer islands. Given the terms of that report alone, it could not, in my view, be said that no reasonable Government would have decided to legislate to prevent resettlement. In particular, the advice that the cost of any permanent resettlement would be "prohibitive" was an entirely legitimate factor for the Government—which is responsible for the way that tax revenues are spent—to take into account. In addition, the Government had regard to defence considerations, the views of its close ally, the United States, and the changed security situation after 9/11. These additional factors reinforce the view that the decision to legislate was neither unreasonable nor irrational.

114 Of course, the decision was adverse to the claim of the Chagossians to return to settle on the outer islands. But that does not mean that their interests had been ignored: a realistic assessment of the long-term position of any potential Chagossian settlers on the outer islands was central to the expert report on which the Government relied. In addition, the Government considered the overall interests of the United Kingdom. It was entitled to do so. There is no support whatever for a proposition that, as a matter of English law, in legislating for a colony, either Parliament or Her Majesty in Council must have regard only, or even predominantly, to the immediate interests of the population of the colony. On the contrary, the authority of Parliament and the Crown could always be exercised on "trade, shipping, or matters of law and policy affecting the whole empire": *Jenkyns, British Rule and Jurisdiction beyond the Seas*, p 22. Since most colonies had legislatures, these wider interests were usually given effect by making an Order in Council disallowing offending statutes rather than by enacting legislation. But, in crucial areas, such as the abolition of slavery, or the regulation of merchant shipping, Parliament would enact legislation for Her Majesty's possessions as a whole. The underlying assumption was, of course, that the policies in question were for the ultimate benefit of all those possessions. Similarly, assuming, of course, that the Government had to take account of the interests of the islanders, it was nevertheless entitled to give appropriate weight to the wider, economic, foreign affairs and defence interests of the United Kingdom when it decided whether to enact the Orders in Council. In the absence of any relevant legal criteria, judges are not well placed to second-guess the balance struck by ministers on such a matter.

115 The final major submission on behalf of the respondent was that, by enacting the Constitution Order and the Immigration Order, the Government had breached a promise made by the then Foreign Secretary, Mr Cook, following the judgment in *Bancoult (No 1)*, when the Immigration Ordinance 2000 was made by the Commissioner. This submission was accepted by all the members of the Court of Appeal. Nevertheless, for the reasons given by Lord Hoffmann, I would reject it. In substance, what is in dispute is a right for the Chagossians to return and live

A permanently on the outer islands. Unquestionably, the Foreign Secretary said that, while observing its Treaty obligations, the Government would put in place a new Immigration Ordinance which would allow the Ilois to return to the outer islands. But the Foreign Secretary had already referred to the work which the Government was doing on "the feasibility" of resettling the Ilois and which now took on a new importance. In other words, the Government had still to complete its work to see whether or not resettlement B would be possible, "feasible". For that reason I am unable to spell out of the statement, or the Government's action in putting the Immigration Ordinance in place, a clear and unambiguous promise that the Chagossians would be allowed to return and settle permanently on the outer islands.

116 I agree with what Lord Hoffmann says about the two remaining grounds of challenge, based on the Human Rights Act and international law.

C **117** For all these reasons I am satisfied that the Constitution Order and the Immigration Order are not invalid and therefore form part of the law of BIOT. It follows that, assuming that chapter 29 of Magna Carta is part of the law of BIOT, it does not make any banishment of the Chagossians by virtue of these Orders unlawful.

118 For these reasons I would allow the appeal.

D **LORD CARSWELL**

119 My Lords, the Chagos Islands are an archipelago of low-lying coral atolls in the middle of the Indian Ocean, over 1,000 miles from Mauritius. In 1965 they were formed into a separate colony or dependent territory, under the name of the British Indian Ocean Territory ("BIOT"). Unhappily for the inhabitants, that very remoteness gave the islands a geopolitical E importance. In the 1960s the United States Government desired to establish a secure defence facility on the island of Diego Garcia, the largest and most populated of the Chagos Islands. Agreement was reached with HM Government and between 1968 and 1973 the Chagossians were in effect uprooted and removed from the islands to Mauritius. The unhappy story of their removal and the consequences has been told at length in the judgments given in the previous proceedings and summarised by my noble F and learned friend, Lord Hoffmann, in his opinion in this appeal. I can only echo the distress and indignation expressed by those who have given these previous judgments about the way that the Chagossians were treated.

120 I have had the advantage of reading in draft the opinions prepared by my noble and learned friends, Lord Hoffmann and Lord Rodger of Earlsferry. I agree with their conclusions and, with very little qualification, G with their reasoning, and I can accordingly shorten this opinion considerably.

121 The respondent, Louis Olivier Bancoult, is the standard bearer for the campaign promoting the expressed wish of many of the Chagossians to return to what they regard as their homeland in the Chagos Islands. That wish, they claim, has been frustrated by the passing in 2004 of the British Indian Ocean Territory (Constitution) Order and the British Indian Ocean Territory (Immigration) Order. It is put on an abstract basis by their H counsel, for it is quite clear that for them to resettle in the islands is wholly impracticable without very substantial and disproportionate expenditure. They are not in a position to meet such a cost. It could only be shouldered by the British Government, which has made it clear that it is willing to permit and fund from time to time short visits to the outlying islands, but not to

support a large-scale permanent resettlement. One might ask the question why this campaign is being pursued, for the Chagossians already can pay visits and there is no realistic prospect of resettlement unless it is funded for them at huge expense. I do not find it necessary to seek an answer to that question, but the practical difficulties in the way of resettlement are in my view relevant to the rationality of the Government's decision to make the 2004 Orders in Council.

122 The two sides have, as Lord Hoffmann has said, put forward in argument extreme and incompatible propositions. Like him, I am unable to accept either in its unqualified form. I would reject the appellant's submission that the validity of an Order in Council made under the prerogative legislating for a colony cannot be reviewed by the courts. I agree with the reasons which Lord Hoffmann has given for this conclusion and do not need to add anything to them.

123 The opposing contention, persuasively advanced by Sir Sydney Kentridge, requires a little more discussion. The desire to be able to remain in one's homeland is so deeply ingrained in the human psyche that the right not to be exiled could readily be regarded as fundamental. Given its high importance, the issue is how near it is to being an inalienable constitutional right.

124 It has been part of the law of England at least since Magna Carta, chapter 29 of which provides that no freeman shall be exiled otherwise than by the lawful judgment of his peers or by the law of the land. Historically this was no doubt aimed at preventing the King from arbitrarily banishing his more important subjects, in particular the barons, but it has come to be accepted as a right possessed by every citizen, which Blackstone said could only be removed by the authority of Parliament (*Commentaries on the Laws of England*, 15th ed (1809), p 137, the same wording also appearing in the 11th edition, published in 1791 and containing Blackstone's ipsissima verba). Since the Crown has plenary legislative authority over a ceded colony, there appears to be no compelling reason why an Order in Council should not validly have the same effect in a Crown colony as an Act of Parliament would have in the United Kingdom.

125 In contending that the inhabitants of a colony could not lawfully be exiled by an Order in Council Sir Sydney relied on a statement of Lord Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp 204. The action concerned a challenge by the plaintiff to the validity of a duty upon goods exported from Grenada, which had been imposed by letters patent some months after an earlier proclamation providing for the constitution of assemblies with power to pass laws for Grenada. The Court of King's Bench held in favour of the plaintiff, who sued for the recovery of duty paid, on the ground that the King had by the proclamation divested himself of legislative authority over Grenadan affairs. In the course of his judgment Lord Mansfield enunciated six general propositions concerning the law governing colonies. The sixth of these propositions read, at p 209:

> "if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for

A instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put."

Like Lord Rodger, I think that too much has been read into this statement. It was made in the context of the imposition of taxes, and is primarily directed to the possibility of the exemption of particular persons from taxes B or the granting of the type of valuable privilege given in earlier times. I share the doubt expressed by the Privy Council in *Liyanage v The Queen* [1967] 1 AC 259, 284, whether Lord Mansfield intended to say that what was not repugnant to English law might yet be repugnant to fundamental principles, which it categorised as "some vague unspecified law of natural justice".

126 Doubts of this kind did not prevent the emergence of the view in the 19th century that colonial laws could be struck down as null and void if their C provisions were contrary to such "fundamental principles", notwithstanding the clear contrary view expressed in 1834 by Sir James Stephen, quoted by Lord Rodger at para 93. The problem became acute when Boothby J of the Supreme Court of South Australia exercised this supposed jurisdiction with great freedom. In order to deal with it Parliament passed the Colonial Laws Validity Act 1865, designed to remove the possibility of such challenges to D the validity of colonial laws. I agree with the reasons set out by Lord Rodger in paras 96 to 101 of his opinion and his conclusion that the question of the inviolability of fundamental principles is put beyond doubt by the 1865 Act. I therefore am of the same view that none of the provisions of the 2004 Orders in Council is open to challenge in the English courts on the ground of repugnancy to any fundamental principle relating to the rights of E abode of the Chagossians as "belongers" in the Chagos Islands.

127 It was argued on behalf of the respondent that the provisions of the Orders in Council were not for the "peace, order and good government" of the Chagos Islands, a proposition which had been accepted by the Divisional Court in relation to the Ordinance in the case which has been termed *Bancoult (No 1)* and by Sedley LJ in the Court of Appeal in the present case. The Orders in Council, unlike the Ordinance, were made in right of the F United Kingdom, not in right of the BIOT. Mr Crow for the appellant advanced the proposition that the very familiar trilogy of objects of legislation, if it be a limitation on the plenitude of legislative power, does not apply to Orders in Council made under Her Majesty's prerogative power to establish laws for a Crown colony. He pointed out that there is a complete dearth of authority for the application of the phrase to the prerogative G power. Nevertheless it is found in the British Indian Ocean Territory Orders of 1965 and 1976 and the British Indian Ocean Territory (Constitution) Order 2004. In each Order the Commissioner is given power to make laws for the peace, order and good government of the territory, which is a standard provision when legislative power is devolved. More significantly, however, in each Order there is reserved to Her Majesty "full power to make laws for the peace, order and good government" of the territory. H This throws more than a little doubt on the correctness of Mr Crow's proposition, as it is apparent that the draftsman of each Order considered that this was the correct definition of the Crown's law-making power. I am therefore willing to accept, as does Lord Rodger, that the Orders had to be laws made for the "peace, order and good government" of the colony.

128 That ritual phrase does not, however, permit a court to strike down a provision in such an order on the ground that it does not consider that it furthered that object. The locus classicus for this proposition is in the decision of the Privy Council in *Riel v The Queen* (1885) 10 App Cas 675. Lord Halsbury LC, giving the judgment of the board, said in a well known sentence at p 678, referring to the British North America Act 1871 (34 & 35 Vict c 28), giving the Canadian Parliament authority to make laws for the administration, peace, order and good government of territories not yet included in any province: "The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to." In the previous paragraph he specifically rejected the suggestion that

> "if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact."

The High Court of Australia confirmed the application in Australia of the same principle in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10:

> "These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words 'for the peace, order and good government' are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a state, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score."

129 The issue received some consideration in Northern Ireland, where section 4 of the Government of Ireland Act 1920 conferred upon the Parliament of Northern Ireland power to make laws for "the peace, order, and good government of . . . Northern Ireland", except for certain specified objects. This provision was considered in several decided cases, but without any resolution of the plenitude of the power conferred by it. In *Gallagher v Lynn* [1937] AC 863 the House of Lords considered the Milk and Milk Products Act (Northern Ireland) 1934, but the decision turned upon the issue whether the Act was a law in respect of trade (an excepted object) or in respect of precautions taken to secure the health of the inhabitants by protecting them from the dangers of an unregulated supply of milk. The House did not pronounce upon the appellant's argument that the power to make laws for the peace, order and good government was limited. Nor did the Court of Appeal in Northern Ireland rule upon the extent of the power in *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79, where

A it was not disputed that legislation in respect of transport came within the power. In *Duffy v Ministry of Labour and National Insurance* [1962] NI 6 legislation to safeguard the employment of Northern Ireland workers (to the detriment of others who did not so qualify) was held by Lord MacDermott LCJ in the Court of Appeal to be clearly a matter within the power. It is notable that there was no successful challenge during the period (some 50 years) of existence of the Parliament of Northern Ireland to any B statutory provision on the ground that it fell outside the general power conferred by section 4 of the 1920 Act. It is suggested in *Calvert, Constitutional Law in Northern Ireland* (1968), pp 170–172 that such a challenge might nevertheless succeed in an appropriate case, but its absence is at least negative evidence against the correctness of the suggestion.

130 I accordingly agree with Lord Rodger in holding that it is not for C the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. A court might understandably be strongly attracted to the view that a law which removes the Chagossians from their homeland cannot be said to be for the peace, order and good government of the colony. But it is not for the courts to declare the law invalid on that ground. Once they enter upon such territory they could very D easily get into the area of challenging what is essentially a political judgment, which is not for the courts of law. However distasteful they may consider a provision such as those under consideration in the present case, I think that the rule of abstinence should remain unqualified and the courts should not pronounce on the validity of such a provision on the ground that it is not for the peace, order and good government of the colony in question.

E 131 I turn then to the question of the rationality of the 2004 Orders in Council. It must be borne in mind that it is the *Wednesbury* (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) standard which must be applied to the Secretary of State's decision to have the Orders in Council enacted. The Human Rights Act 1998 and the European Convention on Human Rights do not apply to BIOT—see Lord Hoffmann's opinion at paras 64–65—and therefore the applicable standard F is not that of proportionality in the Convention context. I think that it may be appropriate, however, to adopt the approach set out by Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of G responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

H The time at which the factors governing reasonableness have to be assessed is, self-evidently, the time of making the decision called into question. One must therefore look at the situation obtaining at the time when the Orders in Council were made and consider whether it was reasonable in the *Wednesbury* sense, as qualified by *Smith*, to prohibit the Chagossians from

returning to their homeland. Could it be said, as Lord Rodger asks, that no reasonable Secretary of State could have so decided?

132 Lord Rodger has set out in paras 112–114 the considerations which were taken into account in making the decision and I need not repeat them. The feasibility reports make it abundantly plain that resettlement in the Chagos Islands, even with substantial financial support, would have been impracticable. The whole substructure of their economy had disappeared and could not be recreated. The practicability of starting replacement occupations was extremely doubtful. The wisdom of settling in the atolls, given the ecological factors now pertaining, was questionable. Looming over all considerations were the twin issues of prohibitive cost and the United Kingdom's interests in co-operation with an important ally in maintaining a secure defence installation. The Secretary of State was quite justified in taking all these factors into account. Criticisms have been advanced of the validity of the reasons advanced on behalf of the United States for wanting to keep the whole of the territory free from settlement, but even if it might be said that the concerns expressed appear exaggerated, the fact remains that the US clearly desired to keep a large clear area around the base. Decisions about how far to accommodate such concerns and wishes are very much a matter for ministers, who have access to a range of information not available to the courts and are accountable to Parliament for their actions. I think that courts should be more than a little slow to pin that butterfly to the wheel. I accordingly conclude, in full agreement with Lord Hoffmann and Lord Rodger, that the Secretary of State's decision should not be set aside on the ground of irrationality.

133 The final issue which I want to discuss is that of legitimate expectation. All members of the Court of Appeal were in agreement that the Chagossians had a legitimate expectation that they would be permitted to return, and that the prohibition contained in the 2004 Orders in Council brought about a breach of that. The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, 358, para 34 Lord Hoffmann accepted *Coughlan* as correct. I would therefore prefer not to express a concluded opinion on the limits of the concept. I am content, however, for present purposes to accept that breach of such an expectation can give rise to an actionable claim and to consider the issue on that basis.

134 Following the publication of the court's decision in *Bancoult (No 1)*, the Secretary of State issued the following press release on 3 November 2000:

> "I have decided to accept the court's ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations. This Government has not defended what was done or said 30 years ago. As Laws LJ recognised, we made no attempt to conceal

A the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the court and praised the openness of today's Foreign Office."

The respondent and the other Chagossians claim that this statement without more gave rise to a legitimate expectation on their part that they could return to the Chagos Islands. As Lord Hoffmann has pointed out in para 61, B the background to the statement was the feasibility study, reference to which was prominent in the press statement. I agree with him that it could not be said that the statement gave an unequivocal assurance that they could be allowed to resettle the islands, irrespective of the conclusions of the feasibility study. Their desire to be allowed to pay more transient visits is not at the centre of the dispute, and this has indeed been accommodated. For the reasons given by Lord Hoffmann and Lord Rodger, I also consider that the C Government did not give the Chagossians a clear and unambiguous promise that they would be allowed to return and resettle permanently on the outer islands. I might add two other points. The press statement was not an assurance directed towards one individual or a small number of people, whereas in *Coughlan*, para 60, the Court of Appeal regarded such a limitation as a significant feature in favour of the applicant's claim. D Secondly, if the Government were obliged to resettle the Chagossians, the consequences could be more than financial, as it could give rise to friction with the United States: see *Coughlan*, para 60.

135 The basis of the jurisdiction is abuse of power and unfairness to the citizen on the part of a public authority: see *Coughlan*, para 82. On this basis it has been held that two factors, both present in the case before the House, tend to show that there has not been an abuse of power. The first is E when the authority changes its policy on sufficient public grounds. If there is an overriding public interest behind its change of policy, it will not be an abuse of power: *Coughlan*, para 57; *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1130–1131. The second factor is whether the claimant has relied on the promise or representation, in particular whether he has thereby suffered any detriment. The Court of F Appeal has affirmed the necessity for this. In *Begbie* Peter Gibson LJ said at p 1124 that it would be "wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation". Cf also *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, 246, where the court adopted at para 29 the statement in *Craig, Administrative Law*, 4th ed (1999), p 619 G that "detrimental reliance will normally be required". If it could be said, contrary to my opinion, that the press statement of 3 November 2000 did contain a sufficiently clear and unambiguous promise or representation, these factors would militate against affording a remedy to the Chagossians.

136 For the reasons which I have given I would allow the appeal and make the order proposed by Lord Hoffmann. I do not do so through any H lack of sympathy with the Chagossians. They were undoubtedly treated very shabbily when they were removed from the Islands. They were paid some compensation, but very tardily, while they suffered considerable privations after their removal. No one could fail to feel distressed about their plight at that time. It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to

a party who has been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially—in the words of the Book of Common Prayer, truly and indifferently minister justice. It is that imperative which has taken me to the conclusion which I have reached.

LORD MANCE

Introduction

137 My Lords, there is a much traversed history to this latest appeal arising from the creation of the British Indian Overseas Territories ("BIOT") in 1965 and its vacation over the next eight years by its inhabitants, the Ilois or Chagossians. Accounts will be found in paras 6 to 20 of the Divisional Court's judgment in previous proceedings brought by Mr Bancoult, *R (Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs* ("*Bancoult (No 1)*") [2001] QB 1067, in the judgments given by Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) and by the Court of Appeal in the same proceedings [2004] EWCA Civ 997 as well as in the judgments below in the present case [2006] EWHC 1038 (Admin); [2008] QB 365. The speech of my noble and learned friend, Lord Hoffmann, contains in paras 1–30 an outline of events up to the commencement of the present proceedings which I am happy to adopt for present purposes with few qualifications.

138 One qualification concerns paras 15 and 23, in relation to which I note that it is clear that the 1971 Ordinance (Ordinance No 1 of 1971) was enacted by the Commissioner of BIOT on 16 April 1971 following a decision taken in London in or by March 1971 that all the Chagos Islands should be cleared of their "extremely unsophisticated" inhabitants; that the Chagossians' objection to the 1971 Ordinance does not depend upon whether or not the 1971 Ordinance was the reason why they left; and that it is not in my view shown that the Chagossians have been, in *Bancoult (No 1)* or the present proceedings, engaged in a mere campaign to obtain United Kingdom Government support for resettlement or to embarrass the United Kingdom and United States Governments. Their wish for recognition of their historic connection, and on their case rights of abode, in relation to the Chagos Islands is deep-felt, longstanding and, in my view, understandable. Arguments that any right of abode is symbolic, since it would be impracticable to exercise without expensive government support to which it is accepted that there is no right and which would not be forthcoming, in my view miss the point. If anything, they indicate that the right claimed could be recognised without this being likely to have any practical effect on the present state of the Chagos Islands. These islands (apart from Diego Garcia) appear to exist as an unspoilt nature paradise to which an increasing number of long-distance yachtsmen venture to spend periods of months without noticeable disturbance to the operations of the United States base at Diego Garcia many miles away.

139 BIOT consists of the Chagos Archipelago, originally a dependency of Mauritius, which was (after capture in 1810) ceded to the United Kingdom by France in 1814. Mr Bancoult was born in the Chagos Islands, living it appears on one of the islands, Peros Banhos (considerably more than 100 miles north of Diego Garcia), until March 1968. In 1965 the Chagos Islands together with three other islands previously part of the Seychelles

A (Aldabra, Desroches and Farquhar) were constituted a separate colony by the British Indian Ocean Territory Order 1965. The Order established the office of Commissioner and gave him the right to make laws for the peace, order and good government of BIOT. The Order was also expressed to reserve to Her Majesty "full power to make laws from time to time for the peace, order and good government of [BIOT] (including, without prejudice to the generality of the foregoing, laws amending or revoking this Order)". B In 1976 Aldabra, Desroches and Farquhar were returned to the Seychelles as part of the preparation for the Seychelles' independence. The 1965 Order was at the same time replaced by an Order in similar terms, but confining BIOT to the Chagos Islands. In the meanwhile, the Commissioner had enacted the 1971 Ordinance, providing that no-one should enter or be present in BIOT without a permit, and the Chagossians had in fact C (it appears by the end of May 1973) all left the Chagos Islands. The Divisional Court's judgment, handed down formally in *Bancoult (No 1)* on 3 November 2000 but no doubt distributed in draft some days beforehand, established that the 1971 Ordinance was ultra vires the commissioner and the 1965 Order.

140 The Foreign Secretary, then Mr Robin Cook, decided to accept the court's decision and not to appeal, and, accordingly, on the day the D judgment was handed down, issued the press release which my noble and learned friend Lord Hoffmann has set out in para 17. Also on 3 November 2000 the Commissioner made Ordinance No 4 of 2000 substituting, for the restrictive regime which had been held void of the 1971 Ordinance, a new regime. The new regime contained an exception from the requirement in section 4(1) to have a permit in order to enter or remain in BIOT, for any E person being under the British Nationality Act 1981 "a British Dependent Territories citizen . . . by virtue of his connection with [BIOT]": section 4(3). On 10 June 2004 Her Majesty in Council enacted the British Indian Ocean Territory (Constitution) Order 2004 ("the BIOT Order 2004"), revoking the 1976 and other previous orders, re-enacting various constitutional provisions, but including section 9. Section 9 recites that, whereas BIOT "was constituted and is set aside to be available for defence purposes" of F the Governments of the United Kingdom and of the United States, "no person has the right of abode in the territory" (section 9(1)) and that "Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory": section 9(2). By a separate British Indian Ocean Territory (Immigration) Order 2004 ("the Immigration Order") on G the same date, Her Majesty in Council prohibited any entry or presence without a permit which an immigration officer might issue or renew "acting in his entire discretion". Mr Bancoult's present challenge is directed primarily at the validity of section 9 of the BIOT Order 2004, which is the basis for the Immigration Order.

141 At the heart of this appeal lie questions as to the scope of the prerogative legislative power which Her Majesty in Council retains over H BIOT and its vulnerability or otherwise to any form of review or challenge. I can identify at the outset some points on which I am in full agreement with my noble and learned friend, Lord Hoffmann, and one point which I prefer to leave open. First, the prerogative power of the Crown to legislate by Order in Council on the advice of Her Majesty's ministers in relation to a

territory such as BIOT is subject to judicial review. Dicey observed in his *Introduction to the Study of the Law of the Constitution*, 8th ed (1915), that "we may use the term 'prerogative' as equivalent to the discretionary authority of the executive" (p 421) and that "it applies . . . also to that large and constantly increasing number of proceedings which, though carried out in the King's name, are in truth wholly the acts of the Ministry": p 422. Into the latter category fall the making of legislative Orders in Council such as the BIOT Order 2004. I see no good reason why they should not be reviewable in the same way as other steps, administrative or legislative, by the executive, and every reason why they should be, on the familiar grounds of legality, rationality and procedural propriety, due weight being of course given to the executive's effective role as primary decision-maker. A recognition that a legislative Order in Council is invalid by a judgment given in proceedings such as the present directed against the minister responsible for the making of the order no more involves the making of an impermissible order against the Sovereign than a successful challenge to any other prerogative act undertaken in Her name.

