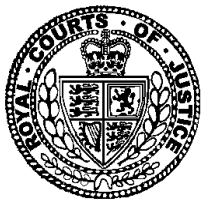

Neutral Citation Number: [2023] EWHC 2217 (KB)

Case No: CO/4670/2022

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

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 15 September 2023

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Rex (on the application of Geoffrey Simmonds)	**Claimant**
and	
Blaby District Council	**Defendant**
and	
(1) Venture Properties Group	**Interested**
(2) EMH Housing and Regeneration Limited	**Parties**
(3) Jessup Brothers Limited	

- -
- -

Andrew Parkinson (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Jack Smyth (instructed by **Blaby District Council**) for the **Defendant**

Hearing date: 21 August 2023

- -

Approved Judgment

HHJ WORSTER:

Introduction

1. On 28 October 2022, Blaby District Council (i) granted planning permission for the erection of 13 dwellings with associated infrastructure, landscaping and access, and (ii) gave listed building consent for the demolition of an old milking shed, on land to the rear of 27 to 45 of Avon Road, Braunstone Town in Leicestershire ("the Site"). The Claimant lives next door to the Site in a Grade II Listed farmhouse dating back to the 16th or 17th century. He and his partner own that property. The milking shed to be demolished is probably early 20th century but is within the curtilage of the farmhouse and so protected by its listed status.

2. The Claimant challenges these decisions by his Claim Form of 8 December 2022. There are four grounds:

> Ground One: The Officers Reports in respect of both applications significantly misled the Planning Committee by failing to consider paragraph 196 of the National Planning Policy Framework ("NPPF") which states that evidence of deliberate neglect or damage to a heritage asset should not be taken into account in any decision.
>
> Ground Two: The Officers Reports significantly misled the Planning Committee by failing to apply section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act").
>
> Ground Three: Members were significantly misled by being told – at the Planning Committee meeting - to disregard, or instructed that they could give no weight to, an emerging Conservation Area designation which would include the Site.
>
> Ground Four: Councillor Moitt, a member of the Council's Planning Committee, was erroneously told that he could not determine the applications on the basis of purported predisposition.

The Defendant resists the claim. The Interested Parties have played no active part in the proceedings.

3. Grounds 1-3 raise issues of a familiar nature in proceedings of this type. Ground 4 is a little different, because it raises an issue of contested fact. Councillor Moitt made a witness statement for the Claimant to the effect that he had been told by one of the Defendant's officers that he should not participate in the decision. A copy of that statement was served with the claim. The officer has also made a witness statement, which was served by the Defendant with its Summary Grounds of Defence, but to a different effect.

4. The question of permission was dealt with on the papers first of all. Eyre J gave permission on ground 4 by his orders of 10 and 17 February 2023, observing that the issue on ground 4 was potentially one of those rare cases where cross examination was appropriate in judicial review proceedings. He refused permission on grounds 1-3. The Claimant renewed his application, and I granted permission on grounds 1-3 at a renewal hearing on 3 May 2023. I also gave directions for the full hearing. During submissions on that occasion, Counsel for both parties (Mr Parkinson and Mr Smyth) agreed that given the nature of the issue on ground 4, this was a case where cross examination of the witnesses was appropriate. I agreed. Their evidence did not go to the decision as

such, and so did not offend the usual practice. It went to a discrete issue which potentially had a significant bearing on the propriety and/or fairness of the decision making process. It raised an issue of fact which could not fairly be determined without hearing from the witnesses.

5. In the event I heard oral evidence from Councillor Moitt and Councillor Brown (called by the Claimant) and from the Council's officer Ms Tiensa (called by the Defendant). The hearing was listed for a day and a half, but much of the background was agreed, and Counsel made their oral submissions with admirable economy. The hearing was concluded in the day, and judgment reserved. There are two bundles of documents, a Core Bundle ("CB") and a Supplementary Bundle ("SB"). I refer to some of the documents in those bundles by page number.

Factual Background

6. The application for planning permission and listed building consent to demolish the milking shed was made by the first Interested Party on 1 December 2020 ("the application"). Mr Simmonds objected, as did his partner.

7. On 11 March 2021, there was a meeting of the Planning and Environment Committee of the Braunstone Town Council at which the application was considered. The Minutes of that meeting are at SB 214. Councillor Moitt was present in his capacity as Vice-Chair of the Committee. The Minutes begin with the following:

> *Councillor Phil Moitt advised that he would not be voting on [the application] … since the application was due to be considered by Blaby District Council's Planning Committee of which he was a member. Councillor Moitt felt it was important to consider all matters raised and presented before he made a judgement on the application.*

The Town Council's response was to object to the application for a number of reasons. Councillor Moitt played no part in the Town Council's discussion of the application, and did not vote on it at this meeting.

