Neutral Citation Number: [2023] EWHC 879 (Admin)

Case No: CO/1428/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

REDROW HOMES LIMITED

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

First Defendant

and

NEW FOREST DISTRICT COUNCIL

Second Defendant

- -
- -

Mr Killian Garvey (instructed by **Redrow Homes Limited**) for the **Claimant**
Mr Riccardo Calzavara (instructed by **Government Legal Department**) for the **First Defendant**
The Second Defendant did not attend and was **not represented**

Hearing dates: **22 March 2023**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a claim under s.288 of the Town and Country Planning Act 1990 ("TCPA") against a decision of a Planning Inspector who determined an appeal under s.78 TCPA. The appeal related to Lymington Shores, Bridge Road, Lymington SO41 9BZ ("the Site"). The Local Planning Authority ("LPA") for the site is the New Forest District Council.

Background to the Appeal

2. On 14 June 2012 the LPA granted planning permission in respect of the Site for the following description of development ("the Original Permission"):

> *"Mixed use development comprised: 168 dwellings; restaurant; retail/commercial space (Use Class A1 & A2) boat club; art gallery (Use Class D1); jetty with pontoon; access alterations;* ***pedestrian bridge over railway****; riverside walkway; car parking; landscaping; drainage."* [emphasis added]

3. The description of development in the Original Permission therefore included the grant of permission for a pedestrian bridge over a railway.

4. The Original Permission was granted subject to 35 conditions, including Condition 19, which said:

> *"Written documentary evidence demonstrating that any residential building has met Code Level 3 shall be submitted to the Local Planning Authority and verified in writing prior to the occupation of any residential building, unless an otherwise agreed time frame is agreed in writing by the Local Planning Authority. The evidence shall take the form of a post construction certificate as issued by a qualified Code assessor.*
>
> *Reason: In the interests of sustainable development, including resource use and energy consumption in accordance with policy CS4 of the Core Strategy for the New Forest District outside the National Park."*

5. A planning obligation under s.106 of the TCPA was entered into (dated 12 June 2012) which imposed the following obligations on the Claimant ("the Original Obligation"):

   i. not to occupy open market dwellings prior to submission of specifications of the footbridge and lift (4th Schedule paragraph 4.1);

   ii. to comply with the terms of an agreement reached between Redrow and Network Rail on 26 March 2010 for the grant of a right to connect to Network Rail's signalling infrastructure and the option of an easement over the railway for the purpose of constructing and operation of the footbridge (4th Schedule paragraph 4.3);

iii. to construct and substantially complete the footbridge and lift prior to the occupation of the 75th open market dwelling (4th Schedule paragraph 4.4);

iv. to offer the footbridge for adoption (4th Schedule paragraph 4.5).

6. The Original Obligation included the 'trigger point' that the footbridge be constructed prior to the occupation of the 75th open market dwelling. There is no dispute that the 2012 planning permission was implemented and the dwellings have been built out.

7. On 23 May 2017, a deed of variation was entered into between the Council, Hampshire County Council and the Claimant, which varied the terms of the Original Obligation by moving the trigger point for the delivery of the footbridge to the occupation of 125th open market dwelling. The effect of this was that 17 open market units had to be left vacant by reason of the failure to deliver the footbridge.

8. On 16 October 2020, the Claimant submitted a s.73 TCPA application to the Council seeking to remove Condition 19 attached to the Original Permission. This was long after Condition 19 had taken effect but, as I understand it, not complied with. At that stage, the Claimant did not put forward any new s.106 agreement or obligation. The Claimant's Planning Hearing Statement included as follows:

> *"4.4 In summary, and as explained later, the Government has now withdrawn the Code for Sustainable Homes and it would therefore be unreasonable to require developers to comply with a standard that no longer exists and to obtain certifications that are no longer issued. It is understood from the Council's reasons for refusal and officer report that this is common ground between the Appellant and local planning authority.*
>
> *4.5 If the condition was not removed, then the properties would be occupied in breach of a condition which they could not comply with. Accordingly, the application sought to remove the condition to avoid the threat of future enforcement action."*

9. I note at this point that the Code for Sustainable Homes had been withdrawn and the properties had been constructed, so the practical effect of removing Condition 19 was minimal, if not non-existent. There is no dispute that the real purpose behind the s73 application was to seek to remove (or vary) the obligation to deliver the footbridge.