142 The second point is that the Colonial Laws Validity Act 1865 is no obstacle to such review in the present case, for the reasons given by my noble and learned friend, Lord Hoffmann, in paras 36–41. The third point is that, for the reasons given by Lord Hoffmann in paras 64–65, the Human Rights Act and Convention have no role to play in this litigation. The fourth point is one that, in the light of the other conclusions which I reach on this appeal, I prefer to leave for consideration in another case. It is whether and, if so, to what extent, international law may have any relevance to the exercise or to judicial review of the exercise of the power to make Orders in Council in respect of a territory such as BIOT: see also para 145 below.

Scope of the prerogative power

143 Logically prior to any question of judicial review of its exercise is the question whether the scope of the prerogative legislative power is subject to any relevant limit. That is any limit affecting the ability of the Crown to make an Order in Council precluding Chagossians, and Mr Bancoult in particular, from returning to BIOT without a permit. Mr Jonathan Crow for the Secretary of State relies heavily upon the equivalence, as he submits, of the power to make laws of Her Majesty in Parliament in the domestic sphere (in which it is now recognised that this is the only way in which laws can be made) and of Her Majesty in Council to make laws in the present sphere, where the Crown in Council remains the primary legislative authority in relation to BIOT, so long as Parliament has not by statute otherwise provided. He notes that in relation to other overseas territories Parliament has substituted for prerogative rule a statutory scheme (e g in the West Indies), and that BIOT and Gibraltar remain exceptions where prerogative rule survives, by inference by Parliament's deliberate will.

144 These are powerful considerations. But they do not lead necessarily to a conclusion that the Crown's prerogative power in respect of a ceded colony or territory is without any limit. First, it is to be noted that in relation to settled territories the Crown's prerogative power was at common law confined to establishing a constitution granting settlers the right to legislate for themselves: see *Roberts-Wray, Commonwealth and Colonial Law* (1966) p 151 and *Sammut v Strickland* [1938] AC 678, 701, where Lord Maugham

A observed that "The Crown clearly had no prerogative right to legislate in such a case". This lack of power was addressed by the British Settlements Act 1887 (50 & 51 Vict c 54), which conferred on the Queen in Council power to make such laws as appear to her "necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement". The aim was to equate the powers of the Queen in Council in British settlements with her powers over ceded colonies: see B *Roberts-Wray*, at pp 166–168.

145 There is, as Mr Crow points out, no express definition of the Queen's powers over ceded colonies in terms of their "peace, order and good government", but the British Settlements Act suggests that this phrase reflects the generally understood nature of such powers. However, it is also, as Mr Crow submits, a phrase which has received the widest interpretation. C "Once it is found that a particular topic of legislation is among those upon which [a legislature] may competently legislate" under the relevant constitution, the words "authorise the utmost discretion of enactment for the attainment of the objects pointed to": see *Croft v Dunphy* [1933] AC 156, 163–164, per Lord Macmillan giving the opinion of the board and quoting in the latter part *Riel v The Queen* (1885) 10 App Cas 675, 678, per Lord Halsbury LC; and see also *Winfat Enterprise (HK) Co Ltd v Attorney* D *General of Hong Kong* [1985] AC 733. In *Croft v Dunphy* Lord Macmillan went on, at p 165:

> "When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred E the power."

The permissible topics of legislation referred to in these authorities were expressed in the relevant constitutions. In *Croft v Dunphy* the Privy Council left open also a possibility that the power conferred in that case by the British North America Act 1867 on the Dominion Parliament might implicitly be limited to the enactment of legislation conforming with international law. F This is the point that, as I have mentioned, I prefer to leave open. But the fact that the Privy Council contemplated the possibility underlines the difference between legislation by the Crown in Council and by the Crown in Parliament. This appeal raises the question whether there is any implied limitation as regards the topics upon which Her Majesty may at common law legislate in Council for a ceded territory such as BIOT.

G **146** A second point is that the Crown in Council may suspend or divest itself of its prerogative power of legislation in a territory subject to the Crown, in contrast at least theoretically with the Crown in Parliament. The rule was established in *Campbell v Hall* (1774) 1 Cowp 204, where the court in a judgment delivered by Lord Mansfield held, after the case had been "very elaborately argued four several times", that in relation to the conquered colony of Grenada the Crown had, by issuing letters patent H providing that subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, divested itself of the power to legislate by later letters patent relating to excise duties, something that "can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain": pp 213–214. The scope of this

limitation is discussed in *Roberts-Wray*, at pp 157–162. The conclusion there reached is that the grant of legislative institutions is irrevocable, unless the power of revocation is reserved (a proposition vouched by *Sammut v Strickland*, at p 704), but that amendment of a constitution not amounting to revocation of the grant remains within the prerogative rights of the Crown. For present purposes, what matters is that the Crown's legislative prerogative in council was not treated as parallel in all its features to the sovereign and inalienable power of the Crown in Parliament.

147 Thirdly, in *Campbell v Hall* the court laid down six general propositions which it thought "quite clear" and which included limitations on the Crown's power: the first was that a conquered country becomes a dominion of the King in right of his Crown and therefore necessarily subject to the legislature, the Parliament of Great Britain; the second, that the conquered inhabitants once received under the King's protection, become subjects and are to be universally considered in that regard, not as enemies or aliens; the third, that the articles of capitulation and peace are sacred and inviolable according to their true intent and meaning; the fourth, that the law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there; the fifth, that the laws of a conquered country continue in force, until they are altered by the conqueror; and the sixth and last

> "that, if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many instances which might be put." (P 209.)

148 In *Liyanage v The Queen* [1967] 1 AC 259 the appellants sought to invoke Lord Mansfield's sixth proposition in the context of an argument that, since Ceylon's independence was the product of one or more Orders in Council in 1946 rather than of Parliamentary legislation, the Ceylon Parliament could not have been granted greater powers than those of the Queen in Council, and that, as a result, legislation altering ex post facto the definition and procedures relating to certain criminal offences could be disregarded as contrary to fundamental principle and void. The Privy Council held that the Colonial Laws Validity Act 1865 had been passed to overcome any suggestion that colonial legislative acts might be regarded as void for any reason other than repugnancy to an Act of the United Kingdom, and that this had been repeated and extended by Act of the United Kingdom Parliament (the Ceylon Independence Act 1947) which provided that no law of the Ceylon Parliament should be void as repugnant to any existing or future Act of the United Kingdom Parliament. The board did not accept that the removal of the fetter of repugnancy to English law "left in existence a fetter of repugnancy to some vague unspecified law of natural justice": p 284G. Strictly, the decision does not touch the question whether Lord Mansfield's sixth proposition still applies to the scrutiny in this jurisdiction

A of the BIOT Order 2004, for the reasons given by my noble and learned friend, Lord Hoffmann, in paras 40–41 of his speech. But it is right to add that the board in *Liyanage* doubted "whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former" (p 285A), and it noted that "no case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has B been founded on that portion of Lord Mansfield's judgment": p 285B.

149 Fourthly, the scope of the royal prerogative to legislate in council is "a pure question of English common law": *Sammut v Strickland*, at p 697. The principle goes back to *The Case of Proclamations* (1611) 12 Co Rep 74, 76, where Coke CJ said that "the King hath no prerogative, but that which the law of the land allows him". Lord Mansfield's six propositions in C *Campbell v Hall* demonstrate, first, that the Crown's prerogative power to legislate in council was not regarded as an equivalent or parallel power, but rather as subordinate, to the Crown's power to legislate in Parliament, and that the primary legislative body was the latter, and, second, that the court was ready and able to attach what were at that time considered appropriate limits to the Crown's power to legislate in council. Further, in determining the scope of the royal prerogative, the courts will look for guidance to its D previous mode of exercise. Considering the scope of the admittedly residual prerogative power to take property in times of war in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101D, Lord Reid said that the proper approach was "a historical one: how was it used in former times and how has it been used in modern times?".

150 The present case concerns the legitimacy of using the royal E prerogative to introduce into a constitution for BIOT a provision that no Chagossian has a right of abode or a right to enter or be present in BIOT except as authorised under the constitution (which contains no presently relevant authorisation) or by any other law (the only other relevant law being the Immigration Ordinance, under which entry and presence depend on executive discretion). It would be surprising if any precedent could be found for such a provision, and none has been shown. The F operational words of section 9 of the BIOT Order 2004 ("no person has the right of abode") were prefaced by the apologia that BIOT was "constituted and is set aside to be available for the defence purposes" of the two Governments. That would be innocuous if BIOT had been without inhabitants or (to use a word much deployed at the time in Government and civil service memoranda) "belongers" when BIOT was in 1965 constituted G by its separation from other British territories. But the history of this sad case shows that, despite attempts to make the facts fit another picture, BIOT had a not inconsiderable number of such inhabitants, certainly hundreds, maybe approaching a thousand. Once BIOT was created with such inhabitants, they in Lord Mansfield's words were by virtue of their connection with BIOT "under the King's protection . . . subjects and are to be universally considered in that light, not as enemies or aliens": *Campbell v* H *Hall* 1 Cowp 204, 208.

151 Mr Crow submits nevertheless that the Crown's subjects inhabiting BIOT had in public law no right of abode, and nothing of which they could therefore be deprived. It is common ground that this would not be the position in the United Kingdom. The right is fundamental and, in the

informal sense in which that term is necessarily used in a United Kingdom context, constitutional. Chapter 29 of Magna Carta provides that "no freeman shall be . . . exiled . . . but by lawful judgment of his peers, or by the law of the land". Blackstone (*Commentaries on the Laws of England*, vol 1, p 137) states the position in these terms:

> "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ ne exeat regnum, and prohibit any of his subjects from going into foreign parts without licence . . . But no power on earth, except the authority of parliament, can send any subject *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law . . ."

The power which Shakespeare records that Richard II, with the advice of his Council, exercised in banishing Henry Bolingbroke, Duke of Hereford, and Thomas Mowbray, Duke of Norfolk, (*King Richard II, Act I, Scene III*) had by the time of Blackstone long since disappeared. In the Divisional Court in *Bancoult (No 1)* Laws LJ cited international textbook and case law authority to like effect to Blackstone: see also *Chalmers' Opinions of Eminent Lawyers* (1814), vol 1, p 4 and *Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown* (1820), p 21. In *R v Bhagwan* [1972] AC 60, Lord Diplock identified the right of a British subject at common law "to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he listed" (p 74B), and of such subjects "to go wherever they like within the realm": p 77G. In respect of persons who were British citizens by virtue of their connection with a part of the Commonwealth other than the United Kingdom, that right was from 1962 onwards made subject progressively to statutory qualifications: see *R v Bhagwan* and *R v Governor of Pentonville Prison, Ex p Azam* [1974] AC 18. Thus, from 1973 when the Immigration Act 1971 came into force, all Commonwealth citizens entering the United Kingdom without leave were liable to prosecution. But the common law right to enter and remain within the United Kingdom remains unchanged in respect of those with British citizenship based on their connection with the United Kingdom.

152 The common law position relating to aliens differs significantly.

> "One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: *Vattel, Law of Nations*, book 1, s 231; book 2, s 125": *Attorney General for Canada v Cain* [1906] AC 542, 546;

and see *Chalmers' Opinions of Eminent Lawyers*, vol 1, p 4 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 111F–G, where Lord Scarman proceeded on the basis that "an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode".

A 153 Mr Crow submits that the common law principles governing persons with a right of abode in England have no relevance to ceded territories like BIOT. In this submission, inhabitants of BIOT never had any right of abode, and certainly none which could survive or be the basis of any objection to section 9 of the BIOT Order 2004. In any event, he submits, the concept of an inhabitant of BIOT is too uncertain to receive legal recognition. As to the latter submission, there may be issues about who in B and after 1965 was an inhabitant of the BIOT, as opposed to an inhabitant of, say, Mauritius or the Seychelles working as temporary labour in BIOT. However, it is clear enough that there were at the least hundreds of persons who could only properly be described as Chagossians, even though they may have had no property rights in BIOT as a matter of private law. Above all, it is, as Sir Sydney submitted, clear that Mr Bancoult was a Chagossian by C birth. And there was no difficulty in identifying the concept of a Chagossian for the purposes of the 2000 Ordinance (see section 4(3) quoted in para 140 above).

154 As to Mr Crow's former submission, the common law position must in my opinion be that every British citizen has a right to enter and remain in the constitutional unit to which his or her citizenship relates. That is the case with the United Kingdom. In relation to overseas territories D acquired by the Crown, there exists in relation to private law a distinction between those acquired by settlement on the one hand and those acquired by conquest or cession on the other. In the case of the former, the settlers take with them English private law. In the case of the latter, the local private law remains in place, subject to potential but presently irrelevant qualifications, unless and until varied (as it was in the case of BIOT under the British Indian E Ocean Territory Courts Ordinance 1983 which provided for English law to apply in BIOT so far as applicable and suitable and subject to any necessary modifications, adaptations, qualifications and exceptions as local circumstances rendered necessary).

155 However, no such distinction exists as regards public law, or in particular as regards constitutional questions including the nature and extent of the Crown's prerogative. Even where the Crown acquires overseas F dominions by conquest or cession, the relationship between the Crown and its subjects becomes subject to the like public law principles to those applicable in the United Kingdom: see *Sammut v Strickland* [1938] AC 678, 697, *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 721C–F, *Kodeeswaran v Attorney General of Ceylon* [1970] AC 1111, 1118A–D (referring to *Ruding v Smith* (1821) 2 Hag Con 371, 382, a case concerning G the validity of a marriage in the English form in the Cape Colony after its conquest from the Dutch in 1795, where Lord Stowell said that "Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded, by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it . . . and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change"), *Burmah Oil Co (Burma* H *Trading) Ltd v Lord Advocate* [1965] AC 75 and *Halsbury's Laws of England*, 4th ed reissue, vol 6 (2003), para 878. The inhabitants of BIOT came in Lord Mansfield's words under the protection of the Crown, became subjects and were to be universally considered in that regard, not as enemies or aliens. They acquired as against the Crown the like

constitutional right of abode and the like immunity from exile as the common law confers on citizens of the United Kingdom: see para 151 above. After 1965, the only constitutional unit to which Mr Bancoult's and other Chagossians' citizenship and right of abode related was BIOT. As Mr J H Lambert pointed out in a confidential memorandum on the status of the inhabitants of BIOT dated 4 September 1968 (disclosed by the Government in these proceedings), if such Chagossians applied for a UK passport, "presumably the colonial endorsement could only reveal that they belonged to BIOT since there was no other British colony to which they could belong". Mr Crow's submission that Chagossians had no common law right of abode in BIOT comes close to treating them as if they were aliens, and is one that I would reject.

156 That does not resolve this appeal, because of Mr Crow's further and principal submission that any common law right of abode in BIOT that Chagossians may have had could always be and was overridden and removed by Her Majesty in Council. This, Mr Crow submits, is what section 9 of the BIOT Order 2004 on any view achieves. Within the United Kingdom, such a result could only be achieved by Parliament, whereas in territories such as BIOT it is submitted that the royal prerogative reigns unlimited in scope, subject only (Mr Crow's contrary submission being already rejected) to judicial review.

157 This submission treats BIOT and the prerogative power to make constitutional or other laws relating to BIOT as if they related to nothing more than the bare land, and as if the people inhabiting BIOT were an insignificant inconvenience (a phrase which reflects the flavour of some of the Government's internal memoranda in the 1960s), liable to be dispossessed at will for any reason that might seem good to the executive in the interests of the United Kingdom. Sir Sydney accepts that in administering BIOT the Crown in Council was entitled to have regard to the interests of the United Kingdom and its territories generally, and was not confined to consideration of the benefits to BIOT alone. He also accepts that the United Kingdom could, in the defence interests of itself and its ally, require Chagossians resident in one part of the territory (Diego Garcia) to move to another part, and that there might be extreme circumstances of necessity (e g where a whole territory became unsafe for inhabitation, due to volcanic eruption or imminent threat of inundation) where the United Kingdom could by Order in Council require its evacuation. But enacting a constitution for a conquered or ceded colony which has the aim of depopulating the whole of a habitable territory in the interests of the United Kingdom or its allies is another matter. A colony, whether conquered, ceded or settled, consists, first and foremost, of people living in a territory, with links to a parent state. The Crown's "constituent" power to introduce a constitution for a ceded territory is a power intended to enable the proper governance of the territory, at least among other things for the benefit of the people inhabiting it. A constitution which exiles a territory's inhabitants is a contradiction in terms. The absence of any precedent for the exercise of the royal prerogative to exclude the inhabitants of a colony from the colony is significant, although to my mind entirely unsurprising. Until the present case, no-one can have conceived of its exercise for such a purpose. Territories, such as Gibraltar or Malta, have been conquered or ceded with military purposes in mind, but never, so far as appears, has there been either

A an original purpose or a subsequent attempt compulsorily to exclude their natural inhabitants. It may not have been necessary in the present case to use force to empty BIOT, but the logic of the Government's position is that this too would have been permissible.

158 The only two cases which offer any support to Mr Crow's position in this connection are *Co-operative Committee on Japanese Canadians v Attorney General for Canada* [1947] AC 87, where a Dominion statute was B interpreted as authorising removal from Canada not merely of persons of Japanese origin who requested repatriation, but also of their wives and children under 16 who resisted their own removal, and *Zabrovsky v General Officer Commanding Palestine* [1947] AC 246, where the Privy Council in dicta endorsed the decisions of Palestinian courts below which had accepted the legality of a deportation order, made in respect of a Palestinian citizen C under an Order in Council and Emergency Regulations, as not being ultra vires a limited territorial power like Palestine, citing the cases of *Attorney General for Canada v Cain* and the *Co-operative Committee on Japanese Canadians* case. No close examination appears to have been undertaken in the former case of the scope of the power of the Dominion legislature or in the latter case of the power which could be or was conferred by the Order in Council. Both cases were concerned with emergency situations and in D the latter the Board relied upon *Liversidge v Anderson* [1942] AC 206 as support for an extended and more "permissive" interference with personal liberty in "the troublous times of war". As both courts below have noted, that precedent is not a happy one, and I for my part think that *Co-operative Committee on Japanese Canadians* and *Zabrovsky* must be regarded as of no real assistance on the fundamental point which now arises.

E 159 Had the present issue arisen 225 years ago when Lord Mansfield was developing and examining the principles governing overseas colonies, the reasoning in *Campbell v Hall* leaves no real doubt about his answer. I do not believe that the common law has over the last two hundred years taken in this respect a more amenable line towards the exercise of executive power over the removal or exiling of a whole population. To treat an executive decision of this nature as non-justiciable is, in my view, even less easy to F justify today when, I understand, all your Lordships agree that the reasonableness of such a decision is reviewable on grounds of, inter alia, rationality: see paras 141 above and 162 et seq below. No doubt it is true, and I accept, that Parliament could by statute achieve the result at which the BIOT Order 2004 aimed. But that is not, as Mr Crow urged in his written case and oral submissions, a reason for holding that the Queen in Council G can or must "logically" be able to do the same. On the contrary, as Waller LJ rightly observed in the Court of Appeal (para 106), there are fundamental differences between legislation enacted by the executive through Her Majesty in Council and legislation subject to democratic debate in Parliament. In the present case, the process adopted affected basic common law rights without any form of consultation whatever with the Chagossians affected. The only justification advanced for this by H Mr Rammell, Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, in the Parliamentary debate on 7 July 2004 was that "There is no settled population within BIOT and that is why we have to make decisions that we have to make" (Hansard (HC Debates), col 293WH). But section 9 affected the rights to enter BIOT of a category of

persons defined by the 2000 Ordinance, with a number of known representatives. Not only was there no opportunity for democratic debate outside or within Parliament, but the process of Parliamentary scrutiny of Orders in Council by the Foreign Affairs Committee could be and was overridden by the executive, with the result that the committee only learned of the BIOT Order 2004 after it was made. (The Secretary of State's evidence is that this usual process was supplemented in mid-2002 by specific committee request to see any draft orders effecting constitutional changes in overseas territories, a request in which the Foreign Secretary said in reply that he saw "merit". The explanation given after 10 June 2004 for the scrutiny override was that complete confidentiality needed to be preserved if "the risk of an attempt by the Chagossians to circumvent the Orders before they came into force" was to be avoided.)

160 In my opinion, the royal prerogative to legislate in relation to BIOT did not extend to enacting legislation aimed at depriving BIOT of its inhabitants' right to enter and be present there, if they wished, and so reducing BIOT to mere territory (apart from the military use of Diego Garcia reserved to the United States). There is no legal obligation to facilitate this entry or presence. Still less is there any to fund resettlement: that has been established by the dismissal of the claims in *Chagos Islanders v Attorney General* [2003] EWHC 2222 by Ouseley J in October 2003 and the Court of Appeal's refusal of permission to appeal against that dismissal in July 2004, and Mr Bancoult through Sir Sydney Kentridge accepts and is entitled to rely on this, without agreeing to forego such moral pressure as it may be possible to bring to bear to obtain voluntary support. The Crown having, it is understood, acquired by purchase all the land on the Chagos Islands may also have private law rights and remedies which would enable it to prevent any private initiative to settle there. But the present proceedings are concerned with the public law rights of the Chagossian inhabitants.

161 For the reasons I have given, it would not as a matter of public law have been permissible for the Crown to legislate by Order in Council to introduce a provision such as section 9 of the BIOT Order during the period 1965 to 1973 while Chagossians continued to live in BIOT. Chagossians who were British citizens by virtue of their connection with BIOT in the period 1965 onwards retain any right of abode that they had during that period, although many now appear also to have British citizenship with the right to come to the United Kingdom under sections 2 and 6 of the British Overseas Territories Act 2002. It has not been suggested that this (as opposed to the BIOT Order 2004) deprives them of any right of abode they may have in respect of BIOT, although it has been submitted that the force of their connection with BIOT diminishes with time. The present issue is however concerned with vires, and, if section 9 could not have been enacted by Order in Council during the period 1965 to 1973, it remained in my opinion outside the legitimate scope of the exercise of the legislative prerogative in 2004. That, I reiterate, would not prevent the Crown legislating by United Kingdom statute in any terms which proved acceptable to Parliament, a process which would involve open debate.

Judicial review

162 I turn to the position on the hypothesis that the conclusion expressed in the previous paragraphs is not accepted. On that basis, there

A was no absolute fetter to prevent the Crown in Council from exiling the Chagossian inhabitants of the Chagos Islands, either in 1971 or in 2004. However, in the courts below, the Crown's decision to do so has been held void on judicial review grounds. In the Divisional Court these were expressed in terms of irrationality. In the Court of Appeal, all three members of the court reached the same conclusion on the grounds of a legitimate expectation generated by Mr Cook's 3 November 2000 press release B accompanied by the 2000 Ordinance. Sedley LJ (paras 68–71) and Sir Anthony Clarke MR (para 123) also based their decision on the separate ground of irrationality.

163 I start with the United Kingdom Government's reasons given for introducing the BIOT Order of 10 June 2004. Unusually, for any form of legislation, section 9 contains in its text the explanation, to which I have C already referred, for the provision that no person has the right of abode in BIOT: BIOT was, it says, "constituted and is set aside to be available for the defence purposes" of the United Kingdom and United States. Mr Crow rightly submits that this explanation involves an area which courts themselves should be cautious about entering. The executive is par excellence better placed to judge the imperatives of the defence interests of this country and its ally. However, the present case presents striking and D unusual features. The only letters produced by the appellant dealing with the position in relation to Chagos Islands other than Diego Garcia come from United States sources, in each case after the commencement of the proceedings in which they were produced, although similar sentiments in relation to landings on the outer Chagos Islands are said to have been repeated from time to time informally. The letters are dated 21 June 2000, E 16 November 2004 and 18 January 2006.

164 In the first, the author, Assistant Secretary of State for Political-Military Affairs, described the central defence role played by Diego Garcia and the advantages of its strategic location and isolation, and then argued that

> "the settlement of a permanent civilian population on the islands of F the Chagos archipelago, even those at some distance from Diego Garcia, would seriously diminish that isolation and as a consequence erode the island's nearly unparalleled strategic importance."

He referred to the "alarming prospect of the introduction of surveillance, monitoring and jamming devices that have the potential to disrupt, compromise or place at risk vital military operations", arguing that in G Western Europe or the United States, efforts to introduce surveillance, monitoring and jamming devices carry a considerable risk of discovery "if only because of the large number of people in the surrounding area", whereas "the return of small and scattered populations onto islands of the archipelago would make introduction and use of such devices possible with much less risk of discovery because this would occur in an isolated and undeveloped area", with the "Peros Banhos and Salomon atolls . . . H located only about 140 miles north of Diego Garcia". He referred to the introduction of settlements on the outlying islands as putting "Diego Garcia more easily within potential reach of hostile states or terrorists operating by boat", to difficulty and a risk of diversion of resources involved in ensuring the safety of any resident population in the event of an attack on the Chagos

Islands, to the inability of Diego Garcia to serve as a back-up airport "in the unlikely event that an international airport were built on one of the outer islands to support limited touristic activities" and to the absence of other sources of back-up supplies and services for the nearby civilian population as "one of the most telling factors distinguishing the situation of the military facility on Diego Garcia from US bases in the United Kingdom". Finally, he observed that the United States might in "currently unforeseeable circumstances" one day require use of the outer Chagos Islands for defence purposes, something to which it would in that event be entitled under the inter-governmental agreement between the United Kingdom and the United States.