8. Councillor Moitt was also at the meeting of the Town Council's Planning and Environment Committee on 4 November 2021. The Minutes are at CB 80. At item 50 the Minutes record the following:

> ***Planning and Licensing Applications dealt with under Delegated Authority***
>
> *The Committee received and noted responses to the planning applications taken under Delegated Authority …*
>
> *RESOLVED that the action taken by the Executive Officer & Town Clerk under delegated authority in forwarding the following observation to Blaby District Council be noted:*

The minutes then give the details of a number of planning applications, with the Town Council's response and the reasons for that response. One of the applications referred to is the application in this case; see CB 87. It is apparent from reading the Minute of the November meeting and the Minute of the March meeting, that all that the Committee was doing on 4 November 2021 was noting that its Executive Officer had sent its response and reasons (as determined at the March meeting) to the Defendant Council. It is apparent that the Executive Officer had done that before the meeting on 4 November 2021. The Committee was not voting on the merits of the application in this case, or

indeed on the merits of any of the other applications which had been forwarded to the Defendant. The discussion and the vote had been concluded at the meeting in March. Councillor Moitt did not exclude himself from taking part in any of the business of the November meeting, but that was because there was no reason for him to do so.

9. At around the same time, there was a proposal to extend the Braunstone Conservation Area. Mr Simmonds' house is on the south side of Braunstone Lane, just outside the Conservation Area. The land on the other side of the road (the north side) is part of the existing Braunstone Conservation Area. The proposal was to extend that Conservation Area to include some of the land on the south side of Braunstone Lane, including Mr Simmonds' house and the old milking shed. That proposal was considered at a meeting of the Braunstone Town Council in September 2021. In summary, the Town Council agreed the principle of that extension, and offered to draft a Conservation Area character appraisal, and to seek "input" from other interested bodies. As a consequence a draft appraisal was prepared and approved by the Town Council together with a timetable aimed at identifying this new area by March 2022. There is a plan at paragraph 5 of the draft of that appraisal dated 12 October 2021 at SB 226 which shows the proposed extent of that extension. Mr Simmonds' farmhouse is referred to and pictured on pages 229-230. On 23 November 2021 the Defendant Council resolved to work in partnership with the Town Council to assist and support the public consultation and preparation of the appraisal. The consultation was then carried out and ended on 10 January 2022.

10. The position at the time of the Defendant's Planning Committee meeting on 7 April 2022, was that there was a proposal to extend the Conservation Area. There had been an appraisal and a public consultation, and it seems that the proposal had a broad level of support (although I am not told what the outcome of the public consultation was). However, the proposal was yet to be formally adopted. There is some issue as to whether the proposal was at an "early" stage, or a "very early" stage, but it can be accurately described as "emerging".

11. The next matter of relevance is the preparation of reports in relation to the application by the Defendant's planning officers. They prepared two reports. The first deals with the application for permission to erect 13 dwellings; see CB 172, and the second with the demolition of the milking shed; see CB 193. The reports have the same author, and given the interrelated nature of the applications, they have much in common. Amongst other matters, they record Braunstone Town Council's objection to the application, refer to the comments of the Leicestershire County Council's Historic Buildings Officer (which in turn refer to the poor condition of the old milking shed; see paragraph 34 below) and the fact that there was no objection to the application from Historic England.

12. Under Third Party Representations the reports record the number of objections received, and summarise the nature of those objections in list form; CB177/195. These include harm to a nearby Grade II Listed Building (Mr Simmonds house) and to a nearby conservation area. Of note however, is that they do not include an allegation which Mr Simmonds had raised in his letter to the Defendant of 3 December 2021; SB 194. In that letter he alleged that the poor state of the milking shed was a consequence of the Applicant's deliberate neglect. In that letter he refers to paragraph 196 of the National Planning Policy Framework:

> *Where there is evidence of deliberate neglect of, or damage to, a heritage asset, the deteriorated state of the heritage asset should not be taken into account in any decision.*

And goes on to say this:

> *The Applicant company purchased this site two years ago on 26 November 2019. Since then they have carried out no maintenance to the building occupied by Mr Shortland's business. I understand the upkeep of the structure and exterior of the building is their responsibility under the terms of Mr Shortland's lease. The peeling paint on the west elevation and the out of control growth of ivy on the east, which has been allowed to grow onto the roof and through a skylight, are part of a pattern of apparently deliberate neglect and damage of the site which includes felling trees, cutting down a boundary hedge, allowing bramble to grow unchecked and not mowing grass, and ignoring fly tipping. The building itself appears to be structurally sound, and could be properly maintained relatively easily, which Mr Shortland has expressed a willingness to undertake.*

13. The Council's Planning Officers did not consider that there was evidence of deliberate neglect on the part of the Applicant, and so they did not refer to the allegation or to NPPF 196 in the reports which were before the Committee on 7 April 2022.