10. The Council accepted that it was appropriate to allow the Condition to be removed. However, the Council were concerned about the legal effect of removing Condition 19 on the requirement to provide the footbridge and refused the application. Their sole reason for refusal stated:

> *"This Section 73 application seeks the removal of Condition 19 of planning permission 11/97849. Whilst there is no objection to the removal of this Condition, the application would grant a new permission for the whole development, and as a consequence, planning permission should not be granted for this application without a new Section 106 legal agreement that secures necessary mitigation and infrastructure, in*

> *accordance with policy. Accordingly, in the absence of any Section 106 to secure all of the mitigation and infrastructure that is necessary to make the development acceptable, including the previously agreed footbridge and affordable housing, the proposed development would not deliver sustainable development and, as such, would be contrary to Policies STR1, HOU1, HOU2, ENV3, and CCC2 of the Local Plan 2016-2036 Part 1: Planning Strategy, Policy CS7 of the Core Strategy for New Forest District outside of the National Park, and Policy LYM10.7 of the New Forest District Local Plan Part 2 (2014) Sites and Development Management."*

11. The Claimant appealed this decision, and the appeal was dealt with at a hearing, with a number of written representations made to the Inspector both before and after the hearing.

12. The Claimant's statement of case dated 18 June 2021 stated at 4.7 onwards that they were prepared to enter into a new s.106 agreement but did not consider it necessary to require the last 17 completed dwellings to remain vacant until such time as the footbridge was delivered. They did not suggest that the s.106 delete reference to the footbridge, but rather stated that it should provide for a period of 2 years for the bridge to be delivered, failing which the Claimant would have to offer the Council the sum of at least £1 million which could be used to deliver the bridge.

13. The Claimant expressly accepted the possibility that the bridge might not be built, stating:

> *"8.40 There is little point in avoiding the question of what happens if the bridge is not delivered after a further 2 years. It is evident that there have been problems with the delivery of the bridge for many years. Even when the LPA took up the reins (with funding from the Appellant), they were unable to find a solution. Non delivery after another 2 years therefore remains a real possibility that cannot be overlooked."*

14. The Claimant suggested that it was effectively Network Rail's fault the bridge had not been built because of delays in reaching the relevant agreements with them.

15. The LPA responded by Statement of Case dated 2 November 2021. It made it clear that it accepted that Condition 19 could be removed "subject to all other Conditions that remain relevant and continue to apply, and subject to the [Obligation] being reimposed". It described the footbridge as:

> *"a necessary and intrinsic element of the appropriate and sustainable development of the site. The [Foot]bridge is not just an option to address modal shift, but forms an integral part of the development, envisaged from the outset and creating a sustainable place, linking the new Lymington Shores community to the existing town centre. … The provision of the [Footbridge] … is consequently considered fundamental".*

And it made the following remarks about the Claimant's conduct:

"The practical reality of the situation is that the [Claimant] is now seeking to use the S73 Application as a 'back-door' way to vary an aspect of the [Obligation] that has nothing to do with the substance of the S73 Application itself"."

16. The LPA statement included the following:

"5.5. The appellant has stated it was their opinion that the requirement for the railway bridge did not meet the legal tests set out within Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). The appellant has further asserted that the provision of the bridge was not necessary to make the development acceptable in planning terms and proposed (as an alternative to the provision of the bridge) a 'package of alternative improvements' which included:

- *tactile paving/dropped kerbs at the Bridge Road/Waterloo Road junction and in other areas within the town centre*
- *vegetation removal at Gosport Street*
- *minor alterations to the Bridge Road/Waterloo Road junction*
- *consideration of a formal pedestrian crossing at Gosport Street*
- *consideration of other minor highway/footway amendments in the town*

5.6 The Council has two principal concerns with the argument and justification put forward by the appellant.

1. It is the Council's first position that an application under S73 for the removal of a redundant planning condition should not be used to make fundamental revisions to the associated S106 legal agreement.