165 The letter of 16 November 2004 was written five months after the making of the BIOT Order 2004 and three months after the commencement of these proceedings. It referred to discussions "over the past several months" and said that, post 11 September 2001, the considerations explained in the letter of 21 June 2000 "have become even more cogent", that "an attempt to resettle any of the islands of the Chagos Archipelago would severely compromise Diego Garcia's unparalleled security and have a deleterious impact on our military operations" and that "we appreciate the steps taken by Her Majesty's Government to prevent such resettlement". The letter of 18 January 2006, written at the request of representatives of the United Kingdom Government and no doubt again intended for use in this litigation, was in similar but more extended vein. Noting that "it has been argued that vessels routinely pass within close proximity of Diego Garcia" (i e on the high seas, outside it appears a three mile territorial limit), and that "the low density and irregularity of such vessel transits afford military operators the opportunity to identify and closely monitor their movement and activity", it went on to say that the same level of tracking and surveillance "would not be possible if the volume or density of the vessels indiscriminately transiting in the vicinity of Diego Garcia or the outer islands on a routine basis increased due to repopulation of the islands", and that the United States was moreover seriously concerned that repopulating the outer islands "would provide terrorists the cover and concealment to establish permanent operating bases from which they could monitor island operations with minimum risk of counter detection".

166 Not all the points made in these letters (particularly the primary letter of 21 June 2000) are easy to follow, and some of them raise on their face more questions than they resolve. The letters appear all to have been addressed to the possibility of permanent and extensive re-settlement of the outer islands, an unlikely future event in June 2000 or 2004 or 2006. In any event, it is clear that the United Kingdom Government in 2000 either did not share the United States' assessment or did not consider that it bore on or precluded the grant to the Chagossians of a right to enter and be present in the outer islands. This is clear from the terms of Mr Robin Cook's press statement and the BIOT Ordinance issued on 3 November 2000 after the decision in *Bancoult (No 1)*. The United States authorities themselves also appear to have recognised a reality in somewhat different terms to that indicated in their letter of 21 June 2000, in view of the affirmative answer given (subject to correction, but none occurred) by Mr John Battle, Minister of State, Foreign and Commonwealth Office, on 9 January 2001 to the Parliamentary question: "has the United States agreed that the islanders may

A return to any of the outlying islands? The letter of 21 June stated that that could imperil the base's status. Has that now changed?" (Hansard (HC Debates), col 193WH).

167 In the written statement by which the BIOT Order 2004 was on 15 June 2004 explained to Parliament, defence considerations were presented only briefly (although "equally") in a short seventh paragraph after two longer paragraphs explaining the decision as one reached B "after long and careful consideration" on grounds relating to the lack of feasibility of resettlement. A similar conjunction of lack of feasibility and defence considerations (with the emphasis on the former) appeared in a letter dated 22 June 2004 from Mr Jack Straw as Foreign Secretary to Mr Corbyn MP explaining the reasons for the BIOT Order 2004; likewise in the explanation given to Parliament by Mr Rammell, the Parliamentary C Under-Secretary of State for Foreign and Commonwealth Affairs, in the debate on 7 July 2004 (Hansard (HC Debates), cols 287WH–293WH). In that debate, Mr Rammell also said (col 293WH) that the decision to make the BIOT Order 2004 was entirely the United Kingdom Government's own. It was "not as the result of any pressure or lobbying from other parties" and he had not received, and did not believe that the Foreign Secretary had "for a significant number of years received", any D representations on the issue from the United States (col 293WH). (That points towards the United States' communication of 21 June 2000 as the last significant communication.)

168 As explained in the written statement, in Mr Straw's letter and by Mr Rammell, the Government had commissioned an independent feasibility study during the proceedings in *Bancoult (No 1)*. After saying that the latest E feasibility report had been delivered after the November 2000 judgment and placed in the House of Commons library, the written statement quoted passages and drew the conclusion that

> "anything other than short-term resettlement on a purely subsistence basis would be highly precarious and would involve expensive underwriting by the UK Government for an open-ended period— F probably permanently. Accordingly, the Government considers . . . that it would be impossible for the Government to promote or even permit resettlement to take place."

The report is in fact dated 28 June 2002, so the BIOT Order 2004 was enacted two years after the report, and nine months after Ouseley J's decision that the Government had no duty to fund resettlement, although a G month before the Court of Appeal finally refused permission to appeal against that decision. In the absence of any legal obligation to fund resettlement, the prospective cost of doing so appears to me (as it did to Sedley LJ in the Court of Appeal: para 71) an unconvincing reason for withdrawing any right of abode and any right to enter or be present in BIOT. The Secretary of State notes in his written case that, even in the absence of any legal obligation to fund resettlement (and although the United Kingdom H has made clear its determination to resist any suggestion that it should provide such funds on a voluntary basis), there could be "public and political pressure claiming that the United Kingdom should provide funding for the cost of resettlement". That is not a reason articulated at the time or supported by any reference in the written case.

169 There was certainly concern in the late 1960s and early 1970s to avoid, if at all possible, any suggestion that BIOT had settled inhabitants to which the United Kingdom's international obligations under article 73 of the Charter of the United Nations would apply. Article 73 provides:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . . d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialised international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this article . . ."

The Government's position in these proceedings has been that any international obligations which the United Kingdom has or may have had are not relevant to its obligations to the Chagossians under domestic law. It is established and accepted that the Government has no enforceable legal obligation to fund resettlement. There is no realistic prospect of resettlement without funding for which no realistic source is suggested to exist (and the Government itself relies on the absence of any steps towards resettlement in the years 2000 to 2004). Currently in issue is a right to enter and be present which would be likely to be exercised, if at all, only transiently and by very few.

170 A third factor, now mentioned in conjunction with lack of feasibility and defence considerations, is "the imminence of the intention to repopulate". This factor was not mentioned in the written statement, or in the letter written by Mr Jack Straw as Foreign Secretary to Mr Corbyn MP to explain the reasons for the BIOT Order 2004 or, as a reason for the Order, by Mr Rammell in the debate on 7 July 2004. The only brief allusion to it by Mr Rammell was, in his reply to a question why the Order had been made secretly, that "There was always going to be an opportunity for these issues to be debated, but it was right, given the imminence of the intention to repopulate, that we took considered action, and I believe that we did so" (Hansard (HC Debates), col 291WH). On 9 July 2004 Mr Straw also gave the Foreign Affairs Committee as the explanation for the secrecy that "we needed to preserve complete confidentiality if we were to avoid the risk of an attempt by the Chagossians to circumvent the Orders before they came into force".

171 The factual basis for these latter statements consists in press reports involving a group called LALIT (Creole for *La Lutte*) with diverse mixed

A support and aims, some of which, shared by some of LALIT's supporters, involved action directed at protesting against or ending United States involvement in Diego Garcia, including some openly publicised, but very general, ideas about sailing a large "peace boat" to the Chagos Islands from Mumbai. Mr Bancoult was reported in Le Mauricien as attending one such meeting in mid-April 2004, but as expressing opposition to any steps to close the base at Diego Garcia. Rather than endorse any such steps, he said that B the base at Diego Garcia would permit Chagossians to have employment, while adding that, if there was a boat to take Chagossians to the other islands apart from Diego Garcia, as authorised by the High Court on 3 November 2000, he would take them. Mr Bancoult's aims were thus both measured and consistent with the existing permission granted by the 2000 Ordinance. The most likely time for any such sailing was, in the C estimation of the United Kingdom authorities, during the summer of 2004. Hence, it is said the urgency of enacting the BIOT Order 2004 in June 2004. No boat ever sailed so far as appears, and the preparation required, the distances involved and the information in, for example, the United States authorities' letters of 21 June 2000 and 18 January 2006 about identification and monitoring of vessel movements make it implausible to suggest that any actual sailing would not have been detected at a very early stage or that, D if any immediate threat developed, it would not have been diverted or apprehended with ease. There is nothing that could in any event justify a permanent withdrawal of the basic rights of entry, presence and abode addressed by section 9.

172 The reasons given for the BIOT Order 2004 must be viewed in context. Two aspects of the context stand out. First, in the light of what E I have already said any order removing the Chagossians' right of abode in the Chagos Islands was abrogating what Sedley LJ [2003] QB 365, para 71 described, in my opinion appropriately, as "one of the most fundamental liberties known to human beings, the freedom to return to one's homeland, however poor and barren the conditions of life". I do not think that one needs to go as far back in history as Sedley LJ did (para 58) to recognise how enduring and strongly held a human instinct this is. Assuming that such a F right can be removed by the Crown in Council, none the less it is one the removal of which calls for both careful consideration and good reason. The situation is one where an anxious or heightened review is called for: see *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *Doherty v Birmingham City Council* [2009] 1 AC 367. It is mistaken, and in my opinion conflates quite separate considerations, to dismiss from consideration the legal G freedom to return and all that it represents for the human spirit on the basis that return is impractical or uneconomic; or that the existence of legal freedom to return might be used as a moral pressure point on the United Kingdom to provide funds which it would be uneconomic to provide and which the Government has established in court that it has no duty to provide; or that the right may in practice remain symbolic. Symbols can themselves be important, more so in some cultures than others. Recognition H of a wrong can be as valuable as, sometimes valued more than, concrete compensation. The denial of a legal right to return, however remote the prospects of its exercise in practice, may add insult to injury. In any event, if the right is likely to remain symbolic, most of the reasons advanced for removing it lose force.

173 Secondly, the introduction of section 9 must be considered in the light of Mr Cook's response on 3 November 2000 to the decision in *Bancoult (No 1)*, in the form of his press statement and the making of the 2000 Ordinance. Mr Bancoult's case, accepted in the Court of Appeal, was that this gave him a legitimate expectation that, barring significant changes, the Chagossians would be recognised as having a right of abode and a right to enter and be present in the outer Chagos Islands. The Secretary of State maintains, and my noble and learned friend Lord Hoffmann accepts, that this is not so. There was, it is said, no unconditional promise, no recognition of any right of abode, and any limited recognition of a right to enter and be present was on a temporary basis and was, above all, subject to the outcome of the ongoing feasibility study. The Court of Appeal did not accept this analysis of the events and of the press statement and nor do I.

174 The press release should be construed according to the ordinary meaning that would be attached to it by those, principally the Chagossians and their supporters, to whom it was directed. It was issued by the Foreign Secretary on behalf of the United Kingdom Government. It was they who said that they had "decided to accept" the court's ruling in *Bancoult (No 1)* [2001] QB 1067 and would "not be appealing". They indicated that a new Immigration Ordinance would be put in place to "allow the Ilois to return to the outer islands while observing our Treaty obligations". They said that "this Government has not defended what was done or said 30 years ago", a clear reference to the wrong done by the 1971 Ordinance and the attitude taken at that time to the Chagossians and their connection with their homeland. All these statements are only consistent with a clear policy decision taken by the United Kingdom to recognise and give legal effect to a right to return on the part of the Chagossians, while continuing the feasibility study which had already been started, in order to assess the feasibility of any resettlement programme which the Government might or might not in due course support.

175 A lawyer who studied the issues closely would know that the ratio of the court's ruling in *Bancoult (No 1)* was, strictly viewed, confined to the legitimacy or otherwise of the 1971 Ordinance issued by the BIOT Commissioner. But Laws LJ had also addressed the question whether the same result could simply be achieved by Order in Council and expressed considerable doubt about this: paras 39 and 61. To treat the Foreign Secretary of the United Kingdom as recognising merely the inappropriateness of proceeding by Commissioner's Ordinance, or as reserving the right for the United Kingdom Government on whose behalf he was speaking to make an Order in Council in like terms to the 1971 Ordinance or the later BIOT Order 2004, would be unrealistic legalism.

176 Mr Crow's main submission was, however, that the press statement was subject to the outcome of the ongoing feasibility study. Again, I do not consider that this corresponds in any way with its natural meaning. The statement amounted to an unconditional recognition, coupled with an assurance that this would be given effect, of a legal right to enter and to be present, whether on a temporary or long-term basis. So too, the subsequent Parliamentary statement by Mr Battle as well as other later statements, as for example that of Baroness Amos in a letter to Mr Bancoult's solicitors dated 28 April 2003. None of these statements was made conditional on or subject to the feasibility study. The feasibility study

A went to a different question, whether resettlement would be economically feasible, so that the Government as a matter of broader policy or outsiders might be encouraged and prepared to fund it. (Had the Government lost the case of *Chagos Islanders v Attorney General*, the feasibility study could no doubt also have been very relevant to the extent of a legal responsibility on their part.) Accordingly, withdrawal in June 2004 of any right of abode and any right to enter and be present in BIOT has to be seen against a B background in which the Government in November 2000 assured Chagossians that they would have such a right, without undertaking any commitment to fund it.

177 The relevant legal principles are not in dispute. Mr Crow accepts for present purposes the Court of Appeal's decision in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 (while reserving the C right to argue in another case that it was wrongly decided). In *Coughlan* Lord Woolf MR giving the judgment of the court identified (para 57) three possible outcomes in a case where a member of the public has, as a result of a promise or other conduct, a legitimate expectation that he or she would be treated in one way and the public body wishes now to treat him or her in a different way; the court may decide that: (a) the authority is only required to give its previous policy weight, but not more, in which case the court's D review of the decision will be on *Wednesbury* grounds, or that (b) the promise or practice induces a legitimate expectation of consultation, which will accordingly be required unless there is an overriding reason otherwise; or that (c) a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, in which case to frustrate the expectation may in some circumstances be regarded as so unfair E as to amount to an abuse of power. Lord Woolf went on to say that in the first two categories of case the court's role was a conventional role of review (on grounds of rationality in the first, procedural fairness in the second), whereas in the third the court's task was to determine whether there was a sufficient overriding interest to justify a departure from the previous promise or practice, weighing the two considerations against each other: paras 57–58. He acknowledged the difficulty of segregating the categories, and of F working out the role of legitimate expectation in each: paras 59 and 71. The approach to judicial review of a decision to depart from an established policy was further considered with reference to *Coughlan* in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, where Lord Steyn, in whose speech three other members of the House concurred, said, at para 60:

G "The Home Secretary decided to depart from the policy . . . Was he entitled to depart from the policy? In the Divisional Court [2002] 1 WLR 1857 Simon Brown LJ observed, at p 1866, para 32: 'There are, of course, cases in which substantive legitimate expectations have been built up where nowadays public authorities will be required to honour their statements of policy or intention. All this is exhaustively and H authoritatively discussed by the Court of Appeal in *R v North and East Devon Heath Authority, Ex p Coughlan* [2001] QB 213, 238–251, paras 51–82 inclusive. As, however, is there made plain, the question for the court is ultimately one of reasonableness and fairness. Would a departure from policy represent an abuse of power? That is a question to be asked in the circumstances of the particular case. It cannot in my

judgment be suggested that the Secretary of State can never in any circumstances depart from his stated policy with regard to the payment of ex gratia compensation. He should, of course, give the person concerned an opportunity to say why in his particular case the policy should be applied rather than disapplied. But no problem of that sort arises here. The opportunity was given and taken. The Secretary of State was simply not persuaded.' I am in respectful agreement with these observations."

178 The approach in *Coughlan* has been applied and considered in subsequent Court of Appeal authorities, particularly *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115; *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363. The judgments in all of these authorities are helpful in illuminating the issues. In *Ex p Begbie* Laws LJ (drawing on para 60 of Lord Woolf's judgment in *Coughlan*) underlined the importance that may attach to whether the decisions in question affect only a few individuals or involve wide-ranging questions of general policy, moving into the "macro-political" field, where judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis: pp 1130A–1131D.

179 The significance of detrimental reliance in relation to Lord Woolf's third category, substantive legitimate expectation, is also considered in *Ex p Begbie* and in the judgment of the court given by Schiemann LJ in *Bibi*. In each case it was accepted that proof of such reliance was not a pre-condition to recognition of such an expectation. But Peter Gibson LJ in *Ex p Begbie* stressed that it would be very much the exception that it was not present (p 1124B–C), and Schiemann LJ in *Bibi* accepted that it would "normally be required", and that "in a strong case, no doubt, there will be both reliance and detriment; but it does not follow that reliance (that is, credence) without measurable detriment cannot render it unfair to thwart a legitimate expectation": paras 29–31. He gave as an example of the latter type of case one of departure from an established policy in relation to a particular person: para 30. On the other hand Sedley LJ, in *Ex p Begbie* had

> "no difficulty with the proposition that in cases where the Government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it,"

whereas in *Ex p Begbie* itself, where the basis of claim was that a pupil-specific discretion should be exercised in certain pupils' favour, he found it "difficult to see how a person who has not clearly understood and accepted a representation of the decision-maker to that effect can be said to have such an expectation at all": p 1133D–F.

180 In *Bibi* Schiemann LJ also identified (in paras 50–51) the need for any decision maker to take properly into account in the decision making process any legitimate expectation generated by previous statements or conduct. Dyson LJ giving the judgment of the court in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, paras 74–75, quoted the relevant passage from Schiemann LJ's judgment without qualification.

181 In *Nadarajah* Laws LJ giving the only full judgment identified six factors tendered by Mr Underwood as counsel for the minister as relevant to

A the existence or otherwise of any substantive legitimate expectation: (1) a promise specifically communicated to an individual or group, which is then ignored, as in *Coughlan*, (2) the clarity of the representation, (3) the singling out of an individual who is then treated less favourably than others also affected by the representation, (4) detrimental reliance, (5) whether the original promise was the result of an honest mistake, which is being corrected and (6) maladministration. But Laws LJ also sought to carry the B law's development and the search for principle beyond terms such as abuse of power or even fairness and beyond a list of a range of factors "which might make the difference": paras 67–68. He identified the underlying principle as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public, and the litmus test for departures from a previously announced promise or practice C as being whether the departure represented "a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest": para 68. He added that this approach made no distinction between procedural and substantive expectations, but noted that proportionality itself involved an assessment of factors such as those included in Mr Underwood's list: para 69.

D **182** For my part, I have no difficulty in accepting as the underlying principle a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. I prefer to reserve for another case my opinion as to whether it is helpful or appropriate to rationalise the situations in which a departure from a prior decision is justified in terms of proportionality, with its overtones of another area of public law. It is on any view necessary to make an assessment of the relevant E factors on each side. In *Coughlan* (para 57) Lord Woolf spoke of the court's "task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy", but that was on the basis that a lawful promise or practice inducing a legitimate expectation of a substantive benefit had already been established. The nature and clarity of the promise or practice and of the legitimate expectation which it engenders combine with the circumstances and reasons giving rise to the proposed change of practice F as factors which have to be weighed together in order to consider whether and how far justice requires that the public authority should be held to a position consistent with the promise or practice.

183 On the facts of the present case, I have come to the conclusion that the courts below reached the right result. First, there is no indication that the Government gave any real weight to the common law right of abode which G the Chagossians, Mr Bancoult in particular, in my view still enjoyed in 2004 by virtue of their birth and connections with BIOT. Second, there is no indication that the Government gave any real weight to the legitimate expectation generated by its words and conduct in 2000. This is a particularly powerful consideration on the facts of this case, where such words and conduct would have been seen as righting a historic wrong and resolving the Chagossians' legal entitlement. Third, there was no H consultation with the Chagossians or anyone before the BIOT Order 2004 was issued. Fourth, the factors relied upon as justifying section 9 of the BIOT Order 2004 (defence and the outcome of the feasibility study) are factors directed on their face to a remote and unlikely risk of large scale resettlement of the outer Chagos Islands. Both appear now to be related by

the Secretary of State to some extent to a risk, not substantiated in legal or, to any realistic extent, practical terms in either 2004 or now, that the United Kingdom Government would have positively to fund and arrange such resettlement, or that a right of resettlement could cause friction with the United States of America. The defence considerations (some hard to follow in themselves, though that is not critical to the view I have formed) were not regarded as any bar to the recognition of a legal right to enter and be present in the outer islands in 2000 or after the events of 11 September 2001, and nothing has been shown to suggest any significant change in such considerations since then. The outcome of the feasibility study was known from June 2002 without any steps being felt necessary for two years. Its bearing is not on the legal right of abode, entry or presence, but on the feasibility of the United Kingdom or others deciding to support a positive programme of resettlement. That, for reasons I have given, is not what is in issue in these proceedings. The practical likelihood of any large-scale resettlement serves also to counter any argument (based on *Coughlan*, para 60) that the Chagossians number considerably more that a "few" individuals—a most unattractive argument anyway against the background of the determined pretences lying at the origins of this matter 40 years ago that there were no Chagossians at all.

184 Fifth, the threat of "imminent" invasion which is said to have been apprehended in 2004 was never advanced at the time as a justification for the making of the BIOT Order 2004 (so that it is unsurprising if it received no attention in the judgments below), but merely to explain its timing and the absence of any consultation before its making. Even now it only appears in the Secretary of State's written case (para 241) as "the single most immediate stimulus" to the making of the BIOT Order 2004. Bearing in mind the primary explanations put forward to the public and to Parliament as well as the references to "long and careful consideration", it is clear that any "imminent" threat is not being relied upon as a substantive ground for the BIOT Order, but merely for its timing. But however it is relied upon, and even if one disregards the apparently inchoate nature of LALIT, its supporters and their plan, it is difficult to accept as a substantial justification, having regard to the joint powers' avowed and obvious monitoring, tracking and surveillance capabilities and activities in relation to Diego Garcia.

185 Sixth, if one looks for particular factors such as those mentioned as *Nadarajah* (para 181 above), the present case concerns an unequivocal assurance and conduct, on a matter on which it is not suggested that there can have been any mistake. The assurance was directed at Chagossians as defined by the Ordinance of 3 November 2000. It was intended to right an historic grievance, and was understood and no doubt relied upon (in the sense that it was given credence) accordingly. The sense of grievance likely to arise from its revocation without the most careful consideration and strong reason is obvious. The Secretary of State's argument that no-one acted upon his statement and Ordinance to his or her detriment between 3 November 2000 and 10 June 2004 is in my view answered by the considerations that specific detriment is not an absolute pre-condition and that in the context of a general public statement proof of individual reliance may not be expected (see per Sedley LJ in *Ex p Begbie* quoted in para 179 above). I also note that Mr Bancoult was plainly acting and relying on the statement and the Ordinance when attending and speaking at the LALIT

A meeting of 19 April 2004. It is not without irony that it was Mr Bancoult's reliance in this respect on the statement and Ordinance which is now said to have been one factor triggering the BIOT Order 2004. But the dominant consideration in my opinion is that the Government's statement and conduct were intended and understood to resolve the long-standing controversy regarding the Chagossians' right to enter and be present in the outer Chagos Islands, and that it would be and in the circumstances was B maladministration to go back on that resolution without any consultation and without strong cause, which has not been shown.

186 Since writing this speech, I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill, which encapsulates with force and brevity the main points on which I would also decide this appeal and bring this unhappy saga to a legal conclusion. The C primary basis on which I would dismiss the appeal is therefore lack of vires: paras 143–161 above. But in the alternative I would uphold the Court of Appeal's reasoning and conclusions and dismiss this appeal on judicial review grounds (paras 162–185): the first, that the decision to enact section 9 of the BIOT Order 2004 was made without regard to relevant considerations and interests, and that, when regard is had thereto, no decision could rationally have been taken on the material available in the D sense in which it was, and the second, that the Foreign Secretary's press statement and conduct in introducing the Ordinance on 3 November 2000 gave rise to a legitimate expectation from which no sufficient ground of departure, let alone departure without any prior consultation, has been shown. Both in 1971 and in 2004 the Chagossians were entitled to say, like the Duke of Norfolk in response to the order of exile for life with E which Richard II in council unexpectedly halted his impending trial by battle against Henry Bolingbroke: "A heavy sentence, my most sovereign liege, And all unlook'd for from your Highness' mouth." To which in my opinion the Crown cannot here simply reply: "It boots thee not to be compassionate; After our sentence plaining comes too late."

Appeal allowed.