14. There are other passages in the Officer's reports which are of relevance to my decision, but it is more convenient to refer to them in the context of the ground to which they are relevant. With that background, I turn to the events of 7 April 2022 which give rise to Ground 4.

Ground 4

15. Ms Tiensa joined the Defendant Council as a Democratic Services Officer in 2009. She is now a Senior Democratic Services Officer. On 7 April 2022 she was preparing the Planning Committee meeting at which the application was to be considered. She attended a pre-meeting with the Chair and Vice Chair and other officers. She says this at paragraphs 8 to 10 of her witness statement; CB 69:

> *8. I attended the pre meeting on 7 April 2022 where I was made aware by the Vice Chairman, that a member of the Committee, Cllr. Phil Moitt, had attended Braunstone Town Council's Planning and Environment Committee on the 4th of November 2021 (where he is also a member) and that the Committee had voted against the planning application for the development that was before us that day.*

She then refers to the minutes of the meeting of 4 November 2021 and says this:

> *I recognised that this could create a problem and so I sought to obtain more information. I did so with speed as the meeting was due to start soon.*
>
> *9. Whilst in the pre-meeting I researched the Town Council's website and located the agenda and minutes (for the 4 November 2023 meeting) and that the appropriate disclosure had not been entered in the minutes that Cllr Moitt was also a member of the District Council's Planning Committee. Having done this research, I was satisfied that it was appropriate to speak directly with the Councillor. I then left the Pre-Meeting to call Cllr. Phil Moitt to let him know of this issue. Where issues like these arise, I contact members to let them know of their responsibilities under the Code of Conduct and the requirement to retain an*

> *open mind and not to pre-determine a decision themselves before the matter has come to committee. It was necessary for me to call Cllr. Phil Moitt as soon as possible, as I was aware that he would be attending the Site Visit, which was due to take place shortly after the Pre-Meeting.*
>
> *10. During the telephone conversation with Cllr. Phil Moitt, I spoke about the minutes of the Town Council meeting of the 4th November 2021, reminded him of his duties under the Council's Code of Conduct, and that the decision to attend the meeting in his capacity as a member of the Planning Committee would rest with him. As an Officer of the Council, I am not able to restrict a Councillor from attending a meeting to which they are a member. Cllr. Phil Moitt decided he would not attend the meeting in his capacity as a member of the Planning Committee and asked me if he could attend and observe the meeting from the public gallery. I reminded Cllr. Phil Moitt that it was a public meeting and that he could observe the meeting if he wished to do so. For the avoidance of doubt, I did not instruct him that he could not attend. Nor did I indicate that he ought not to. I simply raised the issue so that he could reflect and make the decision for himself.*

16. Whilst there is no reference in this evidence to the Town Council's meeting in March 2021, when asked about it, Ms Tiensa said that she believed that she had also found the Minutes to the March meeting. There is some support for that evidence in the content of an email sent by the Council to the Claimant on 29 June 2022 at CB 133, dealing with the complaint he had made. The writer of the email says this:

> *I have spoken with the officer who made the call who confirmed that they received information that Cllr Moitt had attended two Braunstone Town Council meetings where the application in question was featured. In the first meeting Cllr Moitt declared an interest but in the second meeting Cllr Moitt did not. In the second meeting Councillors including Cllr Moitt voted to approve a decision that was made under delegated authority by the Councils officer.*

17. Mr Parkinson asked Ms Tiensa about the email. My note is as follows:

> Q: *Is that an accurate summary of what you told Mr Richardson:*
>
> A: *Yes*
>
> Q: *That Councillor Moitt had voted to approve an objection to the planning application*
>
> A: *Yes*
>
> Q: *So …. You understood that he had voted to approve an objection to the planning application*
>
> A: *I believed that to be the position when I called him up.*

I asked Ms Tiensa why it was she thought that there had been a vote at that second meeting. She said that it was the use of the word "RESOLVED" in the Minute.

18. Throughout her evidence Ms Tiensa emphasised that she would never tell a Councillor that they could not attend a meeting or vote. As she put it in an answer in cross-examination, she had been giving this sort of advice for 13 years and she had never said to a Councillor that they were not allowed to take their seat. She would have asked the Councillor whether they considered they had an open and transparent mind - how

would it look to the public? If they had an open mind, here was the disclosure form. Her evidence was that the decision was for the Councillor.