2. It is the Council's second position that in any case, the provision of the railway footbridge and lift remains a necessary and intrinsic element of the appropriate and sustainable development of the site. The bridge is not just an option to address modal shift, but forms an integral part of the development, envisaged from the outset and creating a sustainable place, linking the new Lymington Shores community to the existing town centre. Not only is the provision of the footbridge a major component of the S106, it is also shown on the approved plans for the development. The provision of the bridge is listed/detailed in the description of the approved development and its provision was integral to the consideration of the proposed development by Members of the Planning Committee. The provision of the footbridge (and the linkage it would provide between the application site and the services and facilities of the adjacent town centre of Lymington) is consequently considered fundamental to the overarching objectives of making a positive social, economic and environmental contribution to the community and achieving sustainable development."

17. There is in my view some ambiguity in these paragraphs as to whether the LPA were saying that, as a matter of principle, the Inspector should not allow the appeal because the footbridge was critical to the overall scheme and the Claimant's proposals significantly lessened the prospects of it being delivered; or alternatively, that the Inspector had no power to allow the appeal because it would change the description of development by the impact on the delivery of the footbridge.

18. At the appeal hearing, the Inspector gave the Claimant time to submit any s.106 agreement or unilateral undertaking. On 19 November 2021 the Claimant's planning consultant then wrote to the Inspector and the LPA in the following terms:

> *"During the Planning Appeal Hearing the Inspector gave the Appellant 10 days to submit any s.106 agreement/unilateral undertakings (UU).*
>
> *In accordance with that timetable please find attached 2no. Unilateral Undertakings which are submitted on an alternative basis. The UUs present the Inspector with two options which were discussed during the hearing:-*
>
> *1. The first option is a UU that supports the Appellant's legal submissions that there is only one lawful approach that can be taken in this case. That is a UU which removes the requirement for the final 17no. open market homes to remain unoccupied unless or until the bridge is delivered. This is now replaced with a positive requirement to deliver the bridge within 2 years but with no restriction on the unoccupied homes (in the absence of any evidence of any planning harm).*
>
> *2. The second option is provided in circumstances where the Inspector rejects the Appellant's primary position and she considers that it is necessary to keep some units vacant in order to make the UU enforceable. The Appellant does not agree with this approach but has provided a UU which would hold back 5no homes which have an estimated value which still exceeds the LPA estimates for the cost of the bridge. This was an option that was first suggested by the LPA during the hearing (but they later withdrew from it).*
>
> *The UUs therefore provides two alternative routes that would enable the appeal to be allowed. Both UUs carry forward the obligations that remain live from the original permission."*

19. On 22 November 2021 the LPA responded stating that the footbridge remained integral to the development; the Claimant's two unilateral undertakings were unacceptable; and the way the Claimant was approaching the matter was wrong in principle:

> *"5. The LPA's detailed response to the two undertakings is set out below. However, the LPA's first submission is that the approach being taken by the appellant should be rejected simply as a matter of principle. Section 106A of the Town and Country Planning Act 1990 provides that a s106 planning obligation may only be modified (1) by agreement*

> *between the LPA and the person against whom the obligation is enforceable or (2) by an application under s.106B of the 1990 Act. One could be forgiven for concluding that the s.73 application and appeal has been a device to enable the submission of unilateral obligations which water down and potentially rid the appellant of liability to provide the Footbridge and Lift. The application to vary a condition that regulates the manner of construction of the development makes no sense in the context of a substantially built-out development. Whether intentional or not, the effect of the unilateral undertakings, if either were to be accepted, would be to circumvent s.106A. For that reason alone, the undertakings, regardless of their content, simply as a matter of principle, should be rejected.*
>
> *6. The proper way to deal with s106 obligations when a s.73 application is granted is for the parties to enter into a simple supplemental s106 agreement applying, for the avoidance of doubt, the terms of the original agreement to the development if carried out under the s.73 permission.*
>
> *7. Secondly, the Original Section 106 Agreement does not cease to have effect simply because a s.73 permission is issued. The appellant clearly recognises this as it has sought to include in both undertakings a somewhat odd provision at clause 18 purporting to be an agreement between the parties that the Original Section 106 no longer applies. Clearly the LPA cannot agree such a thing in a document to which it is not a party! In any event, for the avoidance of doubt, it does not so agree. (There is a wider point here: there are several places in the documents where they purport to contain agreements between the Owner and the LPA – see clauses 6.2; 9; 12.4; 13 and 18.1. It hardly needs to be said that, since the LPA is not a party to either unilateral undertaking, it cannot enter into such agreements. They must surely therefore be rejected in their current form.)"*

20. On 1 December 2021 the Claimant set out a further response that made extensive reference to the Norfolk Homes decision (*Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265) and making it clear that *"the section 106 agreements pertaining to the previous grant of planning permission are not triggered in respect to any grant of permission pertaining to the current s73 appeal"*.