F

D E C P

G

H

Judgments

R (on the application of Majed) v Camden London Borough Council

Town and country planning – Development – Permitted development – Interested party making planning permission application to defendant local authority for erection of first floor side extension to property – Authority adopting statement of community involvement pursuant to relevant act – Claimant whose home backing property not informed of planning application – Planning permission granted by authority – Whether breach of claimant's legitimate expectation by failing to inform him of planning application – Whether authority making factual error – Whether quashing order or declaration should be made – Planning and Compulsory Purchase Act 2004, s 18

[2009] EWCA Civ 1029, (DAR Transcript: Wordwave International Ltd (A Merrill Communications Company))

CA, CIVIL DIVISION

ARDEN, MOORE-BICK, SULLIVAN LJJ

6 JULY 2009

6 JULY 2009

R Harwood for the Appellant

M Beard & D Kolinsky for the Respondent and the Interested Party

Foresters; Louise McLaughlin of London Borough of Camden and David Cooper & Co

SULLIVAN LJ:

[1] This is an application for judicial review of a planning permission dated 4 March 2008, granted by the Respondent to the interested party for the erection of a first floor side extension to the interested party's home: Spedan Towers, 17 Branch Hill, London NW3. Spedan Towers is a modern dwelling house which was granted planning permission in 2000 as a replacement for two existing cottages. To the north-east of Spedan Towers is a property that was formerly The Chestnuts Hotel. That property has been divided into two, and the Appellant and his wife live in the northern half which is now called Holme Vale House. The southern half is another dwelling called The Chestnuts, which is occupied by Mr and Mrs Nobileau.

[2] At the bottom of the rear garden of Holme Vale House is an outbuilding which is to be used as a nanny's cottage. Spedan Towers is on the other side of the boundary. The rear garden of Holme Vale House is at a lower level than Spedan Towers. When looking out of the rear lower ground floor windows of Holme Vale House one sees the nanny's accommodation. Above that there is a substantial fence and above that the upper part of the top storey and the roof of Spedan Towers. In addition to the fence there are also some trees along the boundary.

[3] The application for planning permission was made on 10 December 2007. The Respondent's case officer, Mr Neising, carried out a site inspection on 23 January 2008. He made no notes and did not visit the Appellant's house. The Respondent has adopted a Statement of Community Involvement ("the Statement") pursuant to s 18 of the Planning and Compulsory Purchase Act 2004 ("2004 Act"). The Statement is dated November 2006 and Pt 1 explains what it is:

> "1.1 The Statement of Community Involvement sets out how the Council intends to involve stakeholders and local communities in the preparation of development plans for the area and for the consideration of planning applications. The Statement of Community involvement is a requirement under planning legislation.
>
> 1.2. It sets out
>
> – What the Council is seeking community involvement on
>
> – Where the community involvement will be sought
>
> – How the community involvement will be organised and
>
> – Who will be involved.
>
> 1.3 Where the Statement of Community Involvement is adopted by the Council, the Council is required to follow what it says. The Government also says that the Statement of Community Involvement should enable people to get involved at an early stage in the process before policies are firmed up."

[4] Annex 6 of the Statement sets out the "minimum standards for notifications by letter, site notice and by advertisement". In respect of planning applications involving alterations, additions or demolition works, ie proposals likely to result in a direct effect upon adjoining occupiers such as increased overlooking, loss of daylight et cetera, the notes in the Annex say:

> "The statutory requirement is either a site notice or letter. The occupiers of the application premises and adjoining occupiers likely to be affected by the proposals will receive a letter. Where alterations are proposed to an elevation which fronts a highway, the letter will be sent to the occupants of properties or sites on the opposite side of the highway, site notice and web advert in addition if in conservation area."

[5] Eighteen neighbouring properties were notified of the application, including Savoy Court, a property to the north of the Appellant's house, and Leavesden Cottage and Leavesden, two properties to the south of the Appellant's house. The Respondent accepts that, due to an administrative error, neither the Appellant nor his neighbour Mr Nobileau were notified. A site notice dated 6 February 2008 was displayed on a lamppost in the street about seven metres from the entrance to Spedan Towers on the other side of the entrance to the Appellant's house. Spedan Towers is a backland development and its access way runs alongside and to the north of the Appellant's house and garden. The Appellant did not see the site notice and was unaware of the application, as was Mr Nobileau.

[6] Planning permission was granted by the Respondent's Head of Planning under delegated powers following consideration of a Delegated Report (Members' Briefing) ("the Report") which was prepared by Mr Neising. The Report said that, of eighteen persons notified of the application, one had objected. It briefly described the site and the planning history and listed the relevant policies in the Camden Unitary Development Plan. They were policies S1, S2 and SD1 dealing the quality of life; policy SD6 dealing with amenity for occupiers and neighbours; policy B1, dealing with general design principles; policy B3 dealing with alterations and extensions; and policy B7 dealing with the conservation area. The Report then described the proposals. It noted that "No windows would be incorporated within the northeast elevation". That is the elevation that faces the Appellant's house.

[7] The Report identified three material considerations: overlooking and loss of privacy, design and materials, and loss of daylight and sunlight. In respect of overlooking, the Report said:

> "The subject property is located approximately 25 metres from the nearest neighbouring property and is well screened, ie from the west/northwest by mature trees. It is also noted that large windows in the northwest and a roof terrace with balustrades on the southwest elevation at second floor level already exists. It is therefore not considered that the proposed 2000mm x 50mm window in the northwest elevation or the proposed roof terrace would result in any additional amount of overlooking that would cause harm to the amenities of the neighbouring properties in terms of overlooking and loss of privacy."

[8] In respect of design and materials, the Report concluded that the proposal would preserve and enhance the character and appearance of Hampstead Conservation Area, in which both Spedan Towers and the Appellant's property are situated, there being no objection to the proposal from the Hampstead Conservation Area advisory committee.

[9] In respect of loss of daylight and sunlight, the Report said:

> "Due to the location of the dwellinghouse in relation to all neighbouring properties, the proposal would not result in any loss of daylight of sunlight, detrimental to the amenities of the neighbouring properties."

The conclusion in the Report was as follows:

> "In the light of the above the proposal is considered to comply with the relevant policies on London Borough of Camden Unitary Development Plan, Camden Planning Guidance and Hampstead Conservation Area Statement."

The recommendation was to grant planning permission with conditions.

[10] Building work did not start immediately. On 12 June 2008 the Appellant and his wife arrived back home to find that scaffolding had been erected around that part of Spedan Towers which backs onto their garden. They spoke to Mr Nobileau, who had not been notified of any planning application or permission; they then made enquiries of the Interested Party and the Respondent and discovered the existence of the planning permission on 16 June and commenced these proceedings on 20 June. Permission to apply for judicial review was refused on the papers by Wilkie J and by HHJ Denyer, sitting as a deputy High Court judge after an oral renewal hearing. Laws LJ granted permission to apply for judicial review and directed that the substantive application should be heard by the Court of Appeal.

[11] In his skeleton argument on behalf of the Appellant Mr Harwood identified five issues which for convenience I will summarise under the following headings:

(1) legitimate expectation.

(2) separation distance.

(3) conservation guideline 43.

(4) summary reasons.

(5) quashing order or declaratory relief. I will deal with these five issues in turn.

(1) LEGITIMATE EXPECTATION

[12] Mr Harwood suggests that this is a paradigm case of a breach of legitimate expectation. The Statement is part of the Respondent's local development scheme (see s 17 of the 2004 Act) and was prepared, submitted for independent examination, and adopted in accordance with the procedures which are set out in ss 19, 20 and 23 of the 2004 Act. The Statement sets out how the Respondent intends to involve local communities in the consideration of planning applications: see para 1.1. It sets out who is going to be involved, see para 1.2; and it tells the public that when the Statement is adopted "the council is required to follow what it says".

[13] There can be no doubt that the Appellant should have been notified of the planning application in accordance with the terms of Annex 6, see above. The sole reason why he was not notified is the Respondent's administrative error. On the face of it, therefore, one has a case of both a promise to notify and a practice to notify in accordance with Annex 6 of the Statement, both the promise and the practice being underpinned by the provisions of the 2004 Act, which required the Respondent to prepare the Statement.

[14] On behalf of the Respondent and the Interested Party, Mr Beard and Mr Kolinsky submitted that there was no legitimate expectation. It was submitted that, since there was a specific statutory code – the General Development Procedure Order ("GDPO") – which regulates the balance between the various interests, applicants and local residents, as to who should and who should not be notified, it would be wrong to impose some rigid requirement to notify in accordance with the terms of Annex 6. It was submitted that this would upset the balance that had been struck by the statutory requirements. It seems to me that reference to the statutory requirements is of no real assistance. Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of a statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute. It seems to me that the Statement is a paradigm example of such a promise and a practice. As I understood it, Mr Beard accepted that this Appellant falls within Annex 6. Although he submitted there was an element of discretion, that is not relevant in the circumstances of the present case. No doubt if an officer had given consideration to the matter and had concluded that, for example, this Appellant was so far away from the proposed development that he could not fairly be described as an adjoining occupier then, absent *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680), the court would not interfere with that exercise of discretion. In the present case no discretion was exercised and administrative mistake was made. It was submitted by the Respondent and the interested party that, even though there was a clear statement that a person in the position of the Appellant would be sent a letter, there was nevertheless no unequivocal assurance that they would be notified. I am quite unable to accept that submission given the clear terms of para 1.3 of the Statement which tells the public that when the Statement is adopted by the council it is "required to follow what it says". It would be difficult to imagine a more unequivocal statement as to who would, and who would not, be notified.

[15] There was therefore, in my judgment, a clear breach of the Appellant's legitimate expectation that he would be notified of planning applications, such as the application made by the interested party, in accordance with the terms of annex 6 to the Statement. The Appellant therefore succeeds on issue 1. It does not necessarily follow that the grant of planning permission was unlawful. It is unnecessary in the circumstances of this particular case to decide whether a Claimant in the Appellant's position must, in order to establish procedural unfairness, also demonstrate prejudice as a result of failure to notify him, because the question whether the Appellant was prejudiced by the failure to notify him in accordance with the Statement (and, if so, to what extent) is plainly relevant to the exercise of the court's discretion as to whether the permission should be quashed or whether declaratory relief should be granted (see issue (5) below).

(2) SEPARATION DISTANCE

[16] I turn therefore to issue (2), separation distance. I have already mentioned that the Report said that Spedan Towers was located "approximately 25 metres from the nearest property. . .". That was wrong. There is a dispute as to the precise distances. The Appellant says that the existing building is around 13 metres from the Appellant's house, and only two-and-a-half metres from the proposed nanny's accommodation at the bottom of the garden. Perhaps the more relevant dimension would be the distance from the extension, which is set back some 4.8 metres from the north-eastern wall of the existing building. According to the Appellant, the distance between the extension and Holme Vale House is

17.6 metres. That distance, according to the Respondent, is 18.6 metres, and the extension, according to the Respondent, is 6.8 metres from the nanny's accommodation. I find it unnecessary to resolve that relatively minor discrepancy. While an error of fact is capable of leading to an error of law, for example, because it may result in a failure to have regard to a material consideration or the taking into account of an immaterial one, I am satisfied that this particular error could not have had that consequence. The separation distance of 25 metres was given in the context of overlooking and loss of privacy. A glance at the drawings shows that, because there will be no windows in the north-eastern wall of the extension, whatever other effects it may have on the Appellant's house, the extension will not cause any overlooking or loss of privacy. The window in the existing north-eastern elevation of Spedan Towers is somewhat closer to the Appellant's property than the blank wall of the proposed extension. It should be noted that the windows in the nanny's accommodation face towards the Appellant's house, not Spedan Towers.

[17] Mr Harwood rightly accepts that there was no sustainable objection on overlooking or loss of privacy grounds so far as the Appellant's property was concerned. The question of overlooking relates to the properties to the north-west and the south-west where the separation distances from Spedan Towers are approximately 22 metres rather than 25 metres.

[18] Turning to the second consideration mentioned in the Report, Design and Materials, there is nothing to suggest that the character and appearance of the conservation area would be materially affected by the precise distance, whether it be 25 metres 18.6 metres or 17.6 metres between Spedan Towers and the Appellant's home. Mr Harwood again accepted that this consideration was not affected by the error as to separation distance. That leaves loss of daylight and sunlight. However, in this respect there is nothing to suggest that Mr Neising's conclusion that “due to the location of the dwelling house in relation to all neighbouring properties, the proposal would not result in any loss of daylight or sunlight detrimental to the amenities of neighbouring properties” was based on the erroneous separation distance of 25 metres. As the Appellant's evidence points out, assessing the impact on daylight and sunlight would depend not merely on the distance between, but also on the relative heights of, the extension and the affected windows in the Appellant's house. This was a modest proposal for an extension, slightly lower than the existing Spedan Towers and set back, so that it is somewhat further away than the existing Spedan Towers from the Appellant's property. Mr Neising says in his witness statement that he attended the property on the site inspection:

> “. . . and was able to assess the location of the proposed first floor side extension in relation to the host building, the distances between the surrounding properties and existing trees and vegetation.
>
> It was considered that the distances between the buildings were sufficient to warrant that the proposal would not cause any harm to the amenities of the neighbouring properties, including the possible loss of daylight and sunlight that the Claimant alleges will arise from allowing the proposed first floor extension.”

[19] In my judgment Mr Neising was perfectly entitled to assess this issue of daylight and sunlight on the basis of the impressions formed on his site visit. This was not a case where he was required to carry out detailed daylight/sunlight calculations in order to assess the impact of this modest proposal. It is perhaps not without significance that Mr Abbott, the planning consultant who was instructed by the Appellant after the Appellant discovered the existence of the planning permission, does not say in his witness statement that there would have been a valid objection on the grounds of loss of either daylight or sunlight. He merely says that there is insufficient information to undertake a detailed assessment.

[20] The extension has been in existence since September 2008. There has therefore been ample time to make the necessary calculations and to seek to introduce fresh evidence, if necessary, in order to demonstrate that there would be a material loss of daylight or sunlight. The mere fact that there would be some impact on daylight and sunlight would not be enough to warrant a refusal of planning permission. The Respondent's Planning Guidance, "Daylight and Sunlight", cited by Mr Abbott, makes it clear that a planning application may be refused "where it is found that a proposed development of whatever type has an *unreasonable* impact on amenity . . ." (Emphasis added).

[21] Mr Abbott also says that the Report fails to consider the degree to which the extension would be overbearing or increase the sense of enclosure at Holme Vale House. Again, Mr Abbott is very careful not to express any view as a Chartered Town Planner as to whether or not there would be a valid objection on this ground. In my judgment, that is not surprising given the fact that the extension is both lower than the existing building and set back from the existing rear wall.

[22] For these reasons there is, in my judgment, no substance in issue (2). There a factual error but it was not a material one.

(3) CONSERVATION GUIDELINE H43.

[23] I can deal with this issue very shortly. It is said that the Report should have considered guideline H43 in the Hampstead Conservation Area Statement, which is non-statutory supplementary guidance. Guideline H43 says:

> "Normally the infilling of gaps between buildings will be resisted where an important gap is compromised or the symmetry of the composition of the building impaired. Where side extensions would not result in the loss of important gap they should be single storey and set back from the front building line."

[24] Mr Harwood submits that this extension at first floor level conflicts with the guideline that side extensions should be single storey. He says that the single storey must be at ground floor level. This is, in my view, a good illustration of how not to read Conservation Area Guidelines. Such Guidelines are not enactments; they are practical guidelines to be read in a common sense way and not in a pedantic or legalistic manner. The Guideline is concerned with the infilling of gaps between buildings. Its principal concern (see the first sentence) is that important gaps should not be compromised. Where this does not occur because the gap is not important or because it is not compromised (see second sentence) then extension should be single storey and set back from the front building line. Both sentences of the Guideline should be read together and when that is done common sense suggests that when the Guideline advises that side extensions, which do not result in the loss of important gaps, should be single storey and set back from the front building line, it is not concerned with the circumstances of this backland development where there is no gap and no front building line.

[25] It should be observed that the reports did consider the effect of the extension on the design of the existing building and concluded that it was acceptable. The critical question in respect of this site in a conservation area was of course whether the proposal would preserve or enhance the character and appearance of the conservation area. The Report concluded that the proposal would do so. There is therefore no substance in issue 3.

(4) SUMMARY REASONS

[26] The reasons for granting planning permission were as follows:

> "The proposed development is in general accordance with the policy requirements of the London Borough of Camden Replacement Unitary Division Plan 2006, with particular regard to policies S1, S2, SD1, SD6, B1, B3 and B7. For a more detailed understanding of the reasons for the granting of this planning permission, please refer to the officers report."

[27] Although the parties cited a number of authorities in their skeleton arguments, they were of limited assistance because there is no mechanistic formula for determining the question whether a summary of the reasons for granting planning permission is or is not adequate in any particular case. Much will depend on the complexity of the proposal and the extent to which it is contentious, and upon the number and complexity of the issues which the local planning authority has had to resolve in order to decide that planning permission should be granted.

[28] This was a very modest proposal. The policies referred to in the summary of reasons deal with the three issues, overlooking and loss of privacy, design, including the impact on the conservation area, and loss of daylight and sunlight. This is not a case where no reasons at all were given, nor is it a case where it is in the least unclear as to why the planning permission was granted; for example, because the members disagreed with an officer's report. The court is not bound to quash a planning permission on this ground even if no reasons are given for granting it (see *R (Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin), [2005] 1 P & CR 566, [2004] 46 EG 150 (CS). The principles in *Wall* were approved by the Court of Appeal in *R (Smith) v Cotswold District Council* [2007] EWCA Civ 1341, see per May LJ at paras 13 – 16 and the Master of the Rolls at para 18.

[29] Mr Harwood did not submit that the alleged deficiency in the summary reasons would of itself justify quashing the planning permission. Rather he submitted the permission should be quashed because the inadequate reasons followed an inadequate consideration of the application because there was a failure to notify the Appellant and because the Report was inadequate for the reasons discussed above.

[30] For the reasons that I have already given, although there was a factual error in the Report as to separation distance, I do not consider that that error was significant. In these circumstances, issue (4) adds nothing material to the other complaints.

ISSUE (5) QUASHING ORDER OR DECLARATION.

[31] This leads me to issue (5). Mr Harwood referred to the well-known test in *Simplex GE (Holdings) v The Secretary of State for the Environment* (1988) 57 P & CR 306, [1988] 3 PLR 25, [1988] JPL 809 that, if there has been an error in a decision letter, then the court has to be satisfied, if it is not to quash the decision, that the same decision would, not might, be reached by the decision taker notwithstanding the error.

[32] That case was a statutory appeal against a decision by the Secretary of State that planning permission should be refused for development upon a mistaken basis. The circumstances in the present case are materially different. By the time these proceedings were started, the building works were underway and the extension was completed in early September 2008, and since then it has been occupied as part of the interested party's home. If the planning permission was quashed, the Respondent would have to take the existence of the extension and the costs and disruption involved in removing it into account as material considerations when deciding whether to grant retrospective planning permission

for the extension or whether it would be expedient to issue an enforcement notice requiring its removal. In view of the history of this matter, in particular the lack of any development plan objection, the lack of any real planning harm to the Appellant, and, by contrast, the very real and obvious prejudice that would be suffered by the interested party, enforcement action is in my judgment inconceivable. In suggesting the contrary the Appellant relies not on a real, but upon a wholly fanciful, possibility.

[33] It would not therefore be appropriate to quash the planning permission; but for my part I would grant declaratory relief to the effect that there was a breach of legitimate expectation. Such declaratory relief is justified because the Respondent has contended that the Statement which it has adopted did not give rise to a legitimate expectation that local residents would be notified of planning applications in accordance with its terms.

[34] To that very limited extent I, for my part, would allow the appeal.

MOORE-BICK LJ:

[35] I agree, and there is nothing that I wish to add.

ARDEN LJ:

[36] I also agree. I have no doubt that Mr Majed had a legitimate expectation that he would be sent notice of a planning application which directly affected his property. Mr and Mrs Majed's property was in fact closest to that of Mr Kaye. Mr Beard of counsel expressed concern about the position of Camden if there was a legitimate expectation as to notification and Mr Kolinsky was concerned about the position of the applicants for the permission. However, Camden places a list of neighbouring properties to which notice of planning application was sent on its website so that information is obviously easily ascertainable by Camden from Camden's records. Thus it would follow that Camden's officials would generally be able to check when the notice was sent to all neighbours directly affected by the application. Likewise, an applicant for planning permission can also take that course by looking at the website. The statement of community involvement is intended to promote a culture of open and participatory decision-making and the conclusion that Camden has promised that notice will be given to certain persons in normal circumstances is one it would normally be expected to fulfil and should occasion no surprise.

Appeal allowed.

Judgments

QBD, ADMINISTRATIVE COURT

CO/7061/2009

Neutral Citation Number: [2010] EWHC 1845 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Friday, 11 June 2010

B e f o r e:

MR JUSTICE CRANSTON

Between:

THE QUEEN ON THE APPLICATION OF COPELAND

Claimant

v

LONDON BOROUGH OF TOWER HAMLETS

Defendant

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Tel No: 020 7404 1400 Fax No: 020 7831 8838

(Official Shorthand Writers to the Court)

Mr D Wolfe (instructed by Leigh Day & Co) appeared on behalf of the Claimant

Mr R Harwood (instructed by Legal Department, London Borough of Tower Hamlets) appeared on behalf of the Defendant

J U D G M E N T

(As Approved by the Court)

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MR JUSTICE CRANSTON:

Introduction

1. This judicial review arises from a decision of the defendant, the London Borough of Tower Hamlets ("the council"), to grant planning permission for the change of use of 375 Cable Street, Shadwell, East London ("the premises") to enable a fast food take-away to operate there. Mr Copeland, the claimant, lives opposite 375 Cable Street. He is opposed to the premises becoming a fast food take-away. The first interested party, Mr Miah, has a lease on the premises and made the planning application. He has submitted written representations through his barrister, Mr Ranatunga, which endorse the points raised by the council in disputing the claim.

2. The argument Mr Copeland deploys in this judicial review is that in approving the change of use for Mr Miah's premises the council did not take into account the proximity of the premises to a local secondary school and thus its potential impact on the school's attempts to encourage healthy eating by pupils.

Background

3. The premises subject to the planning application in this case were on the ground floor at Fisher House, 375 Cable Street. There are three storeys of residential use on the upper levels. Cable Street is a busy one-way street. At one time the premises were a general convenience store. They are directly adjacent to 377 Cable Street, which is also a convenience store. The surrounding area is predominantly residential in use. Also in the immediate vicinity - with entrances on Lukin Road, Hardinge Road and Commercial Road - is the Bishop Challoner Catholic Collegiate School ("Bishop Challoner School"). This is a successful school which educates some 1700 students with backgrounds where 73 mother tongues are spoken. It has a "healthy living" programme, which includes advice on healthy eating. Its kitchen facilities and caterers are geared towards a healthy eating programme for breakfast, breaks and lunch time.

4. Mr Miah found that the premises at his convenience store were no longer economically viable. Thus in December 2007 he applied for a change of use from a grocery shop (use class A1) to a hot food take-away (use class A5). The matter came before the council's Development Planning Committee in March 2008. The Council's Planning

Department recommended that the application be refused, but the committee resolved that planning permission be granted subject to conditions regarding opening hours and the design of the ventilation duct.

5. A claim for judicial review was lodged in July 2008. By consent, this court ordered that the decision of the council be quashed because the reasons given for the grant of planning permission were inconsistent with the reasons of the committee.

6. Subsequently, Mr Miah made a further application to change the use of the premises to a hot food take-away. This was reported to the council's Development Planning Committee on 1 April 2009. The officer's report considered that the application was in accordance with the Development Plan, the council's other planning guidance and national planning policy. The Development Plan comprises the London Plan and the Tower Hamlets' Unitary Development Plan. It contains no policies which restrict hot food take-aways because of their proximity to schools. The council's interim planning guidance and other planning guidance notes do not deal with the topic either. There is a council "Healthy Borough" programme which seeks to adopt what is called a whole-systems approach to tackling the environmental causes of obesity. Its basis is that improving the local environment is central to the programme's implementation. There is no national government planning guidance on the proximity of hot food take-aways to schools.

7. After outlining the history and planning background, the officer's report of 1 April 2009 referred to the views of the Metropolitan Police, which remain opposed to the development, and to the recommendations of the council's Environmental and Highways Departments. It then summarised local representations. There were 123 individual responses which supported the application and 70 opposed to it, some of which mentioned the issue addressed in this judgment. There were three petitions against the scheme. At paragraph 7.4, the officer's report stated:

"The following issues were raised in representations but they are not material to the determination of the application. The adjacent Bishop Challoner Catholic Collegiate School is trying to promote healthy eating to its pupils, and the introduction of a take-away establishment would encourage poor eating habits.

Officer comment: While this is a valid concern, it is not a material planning consideration that can have weight in determining this application against council policy."

The background to this was that the executive head of the school had written that she strongly objected to the application.

8. At the committee meeting on 1 April the application was approved, subject to eight planning conditions. The committee divided five-to-one, with one abstention. The matter was considered for about an hour. The minutes are supplemented by a witness statement by the council's development control manager, Mr Irvine, and his contemporaneous notes.

9. Before the planning committee there was a presentation by Ms Emma Davidson, a neighbouring resident, against the scheme. Mrs Ahmed (Mr Miah's daughter) spoke in favour of the application. Two ward councillors, who are not on the committee, then spoke against the scheme; one of these was Councillor Golds. Amongst other things, he said that local schools did not encourage take-away food establishments close to them, and he therefore objected. The other

ward councillor, Councillor Archer, commented that the NHS Primary Care Trust did not encourage unhealthy eating in the borough and that Tower Hamlets had a problem in this regard, namely residents' obesity. Councillor Archer also noted that Waltham Forest London Borough Council had a policy to restrict local take-aways within 400 metres from schools.

10. Mr Irvine, as the development control officer, then presented his report to the committee. The matter was open for questions and comments by members of the committee. One member of the committee, Councillor Heslop, said that he felt public health was an issue, that he believed the applicant had made significant compromises to make the scheme acceptable but that he wanted details on the council's fast food policy. In his witness statement Mr Irvine said that he explained in response to Councillor Heslop that at the time of the meeting there was no relevant policy which specifically forbade fast food take-aways being located next to schools or any healthy eating policy that sought to control their location in any particular way.

11. On 9 April planning permission was formally issued. There was nothing there mentioning the hot food take-away issue.

12. On 13 May 2009 the claimant's solicitors wrote to the council and to Mr Miah that they did not consider that the decision to grant planning permission was lawful for two reasons. One of these was that the committee had failed to take account of a material consideration or misdirected itself in relation to the impact of the change on the healthy eating programme at Bishop Challoner School.

13. On 28 May Mr Miah's solicitors replied that the grounds of challenge were extremely weak and they could not see that the issue of location of a fast food take-away vis-a-vis the school was a material planning consideration. It enquired of the claimant's solicitors what planning guidance or circular indicated that this was a material planning consideration.

14. The next day the council wrote. It explained that the officer's report to the committee drew members' attention to the healthy eating issue and advised that it was not material to the determination of the application. It continued that a consideration would only be material for the purposes of land use planning if it related to the character of the use of land, citing Great Portland Estates Plc v Westminster City Council [1985] AC 661. The letter continued:

"The potential effect of a proposed use on the dietary choices of school children is not a matter going to the character of the use of land. The healthiness or otherwise of the food on offer at take-away premises will naturally vary and will not affect the character of use in land use planning terms one way or the other. The menu choices on offer could not for example be reasonably controlled by condition."

The letter added that members had in fact considered the issue.

15. In response to these letters the claimant's solicitors drew attention to the government strategy entitled "Healthy Weight/Healthy Lives" of January 2008. That strategy refers to the problem faced in promoting healthy eating when in some neighbourhoods there is a prevalence of fast food restaurants and take-aways. The strategy explains that local authorities can use existing planning powers to control more carefully the number and location of fast food outlets in their local areas. The government would promote these powers to local authorities and NHS Primary Care Trusts to

highlight the impact that they can have on promoting healthy weight, for instance through managing the proliferation of fast would outlets, particularly in proximity to parks and schools.

16. The claimant's solicitors also pointed out that another London Borough - Waltham Forest - had adopted a supplementary planning document on hot food take-aways which restricted hot food take-aways outside designated town centre and local parade locations if they were within 400 metres of the boundary of an existing school, youth centre or park.

17. In a subsequent letter the council wrote that notwithstanding those documents, they did not seem to deal with the key substantive point raised in their earlier letter. The council did not consider the potential effect of a proposed use on the dietary choices of school children to be a matter going to the character of the use of land. The strategy to which the claimant's solicitors referred did not address the question of planning law and the policy could not make something material which was not, in law, a material consideration. The council did not have a policy in place where fast food take-aways were restricted near schools or parks. Waltham Forest's approach was of no application to Tower Hamlets, and the council was not obliged to have regard to it when making decisions on applications for planning permission.

18. In November 2009 Mr Justice Collins granted permission for this judicial review. In January 2010 the council approved certain changes of the conditions attached to the grant of permission. Last month, Ian Dove QC, sitting as a Deputy High Court judge, ordered Mr Miah not to take any further action to implement the planning permission and ordered this expedited hearing.

The Law

19. In determining a planning application the local planning authority "shall have regard to the provisions of the development plan, so far as material to the application and to any other material considerations": Town & Country Planning Act 1990, Section 70 (2). There is a presumption in favour of the development plan, set out in Section 38 (6) of the Planning and Compulsory Purchase Act 2004. That provides that -

"(6) ..... for the purpose of any [planning] determination to be made ..... the determination must be made in accordance with the plan unless material considerations indicate otherwise."

20. The principles for addressing material considerations were set out by Laws LJ in R (On Application of Jones) v North Warwickshire District Council [2001] EWCA Civ 315; The Times, March 30, 2001. There Laws LJ said that the operative statute may provide a lexicon of relevant considerations to which attention had to be paid but if the statute provided no such lexicon - or at least no exhaustive lexicon - the decision maker had to decide for himself what he would take into account. In doing so he had obviously to be guided by the policy and objects of the governing statute, but his decision as to what he would consider and what he would not consider was itself only to be reviewed on conventional Wednesbury grounds (paragraph 20).

21. In R (On Application of Kides) v South Cambridgeshire District Council [2002] EWCA Civ 1370, [2003] JPL 431, [2003] P & CR 19, the Court of Appeal addressed what was a material consideration in the planning context. Jonathan Parker LJ said:

"121. In my judgment a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues."

It is trite law that the weight to be attached to any material consideration is a matter for the decision maker, subject to Wednesbury unreasonableness: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20, [70].

22. Promoting social objectives may be a material consideration in the planning context. Planning controls in order to promote social objectives are considerations which can relate to physical land use. Whether a social objective is relevant in a particular case turns on the circumstances. As long as the promotion of the social goal is lawfully within the planning sphere it matters not that it falls elsewhere as well.

23. In Stringer v Ministry of Housing and Local Government [1971] WLR 1281, [1971] 1 All ER 65, Cooke J said:

"It may be conceded at once that the material considerations to which the Minister is entitled and bound to have regard in deciding the appeal must be considerations of a planning nature. I find it impossible, however, to accept the view that such considerations are limited to matters relating to amenity. So far as I am aware, there is no authority for such a proposition and it seems to me wrong in principle. In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration."

The Government's Planning Policy Statement 1: Delivering Sustainable Development of 2005 refers to promoting, amongst other things, personal well-being and to the need for planning authorities to seek to achieve outcomes which enable social, environmental and economic objectives to be effected together.

24. In its correspondence with the claimant's solicitors the council referred to Westminster City Council v Great Portland Estates [1985] AC 661. There, the House of Lords held that the test of what is a material consideration in the planning context was whether it served a planing purpose relating to the character of the use of land. However Lord Scarman, with whom the other law lords agreed, said (page 670 E to F):

"It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as to the background to the consideration of character of land use. It can, however, and sometimes should be given direct effect as an exception under a special circumstance. But such circumstances when they arise will be considered not as a general rule but as exceptions to a general rule to be met in special cases."

That passage was cited in Newport Borough Council v Secretary of State for Wales [1998] ELR 174, [1998] JPL 377, where the Court of Appeal held that it was a material error of law to hold that a genuinely held public perception of danger from a proposed development, albeit that it was unfounded, could never amount to a valid ground for refusal.

The Issues

25. The relationship between a fast food take-away and its proximity to schools was not a matter contained in the council's development plan and is not otherwise required by law to be considered in making a planning decision. However, it is now common ground, subsequent to the council being advised by so experienced a counsel as Mr Harwood, that the proximity of a fast food take-away at 375 Cable Street to Bishop Challoner School was capable of being a material consideration. It relates to the use of land and is thus capable of being a planning consideration. It was thus for the planning committee to decide whether in this case it was material and, if so, what weight should be attached to it. It would not have been irrational - or otherwise flawed in public law terms - for the council not to have taken it into account or to have attached limited weight to the matter.

26. Given the common ground between the parties the issues in this case are whether the claimant can establish that the council's planning committee considered that the effect of a hot food take-away on healthy eating - because of its proximity to schools - was not, in law, capable of being a material consideration and, if so, whether the decision might have been different if it had regarded it as material.

(a) A material consideration

27. In relation to the first point, Mr Harwood in his cogent argument contends that the council's planning officers set out in the committee report the representation made about proximity between the premises and the school and gave a view as to whether that was a material consideration which could have weight in determining this application against council policy. In his submission the officers were expressing a view whether in these particular circumstances the relationship was material and could have weight. The planning officers were not expressing a view as to whether the issue was capable in law of being material. They accepted the point as a valid concern and said it was not material in relation to this application.

28. Mr Harwood continues that the report by the planning officers, where they gave their advice on the planning merits, should be accepted for what it was. It was not a report by the council's lawyers. It did not purport to give legal advice and did not lead to a discussion between lawyers. It was a report from the planning experts to lay councillors about the application, offering their judgment as to the materiality of the issue. Paragraph 7.4 was not giving advice on the law or whether as a matter of law the issue could be considered. On the contrary, the report said that it was a valid concern but that the planning officers did not consider it material and of weight in the present case.

29. Moreover, Mr Harwood submits that the councillors did consider the issue. It was raised by the two ward councillors and then by Councillor Heslop. Councillor Heslop asked about the council's policy on the issue. The officers answered that there was no policy. Thus it was hardly surprising that the committee approved the application as being in accordance with the Development Plan without any material considerations overriding the plan. While three councillors discussed the issue, at no point did officers or other councillors say it could not be taken into account. It was treated at the committee as something which councillors could take into account, which accorded with the report. Consequently, the committee was not misdirected that proximity between the proposed hot food take-away and Bishop Challoner School was not capable of being a material consideration.

30. In my view the difficulty with Mr Harwood's submission is that it flies in the face of the plain words of paragraph 7.4 of the officer's report. When the application for planning permission came before the members of the planning committee councillors were specifically advised that such matters could not be material planning considerations. In my

judgment, notwithstanding that this was not a legal document and was being addressed to lay councillors, it was a clear direction to the effect that the points about proximity of a fast food outlet to Bishop Challoner School could not be taken into account. It was a recommendation that that factor could not be given any weight at all.

31. The subsequent correspondence of the council with the claimant's solicitors underlines the emphatic nature of the advice being given on 1 April to the planning committee. The view within the council was that it was "not a matter going to the character of the use of land". The wording of the officer's report on 1 April was not in my view a direction to the effect that such matters could, in principle, be matters which could be taken into account in planning decisions generally but the councillors should not do so here because they were not material in this particular case. It was definitive advice that these matters should not be taken into account.

32. Mr Harwood correctly submits the issue was considered at the meeting. Councillors Gold and Archer, the ward councillors, raised the issue. Councillor Archer specifically referred to the Waltham Forest policy. Councillor Heslop, a member of the committee, addressed concerns about health and explained that he felt that public health was an issue.

33. In R v London County Council ex p London and Provincial Electric Theatres [1915] KB 466, Pickford LJ warned against treating every comment in committee as bearing on the decision. Here the healthy eating issue was discussed. But that of itself has not persuaded me that in reaching its decision the committee did not follow the officer's advice in paragraph 7.4, and in fact took exactly the opposite approach by treating as potentially material that which the officers had advised could not be taken into account. It is of some relevance that the sequence of events was that Mr Irvine presented his report after the ward councillors - Councillors Golds and Archer - had addressed the committee.

34. In any event, what they and Councillor Heslop said cannot, in my judgment, be taken to represent the basis of the committee's decision. The fact is that this discussion and the decision which followed took place against the background of the advice in the officer's report, that the matter was not a material planning issue which could have weight. It seems to me that the discussion - in particular Councillor Heslop's intervention - was an indication that members were in fact concerned about the point and might, if directed it was open for them to do so, have given it weight in the planning decision.

(b) No different outcome?

35. Mr Harwood submits that as a matter of discretion I should refuse relief because there would not have been a different outcome. In other words, if the committee had treated the proximity of a fast food outlet to a school as being capable of being a material consideration, there is no real prospect of a different decision having been taken in this case. In his submission the application was in accordance with the Development Plan and the council's other planning guidance. The materiality and weight to be attached to the proximity and healthy eating issues have to assessed in the context of the policy support for a positive decision. No planning policy was applicable in Tower Hamlets to support healthy eating as a factor in decision making. The national strategy in "Healthy Weight/Healthy Eating" relied on some further steps by central government which had not been taken. The fact that Waltham Forest London Borough Council may have taken steps reinforced the point that, without a planning policy, planning permission was not going to be refused on this basis, a consideration which is on the fringes of land use planning considerations.

36. I am not persuaded. It is accepted in public law that the probability that a decision maker would have reached the same decision is not enough. It is necessary for those advancing a "no different outcome" contention to demonstrate

that the decision would inevitably have been the same. The point was addressed specifically by May LJ (as he then was) in Smith v North Eastern Derbyshire Primary Care Trust & Others [2006] EWCA Civ 1291, [2006] 1 WLR 315, a consultation case. His Lordship stated the principle clearly:

"10 ..... Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision ..... "

Lord Justice Keene (at paragraph 16) agreed, observing that it was clear from the submissions on behalf of the NHS Primary Care Trust in that case that it could not say that there might not have been a different outcome had there been proper consultation at the proper time. That, in his view, was fatal to their case.

37. In this case the council has not persuaded me that the result would inevitably have been the same. Again I interpret Councillor Heslop's intervention as demonstrating that if the committee had been properly directed they may have reached a different decision overall in the light, for example, of matters like the council's "Healthy Borough" programme. But it is not for me to stray into the "forbidden territory", as May LJ put it in North Eastern Derbyshire, of evaluating the merits by second-guessing the outcome of a fresh consideration by democratically elected councillors, who will have to re-consider the case.

Conclusion

38. That being the case, I declare that the council have acted unlawfully and I quash the grant of planning permission.

39. MR WOLFE: I am obliged. Two things follow from that: first, I ask for an order that the defendant pay the claimant's costs of this application, to be assessed if not agreed; the second is in relation to the injunction which you indicated was put in place by the deputy judge (that is page 42). The order was expressed in the normal terms, in other words that it lasted until today or further order. So in the normal course of events it would fall away with my Lord's judgment.

40. I take you back to the stance the council took on that point. If you go to page 160 of the bundle, this was a letter - the last in the series of correspondence, I do not need to take you to the preceding documents - parallel correspondence at this point between my instructing solicitors and both the council and Mr Miah's solicitors, this is a letter to London Borough of Tower Hamlets. What was being proposed at this point was an order coupled with expedition. The second paragraph states this:

"As set out in your enclosed letter, ... Mr Miah plans to open a business ..... in the next week or two. You will therefore obviously need an injunction against Mr Miah unless he agrees to matters set out. Please confirm that in view of the fact that your planning authority has responsibility for enforcing against a breach of planning control ..... that you support this course of action. If you do not, please explain why not."

41. The council responded to that on page 162, an e.mail at the top of the page (third paragraph):

"If your client's challenge is successful and the planning permission is quashed, then the council as the local planning authority will consider whether or not it is expedient to take enforcement action at that stage."

42. In that context, I do adopt some of the thinking that appears on the deputy's decision when it came to the interim injunction (page 42). He said:

"In my view there is considerable force in the concern expressed by the claimant in his application but if the interested party persists in implementing the consent, whether or not those works are at risk, then there would be prejudice to the claimant even if they were not to be relied upon by the defendant or interested party in relation to discretion. Different considerations apply in relation to subsequent enforcement proceedings ..... not expedient to enforce which could mean the claimant is effectively deprived of his remedy in these proceedings."

I do adopt that thinking.

43. My Lord has seen the way in which matters proceeded after the injunction was served on Mr Miah. I do not go back on what I said. I do not ask you to determine whether there was a breach. All I ask you to do is to recognise that we have a situation and ask you to make a further injunction - I think it is better an injunction rather than an extension - which would prevent Mr Miah from either further works to establish the premises as a hot food take-away or taking steps to operate the premises as a hot food take-away, and pending either further order by the court (so it can plainly look like discharge) or pending the grant of a further lawful planning permission. We would obviously appreciate to preserve the position beyond any doubt, pending any re-determination by the council.

44. I do make those two further applications.

45. MR JUSTICE CRANSTON: Mr Harwood, I am not sure you can say anything about the second, can you, given that Mr Miah is not represented here?

46. MR HARWOOD: I hope I can help in that context. He is here, I am told by solicitor's representative. He does not have counsel. Can costs be dealt with? In terms of costs, we do not resist the general principle we should pay the costs of proceedings. However we would ask my Lord to exclude from that the costs of the injunction proceedings, the injunction, because the injunction arose because of Mr Miah's intention to proceed. I think Mr Wolfe indicated early on in these proceedings that - - - - -

47. MR JUSTICE CRANSTON: Let us hear from Mr Wolfe.

48. MR WOLFE: I do resist that. I have shown my Lord the council's response. I have shown my Lord council's response when we said - - - - -

49. MR HARWOOD: The reason the injunction arose - nothing to do with the council - and arose of Mr Miah's intention to proceed. You will have seen a great deal of correspondence on that. It fell open to the claimant to seek costs in relation to that injunction application at this hearing, having succeeded, from Mr Miah. Agreement has been reached between the claimant and Mr Miah that he is not seeking his costs from Mr Miah in respect of that injunction.

It would be wrong for the council to bear the costs of that interlocutory stage which is a matter we were simply not involved in.

50. MR JUSTICE CRANSTON: What about the other?

51. MR HARWOOD: In terms of continuing the injunction, the first point is that the application in these proceedings was not in the usual form for a declaration and quashing. It is inappropriate. The application for the interim injunction was one to hold the line. We are not aware of any notice having been given to Mr Miah that a permanent injunction was being sought against him until a point of reconsideration. It was not addressed in Mr Ranatunga's submissions. That is a point. It does not directly affect counsel. In the interests of justice, Mr Miah has not had an opportunity of considering our submission.

52. In terms of the ability of the court to grant an injunction, my Lord will appreciate that in general terms a member of the public does not have an ability to go to court to seek an injunction to prevent what might be in breach of planning control. It is a matter for the council to decide how to deal with those matters. That can be subject to review by the court if the council acts unlawfully.

53. The court has exercised - and in Mr Ian Dove's order quite conventionally exercised - a jurisdiction to hold the line once proceedings are under way with the aim of preventing the proceedings being prejudiced. One case in which that happened - it was also Tower Hamlets - was the decision of Mr Justice Collins in Procol (?) where an interim injunction was granted as to damage to Bishopsgate goods yard pending determination of a legal challenge over that. It is a holding-the-line point. To extend an injunction beyond the determination of these proceedings does go beyond that.

54. MR JUSTICE CRANSTON: That is sensible.

55. MR HARWOOD: May be I should make a suggestion. What is appropriate is that if the claimant seeks the injunction which goes beyond the end of these proceedings that Mr Miah has an opportunity to make formal representations on that with Mr Ranatunga, with the right of the court to hold the line there. The cost of that exercise should be borne by the council in any event.

56. MR WOLFE: I deal with the costs point first. I showed you a moment ago correspondence from my solicitors. The council is not a disinterested observer. It is completely bound up in it. Had the council in its response on page 162 taken a robust stance as to what it would do by way of enforcement in the event that there was a breach my solicitors would not have needed to press the matter in quite the way they did. The council had an opportunity and chose to take a very neutral at best stance on page 162, thereby, at least in part, contributing to the need to make that application. So I so say it is appropriate that they should face the costs of that process.

57. On the second point, the continuing injunction, I do not think it is being said my Lord has no jurisdiction to do it. I do not think Mr Harwood goes that far, so you have jurisdiction to do it. I appreciate it was not expressly contemplated in the application so far. As Mr Harwood rightly pionts out, we did indicate from the outset that my Lord might grant such further or other relief that was appropriate and this form was very clearly in that category.

58. As to Mr Miah's position, as I indicated, the wording I ask my Lord to order is that he be restrained until lawful

planning permission or until further order. In other words, he can, without time limit, if he wishes, apply back to the court to vary or discharge that injunction. If he goes away and gets legal advice and discovers there is some flaw in the process or some reason why it should not have been done, that is entirely open to him.

59. I do say please do make the order we seek. In one sense we might say it is not necessary because he has no planning permission, because my Lord has quashed it and therefore anything he did by way of further steps would be unlawful. But you have seen the council's stance as expressed on page 162.

60. I say it is entirely appropriate to carry holding the ring, for the court to hold the ring until there is a fresh planning decision by the planning committee at which point the point can be put beyond doubt one way or the other. The planning committee will either say we think on the planning merits there should be a planning permission or we think on the planning merits there should not be a planning permission, at which point everybody can reflect from that point onwards.

61. I appreciate it is unusual because normally one would assume that if a planning permission was quashed that would be the end of it in terms of further steps being taken. But I hope on the basis of the facts you have seen so far and without needing to determine specifically whether there has been a breach you would recognise the perhaps unusual appropriateness nonetheless of specifically protecting the position of a further determination by this court of the planning committee.

62. MR JUSTICE CRANSTON: It seems to me, notwithstanding the rather ambivalent e.mail of 22 April 2010, the council were not involved in the injunction application and therefore the claimant should not get his costs of that. I am reluctant to issue an injunction when it has only been raised now and Mr Miah hasnot had an opportunity to consider the matter. However, I have the application of the claimant. It seems to me that it is appropriate for me to consider that application as a paper application within the next seven days subject to any submissions that Mr Miah might want to make.

63. MR WOLFE: Does my Lord in that context wish us to make further submissions or are you happy for my submissions to take - - - - -

64. MR JUSTICE CRANSTON: Yes. I have your submissions. Seven days: is that too long?

65. MR WOLFE: Would it be possible to make an order to be in place for seven days, to hold the ring for that seven days? And Mr Miah can make an application if he wishes.

66. MR JUSTICE CRANSTON: That might be a better way. Have you any thoughts on this?

67. MR HARWOOD: No.

68. MR JUSTICE CRANSTON: Can you draw up the appropriate order? Discuss it with Mr Harwood, of course.

69. MR WOLFE: Yes.

70. MR HARWOOD: My Lord, in terms of considering whether we would take proceedings any further, I would ask for permission to appeal. You know the issues. The Court of Appeal might take a different view.

71. MR JUSTICE CRANSTON: You have to go elsewhere for that.

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a

Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government and others

b

[2019] UKSC 33

SUPREME COURT

c LORD REED DP, LORD CARNWATH, LADY BLACK, LORD LLOYD-JONES AND LORD BRIGGS JJSC

21 MAY, 3 JULY 2019

Town and country planning – Change of use – Condition attached to permission for
d *change of use – Planning permission granted with conditions limiting use to sale of specified categories – Categories subsequently extended – Decision notice extending categories not setting out conditions – Whether planning permission permitting use of store for food sales – Correct approach to interpretation – 'Reasonable reader' test – Town and Country Planning Act 1990, s 73.*

e In 1985, the first respondent Secretary of State granted planning permission with respect to a retail store, with the use limited by condition to sale of DIY goods and other specified categories. Use for other purposes was excluded, including those within Use Class 1, with the effect of excluding (inter alia) food sales. Following implementation, the permitted categories were extended by
f later consents under s 73[a] of the Town and Country Planning Act 1990. In 2010, permission was granted for variation of a condition of the 1985 permission to 'allow for the sale of a wider range of goods' as specified, not including food sales, and again excluding other uses within the relevant use class (then Class A1). In 2014, the appellant local planning authority approved the application for the variation of condition. In its decision notice, it set out
g the original wording and then the proposed wording, which provided that 'The retail unit hereby permitted shall be used for the sale and display of non-food goods only and, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking and re-enacting that Order with or without modification), for no other goods' ('the 2014 permission'). The second respondent sought a certificate from the
h authority, determining that the lawful use of the store extended to sales of unlimited categories of goods, including food. The authority refused a certificate to that effect, but one was granted by a planning inspector on appeal on the ground that no condition had been imposed on the 2014 permission to restrict the nature of the retail use to specific uses falling within Class A1, such as food sales. The inspector's decision was upheld by the lower courts. The
j authority appealed. The issue for determination was the natural and ordinary meaning of the words used in the 2014 permission, viewed in their particular context and in the light of common sense.

a Section 73, so far as material, is set out at [8], below.