21. Mr Garvey submits that the position of the LPA was simply to say that the Inspector did not have power to grant planning permission, and this was wrong as a matter of law. Having re-read the LPA's letter I am not sure that it is quite as clear cut as that. The LPA at paragraph 5 of the letter of 22 November 2021 were making the subtler point that "The application to vary a condition that regulates the manner of construction of the development makes no sense in the context of a substantially built out development". As I explain below, I consider this to be a key distinction from the factual position in *Norfolk Homes*, and a valid point on the merits of the Claimant's s.73 application.

The Decision Letter

22. The precise terms of the Inspector's Decision Letter ("DL") are critical to the determination of this appeal. I therefore set out large parts of it verbatim:

> 5. The development was now largely complete with the 17 residential units remaining vacant.
>
> 6. There was no dispute between the main parties that condition 19 no longer met the relevant tests.
>
> 7. *The effect of removing condition 19 would be to create a new planning permission. However, important material considerations need to be addressed, because of the planning obligation pursuant to Section 106 of the Act, which had been agreed as part of the original application.*
>
> *8. The main issue is therefore the effects of removing the disputed condition in the context of an appeal made under Section 73 of the Act, with particular regard to the provision of a pedestrian bridge over the railway.*
>
> *Reasons*
>
> *9. There is no dispute between the main parties that the footbridge is included within the description of development, and that a section 73 application cannot change the description of development. It was emphasised by the Council that the original planning permission had been granted on the basis that the bridge would be delivered, as an integral part of the development.*
>
> *10. Furthermore, and as noted above, the obligation to provide the bridge was included within the original S106 Planning Agreement, and was accepted by the parties as being necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind to the development. At the hearing, both parties confirmed that the need for the footbridge is accepted.*
>
> *11. As emphasised by the Courts, there is no assumption in the legislation that any pre-existing planning obligation will apply to a Section 73 permission, or to development carried out under that permission. The legislation does not prevent a Local Planning Authority from considering whether any S106 linked to a previous planning permission should apply to the Section 73 permission or should be varied or discharged.*
>
> *12. The appellants confirmed at the hearing that they did not detect any specific clause which would have ensured that any S106 obligation linked to the original planning permission was worded from the outset as to apply to any subsequent Section 73 permission, and none was identified by the Council. Accordingly, it was agreed that a new planning permission would require a new planning obligation.*

Alternatively, the original planning obligation would need to be varied to also apply to the new planning permission.

13. The UUs submitted by the appellants as part of the appeal seek to modify the terms of the obligation, particularly in respect of the timing for the delivery of the bridge and the trigger mechanism which had been agreed as part of the previous planning obligations. The appellants consider that the current trigger is ineffective, given that the footbridge has not been delivered and prevents the occupation of several residential units in the context of a national housing crisis.

14. The Courts have however confirmed that an application under Section 73 of the Act may only relate to the modification of discharge of conditions on a planning permission. In circumstances where a landowner wishes to make an application for the modification or discharge of a pre-existing Section 106 obligation, he may only do so under Section 106A (or Section 106BA) of the Act and not under Section 73.

15. Furthermore, the legislation is clear that once a planning obligation has been correctly executed, it can only be varied by agreement between the appropriate authority and the person or persons against whom the obligation is enforceable. This means that a UU cannot be used to modify an earlier legal agreement, as the Local Planning Authority would have to be a party to the variation document. Consequently, and given the above, neither of the two UUs submitted by the appellants as part of this appeal constitute appropriate mechanisms to secure the implementation of the footbridge.

16. A major part of the development has been completed for a number of years. However, and whilst this was discussed at the hearing, I have not heard or seen any substantive evidence to justify convincingly why limited progress appears to have been made with regard to the implementation of the footbridge. The footbridge constitutes an integral part of what was originally applied for under the 2012 permission and the appellants therefore accepted a need for this part of the scheme, firstly by including it as part of the description of development and secondly in committing to its construction as part of the accompanying legal agreement, subject to the inclusion of a trigger restricting the occupation of a number of residential properties.