Held – Whatever the legal character of the document in question, the starting-point – and usually the end-point – was to find 'the natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense. On the issue of interpretation, the Court of Appeal had been right to say that the 2014 permission needed to be seen through the eyes of the reasonable reader. However, such a reader should be assumed to start by taking the document at face value, before being driven to the somewhat elaborate process of legal and contextual analysis hypothesised by the Court of Appeal. In essence the authority's submission, that the decision notice had described itself as doing no more than approving a 'variation of condition' in two previous planning permissions, had been correct. Taken at face value, the wording of the operative part of the grant was clear and unambiguous. The obvious and only natural interpretation of those parts of the document was that the authority had been approving what had been applied for: namely, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There was certainly nothing to indicate an intention to discharge the condition altogether or, in particular, to remove the restriction on sale of other than non-food goods. Once it was understood that it had been normal and accepted usage to describe s 73 of the Act as conferring power to 'vary' or 'amend' a condition, the reasonable reader would be unlikely to see any difficulty in giving effect to that usage in the manner authorised by the section, namely, as the grant of a new permission subject to the condition as varied. The second part of the decision notice could be given a sensible meaning without undue distortion. It was explanatory of and supplementary to the first part. The appeal would accordingly be allowed (see [19], [28]–[35] of the judgment); *Trump International Golf Club Ltd v Scottish Ministers* [2017] 1 All ER 307 applied; *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR 72 and *R v Leicester City Council, ex p Powergen UK Ltd* (2000) 81 P & CR 47 considered.

Observed – When issuing a fresh planning permission under s 73, it is highly desirable that all the conditions to which the new planning permission will be subject should be restated in the new permission and not left to a process of cross-referencing. The present case illustrates the wisdom of that advice, which is also reflected in the PPG. Nothing in the present judgment is intended to detract from that advice, nor from the importance of ensuring that applications and grants under s 73 are couched in terms which properly reflect the nature of the statutory power (see [42], below); *R (on the application Reid) v Secretary of State for Local Government and the Regions* [2002] All ER (D) 77 (Oct) considered.

Decision of the Court of Appeal [2018] EWCA Civ 844 reversed.

Notes

For determination of application to develop land without compliance with conditions previously attached, see 81 *Halsbury's Laws* (5th edn) (2018) para 472.

For the Town and Country Planning Act 1990, s 73, see *Halsbury's Statutes* (4th edn) (2018 reissue) 137.

Cases referred to

A-G of Belize v Belize Telecom Ltd [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988, (2009) 74 WIR 203.

a *Brayhead (Ascot) Ltd v Berkshire CC* [1964] 1 All ER 149, [1964] 2 QB 303, [1964] 2 WLR 507, (1964) 62 LGR 162.
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101, [2009] 3 WLR 267, [2010] 1 LRC 639.
Crisp from the Fens Ltd v Rutland CC (1950) 48 LGR 210, (1950) 1 P & CR 48, CA.
b *I'm Your Man Ltd v Secretary of State for the Environment* (1998) 77 P & CR 251, [1998] 4 PLR 107.
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1984] 2 All ER 358, [1985] AC 132, [1984] 3 WLR 32, (1984) 82 LGR 488.
Pye v Secretary of State for the Environment [1998] 3 PLR 72, [1998] 19 LS Gaz R 25.
c *R v Leicester City Council, ex p Powergen UK Ltd* (2000) 81 P & CR 47, [2000] JPL 1037, CA.
R (on the application Reid) v Secretary of State for Local Government and the Regions [2002] EWHC 2174 (Admin), [2002] All ER (D) 77 (Oct).
Sevenoaks DC v First Secretary of State [2004] EWHC 771 (Admin), [2004] 14 EGCS 141, [2004] All ER (D) 421 (Mar).
d *Trump International Golf Club Ltd v Scottish Ministers (Scotland)* [2015] UKSC 74, [2017] 1 All ER 307, [2016] 1 WLR 85, 2016 SC 25.

Appeal

The appellant local planning authority, Lambeth London Borough Council, appealed against the decision of the Court of Appeal, Civil Division (Lewison,
e Hamblen and Coulson LJJ), on 20 April 2018 ([2018] EWCA Civ 844, [2018] 2 P & CR 280), upholding the decision of Lang J on 3 October 2017 ([2017] EWHC 2412 (Admin)), affirming the certificate that the lawful use, extending to sales of unlimited categories of goods including food, granted by the first respondent Secretary of State with respect to the second respondent Aberdeen
f Asset Management's store of which the third respondent, Nottingham County Council, was the freehold owner. The facts are set out in the judgment of Lord Carnwath.

Matthew Reed QC and *Matthew Henderson* (instructed by *Lambeth Legal Services*) for the authority.
g *Daniel Kolinsky QC* and *Sasha Blackmore* (instructed by the *Government Legal Department*) for the Secretary of State.
Christopher Lockhart-Mummery QC and *Yaaser Vanderman* (instructed by *Freeths LLP*) for the third respondent.

Judgment was reserved.

h

3 July 2019. The following judgment was delivered.

LORD CARNWATH (with whom Lord Reed DP, Lady Black, Lord Lloyd-Jones and Lord Briggs agree).

j INTRODUCTION

[**1**] This appeal concerns the permitted uses of a retail store in Streatham in the area of the London Borough of Lambeth ('the Council'). Planning permission was originally granted by the Secretary of State in 1985, but the use was limited by condition to sale of DIY goods and other specified categories, not including food sales. Following implementation, the permitted categories

were extended by later consents (under s 73 of the Town and Country Planning Act 1990), the most recent being in 2014 ('the 2014 permission'), which is in issue in this case. The second respondent sought a certificate from the Council determining that the lawful use of the store extended to sales of unlimited categories of goods including food. A certificate to that effect was refused by the Council, but granted by a planning inspector on appeal, and upheld by the lower courts. The Council, as local planning authority, appeals to this court.

THE PLANNING HISTORY IN MORE DETAIL

[**2**] The original permission, granted by the Secretary of State on 17 September 1985 ('the 1985 permission'), was subject to a number of conditions, including:

> '6. The retail unit hereby permitted shall be used for the retailing of goods for DIY home and garden improvements and car maintenance, building materials and builders' merchants goods and for no other purpose (including any other purpose in Class I of the Schedule to the Town and Country Planning (Use Classes) Order 1972 or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order).'

The exclusion of use for other purposes, including those within Use Class 1, had the effect of excluding (inter alia) food sales. The following reason was given in the decision letter (para 16):

> 'Because the traffic generation and car parking requirements of certain types of large retail stores are substantially greater than those of the DIY unit proposed and could be excessive at this site, it is necessary to restrict the right to change to other types of retail unit …'

[**3**] On 30 June 2010, the Council granted a further planning permission ('the 2010 permission') expressed to be for 'Variation of Condition 6' of the 1985 permission to 'allow for the sale of a wider range of goods' as specified, not including food sales, and again excluding other uses within the relevant use class (now Class A1). Although it is common ground that this permission was granted under s 73, there was no specific reference to that section in the document, which referred simply to the 1990 Act. This permission included, as a separate condition 1, the same enumeration of permitted uses and exclusions as in the terms of the grant, and the following reason was given for the condition:

> 'In order to ensure that the level of traffic generation is such as to minimise danger, obstruction and inconvenience to users of the highway and of the accesses.'

[**4**] There were in addition two new conditions which had not been in the 1985 permission:

> '2. Details of refuse and recycling storage to serve the development shall be submitted to and approved in writing by the Local Planning Authority prior to first commencement of any of the additional retail uses hereby permitted. The refuse and recycling storage facilities shall be provided in accordance with the approved details prior to commencement of the development and shall thereafter be retained as such for the duration of the permitted use.

a 3. A strategy for the Management of Deliveries and Servicing shall be submitted to and approved in writing by the Local Planning Authority prior to first commencement of any of the additional retail uses hereby permitted. Deliveries and servicing shall thereafter be carried out solely in accordance with the approved details.'

b Reasons were given for each condition.

[**5**] The permission now in issue was granted on 7 November 2014. (The application is not before us.) In this case the grant referred in terms to s 73. It is necessary to set out the operative parts in full:

'DECISION NOTICE

c **DETERMINATION OF APPLICATION UNDER SECTION 73 – TOWN AND COUNTRY PLANNING ACT 1990**

The London Borough of Lambeth hereby approves the following application for the variation of condition as set out below under the above mentioned Act …

Development At: Homebase Ltd, 100 Woodgate Drive, London SW16

d 5YP.

For: Variation of condition 1 (Retail Use) of Planning Permission Ref: 10/01143/FUL (Variation of Condition 6 (Permitted retail goods) of planning permission Ref 83/01916 … Granted on 30.06.2010.

Original Wording:

e The retail use hereby permitted shall be used for the retailing of DIY home and garden improvements and car maintenance, building materials and builders merchants goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose (including the retail sale of food and drink or any other purpose in Class

f A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order).

Proposed Wording:

g The retail unit hereby permitted shall be used for the sale and display of non-food goods only and, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking and re-enacting that Order with or without modification), for no other goods.

h [*I should note in passing that the reference in the revised form of condition to the General Development Order, rather than the Use Classes Order, appears to be a mistake, as Mr Lockhart-Mummery QC for the third respondent suggested. Neither he nor any of the parties saw it as significant to the issues in the appeal.*]

Approved Plans …

Summary of the Reasons for Granting Planning Permission:

j In deciding to grant planning permission, the Council has had regard to the relevant policies of the development plan and all other relevant material considerations … Having weighed the merits of the proposals in the context of these issues, it is considered that planning permission should be granted subject to the conditions listed below.

Conditions

> 1. The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice.
>
> Reason: To comply with the provisions of section 91(1)(a) of the Town and Country Planning Act …
>
> 2. Prior to the variation her[e]by approved being implemented a parking layout plan at scale of 1:50 indicating the location of the reserved staff car parking shall be submitted to and approved in writing by the Local Planning Authority. The use shall thereafter be carried out solely in accordance with the approved staff car parking details.
>
> Reason: To ensure that the approved variation does not have a detrimental impact on the continuous safe an[d] smooth operation of the adjacent highway …
>
> 3. Within 12 months of implementation of the development hereby approved details of a traffic survey on the site and surrounding highway network shall be undertaken within one month of implementation of the approved development date and the results submitted to the local planning authority. If the traffic generation of the site, as measured by the survey, is higher than that predicted in the Transport Assessment submitted with the original planning application the applicant shall, within three months, submit revised traffic modelling of the Woodgate Drive/Streatham Vale/Greyhound Lane junction for analysis. If the junction modelling shows that junction capacity is worse than originally predicted within the Transport Assessment, appropriate mitigation measures shall be agreed with the council, if required, and implemented within three months of the date of agreement.
>
> Reason: to ensure that the proposed development does not lead to an unacceptable traffic impact on the adjoining highway network …'

There was no specific reference to conditions 2 and 3 of the 2010 permission.

[**6**] On 10 June 2015, the second respondent applied to the Council for a certificate of lawfulness of proposed use or development (under s 192 of the 1990 Act) for unrestricted use of the store. This was refused by the Council on 12 August 2015, but the appeal was allowed by the inspector by a decision letter dated 6 December 2016. The letter gave a certificate of lawfulness for use described as—

> 'The use of the premises … for purposes within Use Class A1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) without restriction on the goods that may be sold.'

The reason given was:

> 'No condition was imposed on [the 2014 permission] to restrict the nature of the retail use to specific uses falling within Use Class A1 …'

THE STATUTORY FRAMEWORK

[**7**] It is unnecessary to set out the familiar provisions of the 1990 Act relating to the definition of development, and to the granting of planning permission. It is to be noted however that the extension of the categories of goods to be sold within the store did not in itself amount to 'development' (within the meaning of 1990 Act s 55) requiring planning permission. The erection of the building and the commencement of sales under the 1985 permission no doubt involved both operational development and a material change of use.

a Thereafter a change to sale of other categories (at least those within the relevant class under the current Use Class Order) would not involve any breach of planning control unless restricted by an appropriate condition.

[**8**] Section 73 of the Act, on which the Council relied in granting the 2010 and 2014 permissions, is headed 'Determination of applications to develop land without compliance with conditions previously attached'. It provides:

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> '(1) This section applies … to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.'

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[**9**] The background to this section (formerly s 31A of the Town and Country Planning Act 1971) was described by Sullivan J in *Pye v Secretary of State for the Environment* [1998] 3 PLR 72 at 85:

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> '[P]rior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of conditions had the right to appeal against the original planning permission, but such a course enabled the local planning authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to "go back on the original decision" to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.
>
> It was this problem which section 31A, now section 73, was intended to address …
>
> While section 73 applications are commonly referred to as applications to "amend" the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and un-amended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.
>
> In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to "go back on the original planning permission" under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained.
>
> The original planning permission comprises not merely the description of the development in the operative part of the planning permission … but also the conditions subject to which the development was permitted to be carried out …'

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This passage was approved by the Court of Appeal in *R v Leicester City Council, ex p Powergen UK Ltd* (2000) 81 P & CR 47, [2000] JPL 1037 (para 28) per Schiemann LJ.

[**10**] Sullivan J's comment that such applications are 'commonly' referred to as applications to 'amend' the conditions was echoed by Schiemann LJ, who noted, at para 1, that such an application is commonly referred to as 'an application to modify conditions imposed on a planning permission'. This usage is also consistent with the wording used in the statute under which s 31A was originally introduced. It was one of various 'minor and consequential amendments' introduced by s 49 and Sch 11 to the Housing and Planning Act 1986, described as '(d) applications to vary or revoke conditions attached to planning permission'.

[**11**] It is clear, however, that this usage, even if sanctioned by statute, is legally inaccurate. A permission under s 73 can only take effect as an independent permission to carry out the same development as previously permitted, but subject to the new or amended conditions. This was explained in the contemporary circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of 'an extant planning permission granted subject to conditions', to apply 'for relief from all or any of those conditions'. It added:

> 'If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted.'

[**12**] Although the section refers to 'development' in the future, it is not in issue that a s 73 application can be made and permission granted retrospectively, that is in relation to development already carried out. This question arose indirectly in the courts below, in the context of a dispute about the validity of the time-limit condition (condition 1), which required the 'development to which this permission relates' to be begun within three years. The Court of Appeal ([2018] EWCA Civ 844, [2018] 2 P & CR 280) upheld the inspector's decision that this condition was invalid, in circumstances where the relevant 'development' had been carried out many years before. Lewison LJ said:

> '… I cannot see that the decision notice granted planning permission for any prospective development. The mere widening of the classes of goods that were permitted to be sold by retail does not amount to development at all. Conformably with the definition of "development" in section 55 the only development to which the application could have related was the original erection of the store and the commencement of its use as a DIY store. It was that development that was permitted subject to the conditions that the application was designed to modify; and it was the planning permission permitting that development to which the decision notice referred.' (Paragraph [79].)

[**13**] I agree with that analysis, which is not I understand in dispute before this court. However, it leaves open the question as to the effect of the new permission on conditions which have already taken effect following implementation of the earlier permission. The section does not assist directly. It envisages two situations: either (a) the grant of a new permission unconditionally or subject to revised conditions, or (b) refusal of permission,

a leaving the existing permission in place with its conditions unchanged. It does not say what is to happen if the authority wishes to change some conditions but leave others in place. As will be seen (para [20] below), the Court of Appeal cited government guidance indicating that 'to assist with clarity' planning decisions under s 73 'should also repeat the relevant conditions from the original planning permission'. However, as I read this, it was given as advice, b rather than as a statement about the legal position. Although the current status of the 2010 conditions is not directly in issue in the appeal, it is of some background relevance and has attracted conflicting submissions. I shall return to this aspect later in the judgment.

[**14**] For completeness, before leaving this discussion of s 73, I should note c that circular 19/86 (referred to above) described its predecessor as 'complementing' s 32 of the Town and Country Planning Act 1971 (later, s 63 of the 1990 Act), which at the time made specific provision for retrospective permissions ('Permission to retain buildings or works or continue use of land'). That section has since been repealed and partially replaced by s 73A of the 1990 Act (see Planning and Compensation Act 1991, Sch 7). Whatever the precise d significance of this change, it is not suggested that it has any relevance to the issues in this appeal and neither side has sought to rely on s 73A.

PRINCIPLES OF INTERPRETATION

[**15**] We have received extensive submissions and citations from recent e judgments of this court on the correct approach to interpretation. Most relevant in that context is *Trump International Golf Club Ltd v Scottish Ministers (Scotland)* [2015] UKSC 74, [2017] 1 All ER 307, [2016] 1 WLR 85. An issue in that case related to the interpretation of a condition in a statutory authorisation for an offshore wind farm, requiring the developer to submit a detailed design statement for approval by Ministers. One question was whether f the condition should be read as subject to an implied term that the development would be constructed in accordance with the design so approved.

[**16**] In the leading judgment Lord Hodge (at paras [33]–[37]) spoke of the modern tendency in the law to break down divisions in the interpretation of different kinds of document, private or public, and to look for more general g rules. He summarised the correct approach to the interpretation of such a condition:

> '[34] When the court is concerned with the interpretation of words in a condition in a public document such as a s 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the h condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.'

j [**17**] He rejected a submission that implication had no place in this context:

> '[32] [Counsel] submits that the court should follow the approach which Sullivan J adopted to planning conditions in *Sevenoaks District Council v First Secretary of State* [2004] EWHC 771 (Admin), [2004] 14 EGCS 141 and hold that there is no room for implying into condition 14 a further obligation that the developer must construct the development in accordance with the

design statement. In agreement with Lord Carnwath JSC, I am not persuaded that there is a complete bar on implying terms into the conditions in planning permissions …

[35] … While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether.'

In the instant case, had it been necessary to do so, he would, at para [37], have 'readily drawn the inference that the conditions of the consent read as a whole required the developer to conform to the design statement in the construction of the windfarm'.

[**18**] In my own concurring judgment, having reviewed certain judgments in the lower courts which had sought to lay down 'lists of principles' for the interpretation of planning conditions, I commented:

> 'I see dangers in an approach which may lead to the impression that there is a special set of rules applying to planning conditions, as compared to other legal documents, or that the process is one of great complexity.' (Paragraph [53].)

Later in the same judgment, I added:

> 'Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved … It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well-established rules limiting the categories of documents which may be used in interpreting a planning permission … But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation.' (Paragraph [66].)

[**19**] In summary, whatever the legal character of the document in question, the starting-point – and usually the end-point – is to find 'the natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.

THE COURT OF APPEAL'S REASONING

[**20**] It is unnecessary to review in any detail the reasoning of the inspector or the High Court, since the issues, and the competing arguments, are fully discussed in the judgment of the Court of Appeal. Having set out the planning history and the terms of s 73, Lewison LJ (paras [19]–[22]) identified what he saw as the problem. While he acknowledged that it was 'clear what Lambeth meant to do in a very broad sense', he said ([2018] 2 P & CR 280):

> 'But that is not the question. The question is: what did Lambeth in fact do? The application was an application for the variation of a condition attached to the 2010 permission …
>
> … the technical trap, into which it is said that Lambeth fell, is that approval of an application under section 73 requires the grant of a fresh planning permission, rather than merely a variation of an existing one …
>
> It follows from this that the decision notice must be read as a free-standing grant of planning permission. However, it failed to repeat any

a of the conditions imposed on the previous planning permissions and, more importantly, failed to express the new description of the use as a condition, rather than as a limited description of the permitted use …'

He noted the advice given in the relevant Planning Policy Guidance note ('PPG'):

b 'It should be noted that the original planning permission will continue to exist whatever the outcome of the application under section 73. To assist with clarity, decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged.'

c This advice, he thought, was—

'reflective of the words of section 73(2)(a) which requires a local planning authority, if it decides that different conditions should be imposed, to grant planning permission "accordingly": that is to say in accordance with the conditions upon which it has decided that planning permission should be granted.'

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[**21**] Later in the judgment he addressed the submissions before the court. He noted that Mr Reed QC for the Council put his argument in two ways: first by implication of a condition and second as a matter of interpretation. He thought it more logical to reverse the order, while accepting that the exercise was an 'iterative' process, and observing that the objective was—

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'not to determine what the parties meant to do in the broad sense, but what a reasonable reader would understand by the language they in fact used.' (Paragraph [38].)

[**22**] Having referred to the findings of the judge in the court below, he summarised Mr Reed's submission on the interpretation of the decision notice:

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'[45] In the light of those findings Mr Reed argues that the decision notice described itself as doing no more than approving a "variation of condition" in two previous planning permissions. For technical reasons, however, a variation of a condition under section 73 takes effect as the grant of a fresh planning permission. In order to give effect to Lambeth's intention and also to that of the applicant for the variation of the condition, the limited description of the use must therefore be read as if it were itself a condition.'

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[**23**] In the critical paragraphs of the judgment, he gave his view of how the 'reasonable reader' would have approached the matter:

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'[52] The reasonable reader of the decision notice must be notionally equipped with some knowledge of planning law and practice. The distinction between a limited description of a permitted use and a condition is a well-known distinction. The reasonable reader would also know that the Government's own guidance stated that any conditions applicable to planning permission granted under section 73 must be explicitly stated. He would know the general structure of a planning permission which will set out a summary of the application, describe the development permitted by the permission and, in a separate part of the permission, will set out any conditions imposed on the grant of planning permission with reasons for those conditions. He would notice that there

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were some conditions attached to the grant which were explicitly stated in the decision notice, and that the decision notice stated that Lambeth had decided that "planning permission should be granted subject to the conditions listed below". If he had looked back over the planning history he would also have seen the 2010 approval of a variation to the condition, which did specify the permitted range of goods in the form of a condition. That had not been repeated in the decision notice. He would also have noticed that the decision notice in 2010 had imposed two conditions (relating to refuse and recycling on the one hand, and management of deliveries on the other) which had also not been repeated in the decision notice. If he had considered the 2013 refusal he would have seen that Lambeth was not satisfied at that time that the applicant had demonstrated that increased traffic would not lead to adverse impacts. But he would have seen that the decision notice of 2014 referred to a traffic assessment which Lambeth had considered. He would also have noticed that condition 3 required a traffic survey and the implementation of mitigation measures if junction capacity was worse than predicted. He might reasonably have concluded that Lambeth had been sufficiently satisfied on this second application to grant conditional permission, with the safety net of condition 3.

[53] Accordingly, sympathetic though I am to Lambeth's position, this submission seems to me to go well beyond interpretation. It is not a question of rearranging words that appear on the face of the instrument (as in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101). It is a question of adding a whole condition, which has a completely different legal effect to the words that Lambeth in fact used.'

[24] As a further point he noted the statutory requirement for the notice to state the reasons for any condition imposed. He said:

'To impose a condition without giving reasons for it would be a breach of statutory duty. It is one of the principles of contractual interpretation that one should prefer a lawful interpretation to an unlawful one. There is nothing in the decision notice which could amount to a clear, precise and full reason for treating the description of the use as a condition. Although Mr Reed suggested that the first reason given for the 2013 refusal could stand as the reason, I consider that to be untenable. The requirement to give reasons is applicable to "the notice". It may be that "the notice" might extend to another document incorporated by reference; but that is not this case. Although the decision notice does cross-refer both to the original planning permission and also to previous approved variations, it does not mention the refusal at all. There would be no reason for a reasonable reader of the decision notice to suppose that a reason for an unexpressed condition was contained in a document which was simply part of the background.' (Paragraph [59].)

[25] Lewison LJ went on to deal with the alternative formulation, based on implication of a condition in the same form as the 'proposed wording', holding that it failed to meet the stringent tests laid down by the authorities (paras [63]–[75]). In particular he accepted a submission by Mr Lockhart-Mummery that the judgments in *Trump* (like the decision on which they relied: *Crisp from the Fens Ltd v Rutland CC* (1950) 48 LGR 210, (1950) 1 P & CR 48)

a decided no more than that implication might be made into an extant condition that was incomplete; they did not contemplate the implication of a wholly new condition (para [72]).

[**26**] In this court Mr Reed QC for the Council repeated and developed his arguments in the Court of Appeal. In line with the decision of the High Court in *I'm Your Man Ltd v Secretary of State for the Environment* (1998) 77 P & CR 251, b [1998] 4 PLR 107, he did not seek to argue that the proposed wording could be treated as an enforceable 'limitation'. He accepted the need to establish that the permission was subject to a legally effective condition in that form. In summary he put his case in three ways: (a) as a matter of the correct interpretation of the permission; (b) by correction of an obvious error (by analogy with the contractual principles applied in *Chartbrook Ltd v Persimmon* c *Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101); and (c) by the implication of a condition in the terms of the proposed wording (applying the principles in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988). The respondents generally adopted the reasoning of the Court of Appeal. Mr Kolinsky QC for the Secretary of State emphasised d the need for clarity and certainty in a public document. For the third respondent (as freehold owner of the site), Mr Lockhart-Mummery reminded us that planning is a creature of statute, in which common law principles have a limited role; and also of the need for clear and specific words to exclude rights granted by provisions such as the Use Classes Order.

e COMMENTARY

[**27**] With respect to the careful reasoning of the courts below, I consider that an ordinary reading of the decision notice compels a different view. I find it unnecessary to examine in detail the more ambitious alternatives proposed by Mr Reed. However, I observe in passing (in agreement with Mr Lockhart-Mummery's submission as to the limited scope of the judgments f in *Trump*) that it is difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a wholly new condition, as opposed to interpretation of an existing condition.

[**28**] On the issue of interpretation, Lewison LJ was of course right to say that the 2014 permission needs to be seen through the eyes of 'the reasonable g reader'. However, such a reader should be assumed to start by taking the document at face value, before being driven to the somewhat elaborate process of legal and contextual analysis hypothesised in Lewison LJ's para [52]. In essence Mr Reed's submission, in the simple form recorded by Lewison LJ at para [45] (para [22] above) was in my view correct. It is not necessarily assisted by the varying formulations and citations discussed in his submissions to this h court. There is a risk of over-complication.

[**29**] Taken at face value the wording of the operative part of the grant seems to me clear and unambiguous. The Council 'hereby approves' an application for 'the variation of condition as set out below'. There then follow precise and accurate descriptions of the relevant development, of the condition to be varied, and of the permission under which it was imposed. They are followed j by statements first of the 'Original wording', and then of the 'Proposed wording'; the latter stating in terms that the store is to be used for the sale of 'non-food goods only and … for no other goods'. 'Proposed wording' in this context must be read as a description of the form of condition proposed in the application and 'hereby' approved. In other words, the obvious, and indeed to my mind the only natural, interpretation of those parts of the document is that

the Council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is certainly nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction on sale of other than non-food goods.

[**30**] The suggested difficulties of interpretation do not arise from any ambiguity in the terms of the grant itself. Nor do they raise any question about the extent to which it is permissible to take account of extraneous material. It is unnecessary to look beyond the terms of the document. In these respects the case differs from many of the authorities to which reference has been made in submissions. The arguments against this simple view turn, not on any lack of clarity in the grant itself, but on supposed inconsistencies, firstly with its statutory context, and secondly with the treatment of other conditions in the remainder of the document.

[**31**] In respect of the statutory context, the objection is that this reading is inconsistent with the scope of the power under which the grant was made. Section 73, referred to in terms in the permission, does not give the authority power simply to vary a condition in the previous permission. That purpose could only be achieved by the grant of a new permission, subject in terms to a condition in the revised form. Accordingly, it is said, it was not enough simply to approve the 'proposed wording', without its terms being incorporated into the form of condition as required by s 73(2)(a).

[**32**] One problem with this argument is that it goes too far for the respondents' case. If s 73 gave no power to grant a permission in the form described, the logical consequence would be that there was no valid grant at all, not that there was a valid grant free from the proposed condition. The validity of the grant might perhaps have been subject to a timely challenge by an interested third party or even the Council itself. That not having been done, there is no issue now as to the validity of the grant as such. All parties are agreed that there was a valid permission for something. That being the common position before the court, the document must be taken as it is.

[**33**] It may be that insufficient attention was paid in the submissions below to the background of s 73, as discussed earlier in this judgment. Once it is understood that it has been normal and accepted usage to describe s 73 as conferring power to 'vary' or 'amend' a condition, the reasonable reader would in my view be unlikely to see any difficulty in giving effect to that usage in the manner authorised by the section – that is, as the grant of a new permission subject to the condition as varied. If the document had stopped at that point, I do not think such a reader could have been left in any real doubt about its intended meaning and effect. The lack of a specific reason for the condition, to which Lewison LJ attached weight, is of little practical significance, given that this was the relaxation of a previous condition for which the reason was well-known, rather than the imposition of a new restriction. In any event the absence of a reason would not affect the validity of the condition (see *Brayhead (Ascot) Ltd v Berkshire CC* [1964] 1 All ER 149, [1964] 2 QB 303).

[**34**] Turning to the second part of the notice, it is true that there are some internal inconsistencies. Its heading suggests that it is simply stating the reasons for the permission granted in the first part, rather than imposing a separate set of conditions. Further, the wording of the conditions themselves betrays some ambivalence about what has been approved. In some places it is referred to as 'the development to which this permission relates', or 'the proposed

a development', in others as 'the variation hereby approved' or 'the approved variation'. (As I have already noted, the time-limit condition was held by the courts below to be wholly invalid.)

[**35**] However, reading the document as a whole, and taking the first part in the sense suggested above, the second part can be given a sensible meaning without undue distortion. It is explanatory of and supplementary to the first b part. The permitted development incorporating the amended condition is regarded as acceptable, in accordance with the development plan, but only subject to the conditions set out. They are in other words additional conditions. They are designed to regulate the expanded use as permitted by the revised condition, dealing in particular with staff parking, and monitoring of the additional traffic impact. c

The other 2010 conditions

[**36**] As I have said, we are not directly concerned in this appeal with the status of the other conditions in the 2010 permission, so far as still potentially d relevant, notably conditions 2 and 3 relating respectively to treatment of waste and management of deliveries. However, some comment may be desirable, since the issue was subject to conflicting submissions before the Court of Appeal and in this court. At first sight it would seem surprising if the council, when relaxing the restrictions on sales, had not intended to maintain such requirements. No reason was given for releasing them, and it does not appear e to have been requested in the application.

[**37**] For the Council, Mr Reed's position seems to have shifted during the course of the appeal below. Lewison LJ (paras [46]–[47]) recorded his initial submission that conditions 2 and 3 should be treated as incorporated into the new permission; the 'reasonable reader of the decision notice could not be taken to understand that Lambeth was abandoning them'. However, this f argument was not pursued in his oral submissions (judgment paras [48], [51]), and he seems implicitly to have accepted that they would cease to be effective. In this court this issue was not dealt with in any detail in the written submissions. Questioned in argument, Mr Lockhart-Mummery QC for the third respondent submitted that conditions 2 and 3, not having been repeated in the new permission, must be taken as having lapsed altogether. In reply g Mr Reed for the Council took a rather different position to that initially taken in the Court of Appeal. His submission as I understood it was that the 2010 conditions, so far as still relevant, were not as such incorporated into the new permission; but they continued to have effect under the 2010 permission, so far as not inconsistent with anything in the new grant.

h [**38**] Although we have not heard full argument, my provisional view is that Mr Reed's current submission is correct. It will always be a matter of construction whether a later permission on the same piece of land is compatible with the continued effect of the earlier permissions (see the principles discussed in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1984] 2 All ER 358 at 365–366, [1985] AC 132 at 144). In this case, j following implementation of the 2010 permission, the conditions would in principle remain binding unless and until discharged by performance or further grant. Conditions 2 and 3 were expressed to remain operative during continuation of the use so permitted. The 2014 permission did not in terms authorise non-compliance with those conditions, nor, it seems, did it contain anything inconsistent with their continued operation. Accordingly, they would

remain valid and binding – not because they were incorporated by implication in the new permission, but because there was nothing in the new permission to affect their continued operation.

[**39**] This approach to the interpretation of the decision notice seems to me consistent with the decision of Sullivan J in a case relied on by Mr Reed before the Court of Appeal: *R (on the application Reid) v Secretary of State for Local Government and the Regions* [2002] EWHC 2174 (Admin), [2002] All ER (D) 77 (Oct). Permission for a transport depot had been granted subject to 12 conditions. The landowner applied for development described as 'retention of the use of the land without compliance with condition 2 (improvements to public highway)'. The local authority responded with a notice referring to the terms of the application, and expressed in these terms:

> '… notice of its decision to APPROVE Planning Permission for the application set out above subject to the following conditions:
> Conditions
> None.'

Sullivan J held that the grant did not mean that the other conditions were no longer effective. He said:

> '[58] There is an apparent conflict between the description of the proposed development, which refers not to an existing use but to the retention of a permitted use without compliance with one condition in the 1992 planning permission, and the words "Conditions: None". One is left wondering what is to happen to the remaining conditions on the 1992 planning permission. Once it is accepted that both the application and the 1992 planning permission referred to in the application for permission may properly be considered for the purpose of construing the meaning of the 2002 permission, then the words "Conditions: None" mean, in that context, no additional conditions beyond those which had been imposed upon the 1992 permission.'

[**40**] Lewison LJ saw this as a case turning on the particular wording of permission, which was held to have the effect that 'the conditions attached to the previous planning permission continued to apply to the new one'. He saw it as of no assistance in the present case, particularly given Mr Reed's abandonment before the Court of Appeal of the argument that the conditions attached to the 2010 permission could be carried forward into the new permission (para [51]).

[**41**] As I read the judgment, however, Sullivan J did not intend to say that the other 11 conditions were by implication to be treated as included in the new permission, or that the old permission was superseded. Rather the new permission, confined as it was to the retention of the use without complying with condition 2, and involving no inconsistency with the old permission and the remaining conditions, had no effect on their continuing effect as conditions subject to which the development had been carried out. The words 'Conditions: None' was indicating that there were to be no additional conditions beyond those already having effect under the earlier permission. By contrast, in the present case, the specific conditions in the 2014 permission were intended to be additional both to the varied condition, and to the others remaining in effect under the 2010 permission.

[**42**] Sullivan J added the following comment:

a '[59] I accept unreservedly that the drafting of the 2002 planning permission could have been much clearer. The inspector's observations as to good practice should be heeded by all local planning authorities. When issuing a fresh planning permission under s 73, it is highly desirable that all the conditions to which the new planning permission will be subject should be restated in the new permission and not left to a process of cross-referencing. Good practice was not followed in the present case.'

b

The present case illustrates the wisdom of that advice, which is also reflected in the PPG. Nothing in the present judgment is intended to detract from that advice, nor from the importance of ensuring that applications and grants under s 73 are couched in terms which properly reflect the nature of the statutory power.

c

CONCLUSIONS

[**43**] For these reasons I would allow the appeal. The precise wording of the order should be agreed between the parties, or subject to further submissions.

d *Appeal allowed.*

Karina Weller Solicitor (NSW) (non-practising).

Judgments

QBD, ADMINISTRATIVE COURT

Neutral Citation Number: [2017] EWHC 908 (Admin)

Case No: CO/4918/2016

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/04/2017

Before :

MR JUSTICE GILBART

- -

Between :

THE QUEEN

on the application of

STELIO STEFANOU Claimant

- and -

WESTMINSTER CITY COUNCIL

and

CUNNINGHAM MANAGEMENT LIMITED Defendant

Interested Party

- -

- -

Christopher Lockhart-Mummery QC (instructed by Pemberton Greenish LLP) for the Claimant

Meyric Lewis (instructed by Isaac N P Carter, Senior Planning Solicitor, Borough Legal Services) for the Defendant

John Steel QC (instructed by Quastel Midgen LLP) for the Interested Party

Hearing dates: 14th and 15th March 2016

- -

Approved Judgment

MR JUSTICE GILBART :

ACRONYMS USED IN JUDGMENT

TCPA 1990 Town and Country Planning Act 1990

LBCAA 1990 Planning (Listed Buildings and Conservation Areas) Act 1990

PCPA 2004 Planning and Compulsory Purchase Act 2004

NPPF National Planning Policy Framework

WCC Westminster City Council

LPA Local Planning Authority

CA Conservation Area

IP Interested Party

1. 21 Charles Street, London W1 lies in the heart of Mayfair. It is a Listed Building. Mr Stefanou owns the adjacent house at No 22, which is also a Listed Building. The IP wants to carry out alterations to No 21, which include the construction of a substantial basement underground, on three levels. That will cause a great deal of upheaval, and as is often the case with basement extensions will involve lengthy building and excavation works.

2. On 18th August 2016 the Defendant WCC granted listed building consent and planning permission for the works. The Claimant has issued these proceedings to quash those consents. The development and listed building works thereby

permitted include some significant changes to parts of the works permitted by an earlier planning permission of 2008, which was renewed in 2011 pursuant to s 73 of *TCPA 1990*. The Claimant contends that WCC has wrongly treated that 2011 permission as extant, on what the Claimant contends is the erroneous basis that the IP has carried out works which amounted to a commencement of development as defined in 55 of *TCPA 1990*. The Claimant also contends that, in considering the new applications, the Council failed to have regard to newly adopted Development Plan policy on basement extensions, contrary to s 70(2) *TCPA 1990* and s 38(6) *PCPA 2004*.

3. This application is made after a grant of permission on the papers by HH Judge Gore QC on 16th November 2016. As became apparent during the hearing, Judge Gore was wrong to treat the three main grounds of claim as raising the same issue.

4. It is convenient to start by identifying the two central areas of dispute with which this litigation is concerned.

i) Firstly, the Development Control code appearing in Part III of *TCPA 1990* requires that planning permissions contain conditions require that works within the development should be commenced within a set time period (in this case within 3 years). While the Act makes provision for the conditions of permissions to be varied such an application may only be made within the period specified. There is a substantial issue relating to the 2011 development. WCC and the IP contend that it had been implemented by 2014, but the Claimant contends that it was not.

ii) Secondly, the IP now wants to build a different scheme. Most of the 2016 scheme was similar to the 2008/2011 proposal, but it included some additional works. When the planning application was submitted, it is contended by the Claimant that, whether or not the works involved were different, WCC failed to have regard to its newly adopted policy which was now very restrictive of basement development. WCC and the IP assert that it did.

5. I shall deal with the matter as follows:

i) Factual background

ii) Submissions of the Parties

iii) Findings of Fact, Discussion and Conclusions.

6. The building at 21 Charles Street is a Listed Building which has been identified as being in need of some repair. The works proposed to the building required both planning permission under *TCPA 1990*, and listed building consent under *LBCAA 1990*.

7. In 2008, the building had been the subject of a planning application (and Listed Buildings consent application) for

"External alterations to existing dwelling at 21 Charles Street and 21 Hays Mews including demolition and redevelopment of the mews building (retaining the front façade) to create sub-basement, lower basement, ground to second floors including a mansard roof in connection with the use of the building for residential purposes (Class C3)

……."

It was granted on 24th December 2008 subject to conditions. Albeit not stated within the permission, it included a condition pursuant to s 91 *TCPA 1990* that it be commenced within 3 years.

8. During the course of 2010-1, unauthorised work was carried out to the façade. It had been repointed without the requisite approval being gained under the 2008 consent. On 11th May 2011 the WCC Planning Enforcement Team wrote to the owner requiring that the brickwork be repointed, failing which formal enforcement action, including the issue of a listed building enforcement notice, would be taken. Some works were carried out (the extent, nature and timing appear below). It is not suggested that the 2008 permission was ever implemented.

9. In 2011, an application was made under s 73 *TCPA 1990* to carry out the development without complying with the original implied condition as to the commencement of the development. On 22nd September 2011 permission was granted subject to conditions. They included the following:

i) Condition 2 read

"You must apply to us for approval of full particulars of the following parts of the development:

All works to front façade brickwork.

You must not start any work on these parts of the development until we have approved what you have sent us."

ii) Condition 3 applied a similar approach to approval of facing materials, and prevented work on those parts of the development until approval had been gained.

iii) That permission also omitted the condition required by s 91 *TCPA 1990*, but it was again implied.

10. It is necessary to identify what was proposed on the front façade. The Plans (i.e. as approved in 2008 and 2011) show that the existing rainwater and soil vent pipes in the centre of the front façade were to be removed. Those pipes ran down the centre of the front façade, running to the left side of the front door (as viewed from inside), and between the second and third of the sets of four windows running across the façade at first and second floor level. The "Design and Access Statement" of 2008, put in before me by the IP and relied on by it and by WCC (which formed part of the application, and is referred to on the face of the permission) shows the provision of new cast iron pipes close to the edges of the façade. The Plan in that statement shows that at the top of the pipes to be removed, there would be the repair of brickwork above the cornice of the building. The statement at paragraph 2.0 refers to some reinstatement being required around the hopper head, and new work to form the new position for the rainwater hopper head outlet. The soil vent pipe was to be rerouted internally.

11. That statement also gives descriptions of the work involved on the front façade at first floor level. The removal of the pipework would involve the making good of existing holes in the balcony, the making good of the holes for the

central pipes in the cornice, and the cutting of holes in the cornice for the new pipes. A description of the materials to be used is given, stating that where the fabric is to be repaired or replaced, materials will be reused if possible. So far as brickwork is concerned, it would be carried out in reclaimed matching London stock brick if possible, and lime mortar. There is nothing in the approved plans or application that describes any large scale replacement of brickwork to the frontage.

12. The effect of Conditions 2 and 3 was to require submission of further detailed proposals. Such conditions are commonplace on schemes relating to a Listed Building. The Plans approved (see in particular Plan D01) are consistent with the above description.

13. I shall in due course set out my conclusions on the meaning and effect of the permission.

14. I was taken by Mr John Steel QC for the IP through the work which was said to have been carried out to the front of the building:

i) The central downpipes were removed, and replaced by a new single pipe, also placed centrally;

ii) Repairs were carried out to the brickwork where the pipe had been removed, and some patching carried out beneath windows, and in the basement;

iii) It is stated in evidence by Mr Nazir Ali put in by the IP that there was large scale replacement of brickwork on the front façade'

iv) No plans were submitted to WCC in compliance with the conditions.

15. It is necessary to consider also the involvement of the officers from WCC, and in particular Mr Robert Ayton MA, MSc. MRTPI, IHBC, who is Head of Design and Conservation in the Central Area Team of WCC. According to his evidence, he visited the building in 2014 to inspect the "completed repointing works." He described the removal of the ribbon pointing (the subject of the earlier complaint) and its replacement by more appropriate pointing. Consents were then granted in 2014, which were made on applications submitting details discharge Condition 2. The applicant IP described the work as "repair and repoint the front façade."

16. One of the documents relating to the submission of the application is a file note of a meeting between the IP's architects, Messrs Fielden and Mawson, and Mr Ayton and his team, on 7th May 2014. It describes the front elevation as being "*cleaned up and repointed.*" That meeting records the fact that the work had been done in breach of the condition, but that a retrospective application could be made to discharge that condition. That approval was granted on 8th September 2014 under delegated powers. Thus, the work done to the facade, which should have been approved in advance by virtue of conditions 2 and 3, was now approved.

17. The IP now wanted to apply for a different scheme, which included a new storey added to a link between the two buildings. Mr Ayton stated in an email of 9th February 2016 to the IP and its architects

"There is a problem I am afraid…….

Your proposals now include the addition of a new storey to the link. These are changes that are much more significant than non-material or other minor amendments.

Therefore I am afraid that you need to apply for the whole scheme, as revised. Applications for planning permission and listed building consent are required.

Clearly, in our assessment we will only focus on the revised elements, because the rest has consent……..."

As I shall come to, it was common ground that that does not reflect the proper position in law.

18. The application as made sought a variation of the 2011 permission to permit an extension of time for the development, and for the redesigned link, albeit that the extra storey was not now included.

19. Meanwhile the revision to the Westminster City Plan was moving towards the final stages of its approval process. It was adopted in July 2016, having gone through examination, and is part of the Development Plan for the purposes of Part III of *TCPA 1990*. It applied a new policy on Basement Development (CM28.1). That policy was accompanied by a substantial reasoned justification. Basement developments had caused concern in various respects, including the effect of the disruption extending over a lengthy period. This passage appears therein:

"The construction works associated with basement excavation can often have a serious impact on quality of life and often last longer than other residential extensions with the potential to cause significant disruption to neighbours during the course of works. This has led to significant concern and complaints from local residents in Westminster in recent years. Planning has limited powers to control the construction process and its impacts and must take account of overlap with other regulatory regimes, but it does have an important role in protecting amenity. Applicants for basement development must therefore demonstrate reasonable consideration has been given to potential impact of construction on amenity and this is linked to the council's emerging Code of Construction practice which seeks to create a clear link between planning and other relevant legislation and processes, ensuring these work together and issues are followed through and enforced where necessary.

Work to basement vaults can restrict the space available for services in the highway and may make it difficult to access cables, pipes, sewers, etc. for maintenance and to provide essential items of street furniture. In order to ensure that services and essential street furniture can be provided, adequate space must be available between the highway and any excavation proposed under the highway."

20. The policy itself falls into four parts, of which A and C are relevant.

i) Under part A, all applications are required to be accompanied by a detailed structural methodology statement. All applications are required, inter alia, to be designed and constructed so as to minimise the impact at construction and occupation stages on neighbouring uses and the amenity of those living or working in the area, on highway users and

traffic and highways.

ii) By part C, basement development to existing residential buildings, or in new build residential development adjoining residential properties where there is the potential for impact on those properties

"will

(1) - (2) …….

(3) not involve the excavation of more than one storey below the lowest original floor level, unless the following exceptional circumstances have been demonstrated:

(a) that the proposal relates to a large site with high levels of accessibility such that it can be constructed and used without adverse impact on neighbouring uses and the amenity of neighbouring occupiers.

(b) that no heritage assets will be adversely affected."

21. Patently, this development fell to be considered against that policy. It proposed a very substantial basement extension, with the creation of two new basement floors. The top basement floor would contain a kitchen, laundry cinema and TV room, games room, gym and the upper part of a double storey swimming pool. A new lift in the Hays Mews area would pass through it. Below that would be a floor with a sauna, steam room, hot tub and the lower part of the swimming pool space, and below that another floor containing plant. The lowest floor (which is rather smaller) would contain plant and the base of the lift shaft.

22. On 11th May 2016 Ms Paula Kelly, the agent for the Claimant, had raised with Mr Ayton the issue of the basements. On the same day Mr Ayton informed her that the current applications were "*for relatively minor changes*" to an existing planning permission (that of 2011) and that the majority of the works had been approved previously, including the basements. She pressed the point, asking whether he was saying that neighbours could not object to the basement level extensions, and received this reply:

"You can object, but since we have approved it already (and it can be built) your objection is unlikely to have much weight I am afraid."

23. On 8th August 2016 an officer's report was prepared. This was a delegated matter, so did not go before any committee of members. It recited the planning history. While the WCC Unitary Development Plan was referred to, Policy CM28.1 was never addressed in the Report. A report was also made on the application for Listed Building consent.

24. The planning application decision notice includes the conditions. It does refer to many Development Plan policies, but not CM28.1. However, the Listed Building Consent, issued the same day, includes an "Informatives" section, which states that it took into account, among polices of "particular relevance" Policy CM28.1, and it states that

WCC has had regard to, inter alia, *NPPF*, and the City Plan of July 2016 (including the Basements Revision).

25. On 1st September 2016 the Claimant's agent Ms Paula Kelly asked Mr Ayton and his assistant Mr Giles

" whether if a fresh application were required whether the Council would have permitted it in light of the Council's latest policy on the development of basements in Westminster."

The answer was given that WCC considered that the 2011 permission had been implemented through the works to the façade. When Ms Kelly pressed her point, she received this response from Mr Ayton on 7th September 2016

"I think it is likely such a proposal would be refused if it was submitted as a new application today.

This is of course a purely academic question given that, in our opinion, the planning permission and listed building consent have been commenced."

26. Against that background, these proceedings have been issued.

The Claimant's case

27. The logic of Mr Lockhart-Mummery QC's argument is

i) The development permitted in 2011 was never commenced within the terms of the conditions and of the Act. WCC's treatment of it in 2016 as extant was erroneous, and thus there was no basis in law for an application or grant under s 73 *TCPA 1990*;

ii) Even if the development had been commenced the revised scheme had to be considered against the new Development Plan policy, and was not. WCC wrongly assumed that all it had to address were the changes in the scheme then proposed.

28. He also argued grounds relating to the treatment of the application in the context of s 16(2) *LBCAA 1990* and *NPPF*.

29. Mr Lockhart-Mummery therefore argued the following grounds.

Ground 1:

30. The 2014 application was made pursuant to s 73 *TCPA 1990*. That provision may only be used if the 2011 permission remained extant. In fact, it had expired because none of the development permitted by it had been commenced. S 56 *TCPA 1990* sets out when that occurs. For the purposes of s 91 s 56(3) states that development shall

be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. It follows that the works in issue must be comprised within the development for which permission was granted. By s 56(4) "material operation" is defined as

(a) any work of construction in the course of the erection of a building;

(aa) any work of demolition of a building……"

It is accepted that in *Field v First Secretary of State* [2004] EWHC Admin it was held that in exceptional cases the carrying out of an act of development permitted by the permission may operate to begin permitted development.

31. On 7th May 2014, a file note of a site visit by the WCC officers (including Mr Ayton) and the IP's architects describes the front elevation as having been "cleaned up and repointed." That work was discussed in the context that it was work included in the permitted development.

32. In a letter from the IP's architects to WCC on 18th August 2014 work done to the façade was described as (work to) "repair *and repoint the front façade. This work was completed by November 2011*." The letter called them "*repair works*." The application by the IP of 18th August 2014 for approval of details, described the work done as

"Wash down brickwork with weak acid

Cut out existing brick and review (50 nr)

Rake out and repoint ribbon fashion pointing with flat, twice cut top and bottom and both side of perps (sic)

Additional brick replacements

Brick replacements to left hand side of front door

Change style of pointing- rake out and repoint brickwork, tuck style pointing"

That application also stated that the development had started on 1st January 2011.