17. Notwithstanding my findings in relation to the removal of condition 19, were I to allow the appeal, the submission of UUs seeking to modify the terms of the planning obligation agreed under the original planning permission fall outside the scope of an application made under Section 73 of the Act. In the absence of a duly executed planning obligation to secure the construction of a pedestrian bridge over the railway in the terms agreed as per the original planning permission, the appeal cannot succeed.

Conclusion

> *18. For the above reasons, I conclude that the appeal should be dismissed.*

23. The parties' submissions differ fundamentally on what the Inspector was doing in this decision letter and therefore in my conclusions I will have to go through some of these paragraphs in detail.

The Law

24. The issue in this case turns on the effect of a s.73 TCPA application and the judgment of Holgate J in *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265, and how the Inspector approached her powers on a s.73 application and appeal.

25. Section 73 allows an application to develop land without compliance with conditions previously attached. It only allows the planning authority to consider the question of what conditions, if any, should be imposed on the grant of permission, *Pye v SSE* [1998] PLR 28. The LPA may grant permission subject to different conditions or no conditions at all, s.72(2).

26. Where a s.73 application is allowed, the LPA must grant a fresh permission, but the original permission remains intact, *R v Leicester CC ex p Powergen UK Ltd* [2001] P&CR 5. The earlier permission therefore remains as a permission which is capable of being relied upon.

27. If the LPA grants a s.73 permission, it may not alter the description of development which was authorised in the earlier permission, nor may it impose a condition on a s.73 permission which purports to have the effect of altering the earlier permission, *Finney v Welsh Ministers* [2020] PTSR 455, at 464-5.

28. The issue in *Norfolk Homes* was that the original permission had a s.106 obligation attached to it, however the permission had not been implemented. The LPA then granted a s.73 permission but did not make it expressly subject to the s.106 agreement. The LPA argued that the original agreement could be read to include the grant of any subsequent s.73 permission (issue one); or alternatively that additional words could be implied into the original agreement (issue two). Holgate J rejected both arguments. At [127] he said:

> *"127. There are other legal consequences of the implied language for which NNDC contends, including the following:-*
>
> *(i) Going back to the original decision on whether or not to grant planning permission, if the local authority were to be dissatisfied with the terms of the s.106 obligation offered by a developer, they could refuse permission and the developer would be able to test the reasonableness of that stance in a planning appeal;*
>
> *(ii) If, however, a s.106 obligation is treated as applying to subsequent s.73 permissions, the landowner may seek to persuade the local authority to vary or discharge the s.106 obligation in relation to a particular s.73 application. But the local authority might decide that although there is no reason to refuse to grant the s.73 permission*

sought, the s.106 obligation should remain unaltered. In that event, s.78 would not give any right of appeal to enable the merits of that issue to be determined independently. The landowner would not be able to apply under s.106A to modify or discharge the s.106 obligation for a period of 5 years from the date on which it was entered into. If, however, the proposed terms are not implied and there is a dispute when a s.73 application is being determined by the local authority as to whether existing s.106 obligations should be re-applied (whether at all or in some amended form) and the application is refused for that reason, the issue can be tested on appeal;

(iii) As pointed out above, similar problems would apply to a local planning authority which has no good reason for refusing a s. 73 application, but which could justify seeking a variation in the terms of a s. 106 obligation only to find itself tied to an existing agreement by virtue of NNDC's implied terms. In these circumstances, it would be unreasonable for an authority to refuse to grant a s. 73 permission simply because the s.106 obligations treated by implication as applying to such a permission were no longer acceptable to the authority. The authority could not seek to "have it both ways". Flexibility to deal with changes of circumstance or evaluation may be just as important to a planning authority as to a landowner or developer;

(iv) The planning merits affecting what conditions if any should be imposed in the determination of a s.73 application are considered as at the date of that decision. The same approach should apply to the need for any s.106 obligation and its terms. There should be a contemporaneous decision on that point unless the parties have expressly agreed otherwise. That point should not go by default. It is a generally intrinsic feature of decision- making under the development control system;

(v) The merits of what should be imposed in a s.73 permission may be connected or intertwined with the issue of whether there should be a related s.106 obligation and, if so, on what terms."

29. The Claimant's second ground is that the Inspector failed to give adequate reasons for her decision. The principles to be applied in respect of challenges to the reasons in a planning decision letter are extremely well known and were summarised by Lindblom LJ in St Modwen Developments v SSCLG [2018] PTSR 746 at [6] – [7]:

"6. In my judgment at first instance in Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288 . This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a

> *reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26 , at p.28).*
>
> *(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953 , at p.1964B-G).*
>
> *...*
>
> *7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasized the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in Suffolk Coastal District Council v Hopkins Homes Ltd. [2017] UKSC 37 , at paragraphs 22 to 26, and my judgment in Mansell v Tonbridge and Milling Borough Council [2017] EWCA Civ 1314 , at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in Barwood Strategic Land II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893 , at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in Mansell , at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63).”*

Submissions

30. Mr Garvey submits that the effect of *Norfolk Homes* is that if the original s.106 does not expressly bind any new planning permission, as is agreed to be the case here, then it is open to the Inspector to grant s.73 consent subject to a fresh s.106, whether obligation or undertaking. She therefore should have considered the merits of the unilateral undertakings offered, and she failed to do so.

31. Mr Garvey submits that the Inspector in the DL agreed with the LPA that, if she considered that the terms of the original s.106 should be continued, she had to refuse the appeal. He reads the DL, and in particular DL17 as holding that she had no power

to allow the appeal because the Unilateral Undertakings fell outside the scope of a s.73 application.

32. His textual analysis of the DL is that the Inspector started to go wrong at DL13 when she used the word "modify", when the Claimant's unilateral undertakings do not modify the original s.106, but rather seek to replace it. He accepts that DL14 is a correct statement of the law.

33. However, he says that in DL15 the Inspector went fundamentally wrong because she is saying that the Unilateral Undertakings cannot be used to modify the earlier agreement, and thus are inappropriate. This is wrong because the Unilateral Undertakings could be fresh obligations which would meet the planning merits, and this is made clear in *Norfolk Homes*.

34. In DL17 the Inspector by saying that the unilateral undertakings fall outside the scope of the s.73 application, is effectively repeating what she said at DL15 and erring in law.

35. Mr Garvey's Ground Two is that the Inspector's reasoning is not sufficiently clear, even if she did not make the legal error identified in Ground One. There is substantial doubt over on what basis she dismissed the appeal. If, contrary to Ground One, the Inspector was addressing the planning merits of the appeal, she fails to explain why the footbridge was still required and why a trigger of 5 dwellings rather than 17 was necessary.

36. Mr Calzavara pointed out that the footbridge had been considered a critical part of the development, and to meet regulation 122 requirements, since the original grant of permission in 2012. The LPA's reason from refusal had made clear that the footbridge remained a critical part of the development.

37. He submits that what the Inspector was doing in the DL was finding on the planning merits that the Unilateral Undertakings submitted by the Claimant would not meet the need to deliver the footbridge.

38. At DL13 when the Inspector used the word "modify" she plainly knew the original s.106 would fall away because that is what she had said in the previous paragraph. So the Claimant is failing to read the DL as a whole.

39. In DL14 she was setting out a correct analysis of the law, and she was setting it out there because the LPA had raised the issue of the scope of a s.73 application.

40. The first two sentences of DL15 are correct as a matter of law. The third sentence, which lies at the heart of the Claimant's case, is an exercise of planning judgement about the merits of the Unilateral Undertakings. When she says "Consequently and given the above…." she is referring back to all her reasoning above, namely the importance of the footbridge and the lack of agreement from the LPA, not merely the sentence above which refers to a Unilateral Undertaking not being used to modify an earlier legal agreement.

41. In DL16, she explains her reasoning on the planning merits. The Claimant has not justified its failure to deliver the footbridge, and nothing has changed in terms of the

importance of the footbridge since 2012.

42. On DL17 Mr Calzavara accepts that the use of the words "outside the scope of an application made under section 73…" are infelicitous. However, it is plain from the second sentence that she is refusing the appeal on the planning merits. She knows that she could allow it if there was an appropriate planning obligation that secured the footbridge in the same way as the original permission.