33. Mr Ayton's own evidence for WCC describes the work done as "*repointing works*." The plans referred to do not show any works to the brickwork of the façade, save as previously described. The works of pointing carried out, even if as substantial as the IP now claims, were not works for which permission had been granted. They were works of repair, not works of construction in the course of the erection of a building. No demolition was permitted by the permission, nor was any demolition carried out. One cannot describe the replacement of bricks on the scale noted here (50) as demolition. Further the works relating to the provision of the current central pipe have nothing to do with what was

permitted, which was for the removal of the central pipes, and the provision of rainwater pipes at the edges of the house, and the soil pipe rerouted internally.

34. The taking down of walls cannot be relied on as a work of construction in the course of the erection of a building- see *Ceredigion CC v Nat Assembly for Wales* [2001] EWHC Admin 694 [2002] 2 P & CR 6 at [19] per Richards J.

35. A ground argued in the Claim (Ground 1(3)) that no approval had been sought under a condition relating to waste storage was no longer pursued in the light of the evidence filed by WCC.

Ground 2

36. It is common ground that on a s 73 application the LPA was obliged to comply with s 70(2) *TCPA 1990* and s 38(6) of *PCPA 2004*. Thus, it had to have regard to the development plan and any material considerations (s 70(2) *TCPA*) and then determine the application in accordance with the development plan unless material considerations indicated otherwise (s 38(6) *PCPA*). Reference was made to *Pye v Sec of State for the Envt* [1998] 3 PLR 72, approved in *Powergen UK PLC v Leicester City Council* [2000] JPL 1037 [2001] 81 P &CR 47 (CA) per Schiemann LJ. While the 2011 permission was a matter to be considered in 2016, the 2016 application still had to be determined in accordance with the statutory tests.

37. WCC wrongly misdirected itself in taking the position that the 2011 permission can be built, so that the objections to the development proposed in the 2016 application can be set aside. If the 2011 permission were extant (i.e. if Ground 1 fails) then the 2011 permission can be implemented. But in fact the development now applied for and permitted is a materially different form of development, not capable of being built under the 2011 permission. The 2011 permission was a material consideration, but that did not result in WCC being relieved of the duty to consider the whole of the now proposed development against the development plan and all other material considerations.

38. WCC had fundamentally misdirected itself, as shown in the emails. Further, before the Court its counsel had argued that an LPA could not “claw back” an earlier consent. That is illogical. If the previous permission had been implemented in time, the refusal or grant of a later application could not “claw it back.” This error informed the officer's report which stated that the elements of the 2011 permission “*do not form part of this proposal*.” WCC's arguments are exactly those rejected in *Pye* and *Powergen*.

39. There was an unequivocal Development Plan policy (CM28.1), which the 2016 proposal would breach. The application was accompanied by none of the required technical information, and was clearly in breach of paragraph C 3(a) and (b). The new policy on basement development should have been addressed, but was not had regard to. It goes entirely unmentioned in the officer's report. Its only mention is in a formulaic note appended to the Listed Building Consent. Given the view of Mr Ayton that permission for the building works would have to be refused if submitted as a fresh planning application, it is not credible that the policy was had regard to. There is not even a discussion of whether an exception should be made to it.

40. It is incumbent on the decision maker to establish whether a proposal accords with the development plan as a whole- see Lindblom LJ in *SSCLG v BDW Trading Ltd* [2016] EWCA Civ 493 at [20]- [23].

41. Since the proceedings were issued, Mr Ayton has put in a witness statement asserting that he and his colleague Mr Giles did take account of the new policy. No regard should be had to that witness statement. The time for setting out the reasoning of the decision maker was in the officer's report. Reference was made to *Shasha v Westminster City Council [2016] EWHC 3283* and to *R (Ermakov) v Westminster City Council* [1996] 28 HLR 819.

42. Further, WCC failed to comply with its duty under s 66 LBCAA 1990, and also failed to have regard to a material consideration, namely the policies in *NPPF* on listed buildings.

Ground 3

43. The Listed Building application also required consideration in the light of the Development Plan, including the policy CM 28.1, and in the light of *NPPF*. Further, WCC was bound, but failed, to consider the requirements of s 16(2) *LBCAA 1990* in respect of the whole building. The matters under Ground 2 in relation to the grant of planning permission are repeated in the context of Listed Building Consent.

The case for Westminster City Council

44. Before turning to the specific grounds, Mr Lewis submitted in his skeleton that

i) The exercise of planning judgement and weight are for the decision maker and not the Court: *Seddon Properties v Sec of State for Envt* [1981] 42 P and CR 26. A s288 *TCPA* (and therefore also a judicial review) challenge is not to be used as a cloak to rerun a case on the planning merits, and a claim that an Inspector (or LPA) has reached a *Wednesbury* unreasonable conclusion faces a particularly daunting task (*Newsmith v SSETR* [2001] EWHC Admin 74 per Sullivan J).

ii) A material consideration for the purposes of s 70(2) *TCPA 1990* and s 38(6) *PCPA 2004*, is one which might cause the decision maker to reach a different conclusion if he had taken it into account; *Bolton MBC v Sec of State for Envt* [1991 61 P and CR 343@352 per Glidewell LJ. The question whether a particular factor is material is a matter for the Court, but the weight to be given is a matter for the decision maker: *Tesco Stores Ltd v Sec of State for Envt* [1995] 1 WLR 759 (HL) per Lord Keith @ 764G-H;

iii) A previous grant of planning permission is capable of being a material consideration: *N Wilts DC v Sec of State for Envt [*1992] 65 P and CR 137. The “fall-back” position - i.e. that a previous planning permission could be implemented -must be taken into account: *R(Ahern) v Sec of State for Envt* [1998] JPL 357;

iv) The interpretation of Development Plan policies is for the court, but their application, which involves questions of judgement, is for the decision maker. Their provisions should not be construed as if they were statutes or contracts: *Tesco Stores Ltd v Dundee City Council [2012]* UKSC 13 per Lord Reed including at [19] reliance on *Tesco v Sec of State for Envt* [1995] 1 WLR 659@780 per Lord Hoffman;

v) Reference was also made to R (Goodman) v Lewisham LBC [2003] EWCA Civ 140 and R (Wye Valley Action Assoc) v Herefordshire Council [2011] EWCA Civ 20;

vi) A planning officer granting permission under delegated powers is required to give reasons for his decision, pursuant to Reg 7 of the *Openness of Local Government Bodies Regulations 2014:* see *R(Sasha)v Westminster City Council* [2016] EWHC 3283 at [27]- [31].

vii) Reference was also made to *S Bucks DC v Porter (No 2)* [2004] 1 WLR 1953 on the giving of reasons by the Secretary of State or his Inspectors in Decision Letters.

Ground 1

45. The 2011 permission was commenced by virtue of the works to the front façade. *Malvern Hills DC v Sec of State for Envt* [1982] JPL 439 CA (the case about pegging out the line of an access road) shows that one should adopt a benevolent approach, and that very little was required to satisfy the requirements of what is now s 56 *TCPA 1990.* Reference was also made to *Field v First Secretary of State* (supra) per Sullivan J at [41]- [46].

46. WCC was entitled to regard the works to the façade as "works in the course of erection of a building" which is a material operation for the purposes of s 56(4). WCC had required that they were the subject of Condition 2 of the original 2011 planning permission and listed building consent. The 2016 officer's report sets out that it was considered that the works were retrospectively approved, and materially implemented the permission.

47. In any event the works involved more than just "cleaning and pointing." Mr Ayton's evidence showed that it amounted to the replacement of all the objectionable pointing carried out in 2010. The evidence of Messrs Ali and Maric for the IP shows that the façade was cleaned and repaired. It follows that works of "construction" and "demolition" were carried out before the permission expired. The Council's interpretation lies within the range of reasonable responses to the question, as per *Goodman* and *Wye Valley*.

Ground 2

48. WCC did take the new Development Plan policies into account. The policies of the Development Plan on urban design and conservation are referred to in the delegated report on the planning application, and in the reasons for the imposition of condition. The reference to the previous version of the Plan (City Plan 2013) was a pro forma reference not updated by the WCC software.

49. It was accepted that the issue raised in policy CM 28.1 was not in fact addressed in the officer's report, but that does not mean it was not taken into account. It was taken into account. The listed buildings consent states in the "Informative" that it was of particular relevance. An LPA does not have to recite the fact that a proposal accords with the Development Plan: see Lindblom LJ in *SSCLG v BDW Trading Limited* [2016] EWCA Civ 493 at [27]- [39].

50. The 2011 permission was a material consideration. As it had been implemented it could not be "clawed back" (sic). That distinguished this case from *Pye* and *Powergen*.

51. The differences between what was permitted in 2011 and what was applied for in 2016 were not "significant" or "materially different" as the Claimant avers. The officer gave the apt description of them as "minor material amendments." The basement excavations as between those proposed in 2008 and in 2016 show no significant change. It is for these reasons that the officers focused on the revised elements and why they had thought it "academic" that it was "likely that the 2016 proposal would have been refused if submitted as a new application today."

52. The 2011 permission was a relevant consideration. The Council was entitled to, and did, consider the "fallback" position that if the 2016 application were refused, the 2011 permission could be implemented.

53. As to the alleged failure to perform the duty under s 66(1) *LBCAA 1990*, the fact that it is not recited is not fatal, provided the duty has actually been performed: *Jones v Mordue* [2015] EWCA Civ 1243 [2016] JPL 476, [2016] 1 WLR 2682, [2016] 1 P &CR 12 per Sales LJ at [26] to [29], and *R(Garner) v Elmbridge BC* [2011] EWCA Civ 891 at [8] per Sullivan LJ. The officers were patently well aware of the fact that they were dealing with a listed building which adjoined another.

54. All the above is supported by the documents in any event, without reference to Mr Ayton's disputed witness statement. *Ermakov* does not render all of a statement such as this as inadmissible- see *Sasha* at [43].

55. Even if all the matters said in Ground 2 not to have been addressed, had been addressed, it is unlikely that the decision would have been any different.

Ground 3

56. The same points with regard to the consideration of the Development Plan, and the consideration of s 66 *LBCAA 1990* are taken under this ground.

57. NPPF added nothing new to the way in which the significance of heritage assets had to be considered. That was the case under the predecessor policies in PPS 5.

58. Even if all the matters said in Ground 3 not to have been addressed, had been addressed, it is unlikely that the decision would have been any different.

The case for the Interested Party

59. Mr Steel QC adopted the submissions already made by Mr Lewis. He concentrated on what the IP saw as the implementation of the 2011 permission by virtue of the works to the façade.

60. By virtue of s 336 *TCPA 1990* "building" includes any structure or erection, and any part of a building, ……" and "erection" in relation to buildings as defined in the subsection, "includes……..alteration and re-erection." S 56(4) defines "material operation," which includes "any work in the course of the erection of a building" and "any work of demolition of a building."

61. The question of whether the works done were comprised within the development involves a question of fact and degree. They may include works which are ambivalent in nature and not unequivocally referable to the planning permission in question: see Ouseley J in *Commercial Land Ltd v SSETR* [2002] EWHC 1264 (Admin), followed in *Green v SSCLG* [2013] EWHC 3980 (Admin) per Cranston J and *Silver v SSCLG* [2014] EWHC 2729 (Admin) per Supperstone J.

62. The works here consisted in part of the alteration and re-erection of the façade, which counts as works of construction in the course of the erection of a building by virtue of the definitions in s 336(1) *TCPA 1990.* They also constituted works of demolition, as occurred here. "Demolition" in s 56 does not have to be as extensive as "demolition" constituting development.

63. A low threshold was set by Parliament in s 56(2): see *Field* at [41] per Sullivan J. The test in law is whether the works are more than *de minimis*: see *E Dunbartonshire CC v Sec of State for Scotland* [1999] SLT 1088 at 1094, endorsed by the Court of Appeal in *Staffs CC v Riley* [2001] EWCA 257 at [28] per Pill LJ.

64. Mr Steel took me through the works carried out to the façade. He submitted that the fact that Conditions 2-4 were included in the consent showed that such works created a necessary implication that they were part of the development.

65. The need for the work was discovered after the 2008 access and design statement had been submitted. The application in 2014 for approval of details, in its reference to brickwork, was a shorthand reference to work already carried out; see the terms of the application (Bundle C/86).

66. The work of removing the pipework and of replacing brickwork amounted to material operations for the purposes of s 56. The roof was also rebuilt in part. 50 tiles were replaced, which suffices for an operation under s 56.

Ground 2

67. The new policy is referred to on the Listed Buildings consent. It was unnecessary to list the polices one had regard to, especially when the report was not going to members.

68. There is no evidence of any prospect of problems being caused to neighbours by the construction of basements. There are conditions in the permission which address matters such as noise.

Reply by Mr Lockhart-Mummery QC

69. There was no jurisdiction to consider the 2016 application unless there had been material operations for the purposes of s 56. Whether or not there had been such works is a matter for the decision maker, which in this case is the court: see *East Dunbartonshire* at p 1094 and *Field.* The fact that approval of details was given in 2014 cannot affect that question.

70. The erection of the central downspout cannot be relevant. It is not shown in the application plans, which replaced the central pipes with an internal one (soil pipe) and two at the side \(rainwater|).

71. Mr Lewis' submission that this development would have been permitted anyway is untenable in the light of the new policy CM28.1

Discussion and Conclusions

72. There are in my view the following relevant issues:

i) What was required to implement the 2011 planning permission?

ii) Who decides whether the permission has been implemented: the local planning authority or the court?

iii) Were works carried out which implemented the 2011 permission?

iv) Did the WCC officers have regard to policy CM28.1 in considering the 2016 application?

v) If not, should the Court quash the permission?

73. To set those issues in context, it is necessary to identify the relevant legal principles affecting decision making. In determining a planning application, an LPA must

i) have regard to the statutory Development Plan (see s 70(2) *TCPA 1990*);

ii) have regard to material considerations (s 70(2) *TCPA 19*90);

iii) determine the proposal in accordance with the Development Plan unless material considerations indicate otherwise (s 38(6) *PCPA 2004*);

iv) consider the nature and extent of any conflict with the Development Plan: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [22] per Lord Reed;

v) consider whether the development accords with the Development Plan, looking at it as a whole- see *R(Milne) v Rochdale MBC (No 2)* [2000] EWHC 650 (Admin), [2001] JPL 470, [2001] Env LR 22, (2001) 81 P & CR 27 per Sullivan J at [46]- [48]. There may be some points in the Plan which support the proposal but there may be some considerations pointing in the opposite direction. It must assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it; per Lord Clyde in *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] UKHL 38, [1997] 1 WLR 1447, 1998 SC (HL) 33 cited by Sullivan J in *R(Milne) v Rochdale*

MBC (No 2) at [48];

vi) apply national policy unless it gives reasons for not doing so- see Nolan LJ in Horsham District Council v Secretary of State for the Environment and Margram Plc [1993] 1 PLR 81 following Woolf J in E. C. Gransden & Co. Ltd. v. Secretary of State for the Environment [1987] 54 P & CR 86 and see Lindblom J in Cala Homes (South) Ltd v Secretary of State for Communities & Local Government [2011] EWHC 97 (Admin), [2011] JPL 887 at [50];

vii) 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: s 66(1) *LBCAA 1990.*

74. As is well known, planning permissions are not open ended. They must (s 91 *TCPA 1990*) contain a condition requiring that the permission is implemented during a specified time period: in this case three years. It is perhaps important to note that s 91(1) describes it thus (my italics):

"(1) Subject to the provisions of this section, every planning permission granted or deemed to be granted shall be granted or, as the case may be, be deemed to be granted, subject to the condition that *the development to which it relates* must be begun not later than the expiration of—

(a) three years beginning with the date on which the permission is granted or, as the case may be, deemed to be granted; or

(b)such other period (whether longer or shorter) beginning with that date as the authority concerned with the terms of planning permission may direct."

75. It may happen that, for whatever reason, that condition cannot been complied with. Like other conditions, application may be made to vary it. By s 73

"Determination of applications to develop land without compliance with conditions previously attached.

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

(3) ……

(4)This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

(5) …….”

76. S 56 of *TCPA 1990* is relevant by s 56 (2) and (3). It is helpful to set out s 56 (1) to (4)

“Time when development begun.

(1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated—

(a) if the development consists of the carrying out of operations, at the time when those operations are begun;

(b) ……..

(c) …….....

(2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

(3) The provisions referred to in subsection (2) are sections….. 91……

(4) In subsection (2) “material operation” means—

(a) any work of construction in the course of the erection of a building;

(aa)any work of demolition of a building;

(b) –(e)……..”

77. As noted in the submissions made to the Court, in *Field v First Secretary of State* [2004] EWHC Admin it was held that in exceptional cases the carrying out of an act of development permitted by the permission, but outwith the list in s 56(4), may operate to begin permitted development for the purposes of s 56(2).

78. While the terms of s 56 were the subject of extended submissions before me, in my judgment the critical question in this case is whether the operations relied on by WCC and the IP amounted to "any material operation comprised in the development" which is the fundamental test set out in s 56(2) of TCPA 1990,

79. What did that involve? Plainly, it included any material operation specifically identified in the planning application. But what if the restoration and alteration of the building turned out to require more works than had been applied for? Here, it is relevant to consider what was proposed to the façade. There can be no doubt that the works shown to the brickwork in the application and its plans were very limited. However, there are few restoration projects where those executing them do not find that more work is required than anticipated. This permission expressly permitted the execution of works to the façade, and Condition 2 attached to the consent certainly allowed for works which had not yet been precisely determined to be approved.

80. It follows then that the issue relating to the brickwork is not simply one of whether it was shown on the plans or described in the design and access statement. It need not have been for the reason just given, but to qualify it still had to be an operation within the meaning of s 56(4) or fall within the exceptional commencement operation of the type addressed in *Field*. Above all, it had to be an operation referable to the development. I do not thereby intend to apply a test of intention (which is without question irrelevant) but to consider whether it was referable, as in *Staffordshire County Council v Riley & Ors* [2001] EWCA Civ 257 [2001] JPL 1325.

81. I have noted the evidence filed by the IP contending that there was substantial work done throughout the façade. Given the contemporaneous descriptions given by the Architects, the planning applications and the Planning Officer, I place no weight on it. Much more helpful was Mr Steel QC's taking me through the work in question, and the photographic record.

82. I find the following:

i) pointing had been carried out to the building which had harmed its appearance. WCC wanted it to be repointed in any event, and threatened enforcement proceedings if it were not carried out. the building was repointed in 2010-1 before the period when it was suggested that referable works were carried out;

ii) the removal of the pipework involved some inevitable effect on the fabric, but nothing that could be called demolition. A few bricks were disturbed or removed when the stanchions were removed, but then made good. It would be absurd to describe that as demolition;

iii) the replacement of the pipes did not take place as shown in the application or permission. So far as the brickwork is concerned, it consisted of making good of some very limited areas, totalling no more than 50 bricks in a brick façade of considerable size;

iv) the replacement of about 50 tiles is similarly a matter of making good;

v) some of that work was carried out after 22nd May 2011. Work carried out before that date is irrelevant, as neither party contends that the 2008 permission was ever commenced.

83. But my findings of fact on the issue of the commencement of works must relate to more than the disputed items of work themselves. The application of 28th July 2011, which sought an extension of the time for commencement of the 2008 consent, was sought and granted on the basis that none of the works thus authorised had been commenced. I also find as a fact that WCC as LPA treated the work carried out between January and November 2011, as described in the application for approval of details submitted on 18th August 2014, as works authorised by the 2011 permission. Some of it occurred after the date of the 2011 consent. Further no challenge has been made at any time to the reserved matters consent of 2014. If the Claimant is right in his claim now that no works comprised in the permitted development had occurred, then the 2014 approval of details was itself open to challenge. It was granted on 8th September 2014 shortly before the permission was due to expire. A judicial review challenge could have been made, and been promptly made, after the 22nd September 2014.

84. That has another significance. The developer IP has submitted that application, and had it approved by the local planning authority, on the basis that the work carried out was works to the façade of the kind whose approval was required under Condition No 2.

85. I have set out my conclusions on the factual matters. If I were the decision maker, I would be very attracted by the factual conclusions which the Claimant's seeks to persuade me are to be drawn. Mr Lockhart-Mummery submits that this court is the fact finder for the purposes of determining whether there was jurisdiction to consider the s 73 application. I accept that submission up to a point. This Court may have to find facts which are disputed and which have not themselves been determined within the planning history. But if a decision in that planning history has been made on a particular factual basis which is alleged to be erroneous, then the time for challenging it was at the time it was made, and not two years' later in the context of a further discrete application. That is in essence what the Claimant's claim is seeking to do, which in my judgement is impermissible. Even if I had thought that it had merit, I would decline to exercise my discretion to quash the 2016 decision on this ground.

86. I therefore dismiss the Claim under Ground 1.

87. I turn now to the other main basis of Mr Lockhart-Mummery's case, namely the alleged failure to address Policy CM28.1. Here he is on much firmer ground.

88. There can be no doubt that this proposal involved the provision of basements, and that it was caught by the new policy CM28.1. WCC was bound to have regard to it. What is also quite clear, and I so find, is that the WCC officers had approached this application in an entirely inappropriate mindset. The email of 9th February 2016 that "*There is a problem I am afraid*…….

Your proposals now include the addition of a new storey to the link. These are changes that are much more significant than non-material or other minor amendments.

Therefore I am afraid that you need to apply for the whole scheme, as revised. Applications for planning permission and

listed building consent are required.

Clearly, in our assessment we will only focus on the revised elements, because the rest has consent……..”

contains a very straightforward error of law. As *Pye* and *Powergen* make clear, the whole scheme now applied for had to be considered in accordance with the relevant tests. I do not accept Mr Ayton's evidence, submitted since the challenge was made, that in fact he and his officers did have regard to Policy CM 28.1 That policy was well advanced towards adoption when that email was written. Mr Ayton's emails of 11th May and 7th September 2016 to Ms Kelly bear out the fact that he was directing his mind only to the fact that there was an extant permission, and that all they were addressing were the changes.

89. In most cases it is a straightforward matter to approach them on the basis that policies not referred to in the planning officer's report could still be taken as having been had regard to. This is not such a case. It is on any view remarkable that a policy of such obvious and direct application to the proposal earned not a single mention in the report on the planning application, not least when an objection had been made which specifically referred to it. Its only appearance was in the informative to the listed building consent, to which it was much less relevant. Mr Ayton knew exactly what importance it had when noting that, had the application been made for the first time, it would have been refused.

90. I also reject as misconceived the submission that one could not “claw back” the earlier consent. The world is full of schemes where a subsequent change in planning policy meant that they would not be approved if resubmitted. Indeed, that was exactly the climate which existed in the late 1970s and early 1980s when schemes approved under older planning regimes would be refused under newer ones, which led to many of the cases on whether operations had been commenced. Changes in circumstance can relate to the facts on the ground, or the policy climate, or both. The duty of WCC was to assess this application against the Development Plan as it stood in 2016 and all material considerations as at that date. Given the terms of s 38(6) *PCPA 2004*, the starting point was the development plan policy, and it was then for WCC to determine if material considerations justified a different outcome.

91. One such consideration, and no doubt one to which WCC might have wanted to ascribe great weight, was the fact that there was a permitted scheme in existence, which if it went ahead would include the restoration of the listed building. It may be that, on applying s 70(2) *TCPA 1990* and s 38(6) *PCPA 2004* that fallback position would have outweighed the clear objective of CM 28.1 of preventing a development with basements such as these from being built, with the consequent disruption of the street scene and of neighbours for an extended period. But assessment of the weight to be given to the fallback position must have looked at the likelihood of it going ahead without the proposed 2016 amendments, and of the likelihood of a scheme not going ahead which would not have included basements of the scale proposed here.

92. Those considerations were simply never explored by WCC. I do not suggest what weight should be given, nor how the competing advantages or disadvantages should be weighed the one against the other, or the s 38(6) balance determined. That is a matter for the local planning authority, and not for the Court.

93. Ground 2 therefore succeeds, subject to consideration of whether the decision would have been the same in any event.

94. As to Ground 3, I do not consider it arguable that WCC was not aware of the fact that it was dealing with listed buildings, and that therefore it had to address matters under s 66 *LBCAA 1990*. I also consider that there is nothing in *NPPF* which serves to undermine that aspect of the decision making process.

95. I return therefore to the effect of my conclusions on Ground 2. Given my conclusion that WCC approached this case with the erroneous mindset that it could not refuse permission for something which was in large part already approved, I do not consider that this is a case where I can conclude that, had it approached its duties in accordance with the law, the outcome would have been the same.

96. I therefore quash the permission. As to the listed building consent, it must go hand in hand with the permission. I therefore quash it as well.

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