Conclusions

43. Reading the DL as a whole and without excessive legalism, as I must, I accept Mr Calzavara's submissions. If the Inspector thought that she had no power to allow the appeal and impose a fresh s.106 obligation, then much of what she says in the DL would make no sense. Most of DL16 and 17 would be irrelevant if the Inspector had taken the view that she had no choice but to refuse the appeal because the Claimant (Appellant) was seeking to rely on a fresh s.106 undertaking. Mr Garvey's submission rests on the Inspector believing she had no power to grant the appeal subject to the Unilateral Undertakings offered. But to reach that conclusion I would have to ignore what she says in DL16, which would be contrary to the principle of reading the DL as a whole.

44. It matters not whether what she was considering is described as modifying the obligation (the language of DL13) or, more precisely, imposing a fresh obligation, it seems to me clear that the Inspector knew she could do that, but took the view that the Unilateral Undertakings offered by the Claimant were insufficient. This is clear from the second sentence of DL17 where she says there needs to be a "duly executed planning obligation….in the terms agreed as per the original planning permission….". This is quite obviously saying that what has been offered is not good enough, rather than suggesting that she did not have the power to allow the appeal.

45. Mr Garvey submits the Inspector failed to explain why the unilateral obligations offered were inadequate. However, given the DL is written for the parties, it is in my view totally obvious why they were not good enough. An obligation to keep 5 as opposed to 17 dwellings vacant is plainly likely to be less effective in achieving the critical objective of the delivery of the bridge. Equally, an obligation to pay a capital sum of £1m is even less likely to deliver the footbridge. Given that the LPA had made clear the criticality of the footbridge, and the Inspector's acceptance of this in DL16, it is obvious why the Inspector rejected the less onerous obligations. Equally, the Claimant had made clear its lack of enthusiasm for delivering the footbridge, and that it would seek whatever legal route was open to it to be able to sell all the dwellings without the delivery of the footbridge. In that context the Inspector's reasons are sufficiently clear.

46. I accept that the Inspector's language in DL15, particularly the last sentence, could be clearer. However, if that sentence is read together with the following two paragraphs, then it is sufficiently clear that the Inspector was finding that the "UUs" were not appropriate mechanisms because they did not mirror the terms agreed in the original s.106 (see last sentence of DL17). Further, it is clear from DL16 that the Inspector did not accept the Claimant's arguments as to why the footbridge had not been delivered and saw no grounds to remove (or lessen) the obligation upon them to deliver the footbridge.

47. For these reasons I reject Ground One.

48. In respect to Ground Two and the quality of the reasons, I take note of the core principles in *St Modwen Homes* that a decision letter is to be read as a whole; as though by an informed readership; and without excessive legalism. Once one understands the background to this matter and the cases that the parties were advancing, then I think the Inspector's reasoning is sufficiently clear. I have explained my analysis of the reasoning above, under Ground One.

49. Finally, an important issue arose during the course of the hearing about the degree to which the principles set out by Holgate J in *Norfolk Homes* apply to the situation that arose in the current case. The Claimant placed great reliance, both in its written representations and before this court, on *Norfolk Homes*, and in particular the principle that the s.106 agreement ceased to have effect if it was not expressly tied into the subsequent s.73 grant, see [127] of that case.

50. However, there is at least one important distinction between the current case and *Norfolk Homes*. In that case the original planning permission had not been implemented and the obligations in the s.106 had therefore not yet arisen. However, the present case is completely different. Not merely had the 2012 permission been implemented, it had in all material respects been completed. The obligation to construct the footbridge had already arisen under clause 4.4, albeit it did not bite until the occupation of originally the 75th and then the 125th dwelling.

51. It cannot be the case that the effect of the s.73 fresh permission wipes out obligations which have already arisen. It is in my view open to debate the degree to which a s.73 consent would remove an obligation which had arisen but had not yet become enforceable. *Powergen* makes clear that a developer can elect whether to implement the s.73 consent or the original consent. However, where the original consent has been implemented (here virtually completed), I cannot see how the developer can rely upon s.73 to change the effect of the extant s.106. That is a matter for another case, but I note that it is a material distinction between the two cases, and one that the Claimant did not acknowledge in their representations. It was the distinction between a case where the original permission had been implemented and one where it had not, which the LPA was raising in its post-hearing representations. Therefore I do not think the position is as clear cut as Mr Garvey and his clients had suggested. However, so far as the Inspector's decision is concerned, she was deciding the matter on the merits of the undertakings that had been offered and therefore this legal complication was not in issue.