19. Councillor Moitt's recollection was rather different. He was intending to go on the site view and the Committee meeting on 7 April 2022. He was in the park when he received the telephone call from Ms Tiensa. He says this in his witness statement; CB41:

> *6. ... one hour before the District Council meeting on 7 April 2022 I was contacted by phone by the Council's Senior Democratic Services and Scrutiny Officer, Sandeep Tiensa, who told me that I could not participate in the meeting about to start. She said this was because I had sat on the Town Council's meeting when the plan was discussed and "had voted against it".*
>
> *7. She told me "not to bother to turn up" as I would not be able to participate. I responded to say that I would come, and I did so, and I sat in the public gallery and did not take my seat on the committee. My clear evidence is that I was not given a choice in the matter and that I was excluded from the meeting by the Council's legal officer who told me very clearly not to turn up as I would not be able to participate.*

20. I do not for a second think that Councillor Moitt is doing anything other than telling the truth as he remembers it, or doing his very best to help. But I find it highly unlikely that Ms Tiensa would have told him in terms "not to bother to turn up". It would be contrary the way she undertook her duties, and indeed, contrary to the training that she gave to Planning Committee members. It is more likely that the advice she gave was more open and nuanced.

21. Mr Smyth suggested to Councillor Moitt that his description of what had been said on the phone call had hardened. He referred the witness to an email the Claimant had sent the Council on 26 April 2022; CB 124. It purports to quote from something that Councillor Moitt had said:

> *Cllr Moitt stated, "The fact of the matter is I was deemed to have fettered my discretion by voting against the plan in November when it came up for consideration at Braunstone Town Council planning committee. I was reminded of this fact an hour before the Blaby District planning committee meeting was due to start. I am disappointed to have found myself in that position"*

22. The word used in this quote is "reminded". The description of the phone call Councillor Moitt gives in his evidence (to borrow Mr Smyth's formulation) is "more firm and instructional" than that used in the email. Mr Smyth put that to Councillor Moitt. My note of his response is as follows:

> *I can't say anything save that the position now reflects honestly what happened. It might have hardened in the language but the more I think about it the more I see it for what it [is] It may be open the conjecture but it was a serious thing even if the wording varied in tone. Looking at it now and then it was serious.*

There is force in Mr Smyth's well judged question. It drew a thoughtful reply from Councillor Moitt.

23. Whilst I struggle to accept that Ms Tiensa told Councillor Moitt not to attend the meeting, I can accept that that is how her advice was understood. Having come off the phone from Ms Tiensa, Councillor Moitt called Councillor Brown. His evidence was

that Councillor Moitt told him that he could not participate in the vote because he had fettered his discretion. He encouraged Councillor Moitt to go back to the Council and see if they would change view. Councillor Moitt did that. In his witness statement he says he called Ms Tiensa back, but to no avail. When he gave his evidence he said he was not sure it was Ms Tiensa he spoke to on that second call, and that it might have been another officer. For her part, Ms Tiensa made no reference to a second phone call with Councillor Moitt in her witness statement, but then in evidence volunteered that she did have a vague recollection of one. The need for a second phone call is consistent with Councillor Moitt's belief that he was unable to vote, and Councillor Brown's evidence is further corroboration of that. I note Councillor Brown's recollection puts it on the basis that Councillor Moitt had "fettered his discretion".

24. On the face of it these two accounts seem irreconcilable. There is, however, no question but that these witnesses are giving honest evidence. Counsel both went out of their way to emphasise that there was no challenge to their honesty. I can only say that I came to the same conclusion. They were doing their best to help the court. From the evidence I heard it seems that they had always been on good terms with each other. Even on the day of the meeting, not long after this disputed phone call, when Councillor Moitt attended the meeting to sit in the public gallery, he had a friendly exchange with Ms Tiensa.

25. For her part, Ms Tiensa had a professional respect for the Councillors she was there to help. They, in turn, took her advice seriously. In that regard, Councillor Brown made an important point. Mr Smyth was suggesting to him that it was for a Councillor to decide whether or not they had an open mind and could participate in a vote. My note of his answer is this

> *It [is], but members would have to be brave to go against the advice of an officer particularly one dealing with declarations of interest. As a longstanding member you listen carefully to the advice of professional officers on matters of fettering discretion on planning applications or you end up causing issues.*

26. Mr Smyth continued:

Q: *I understand the "brave" point, but that presupposes the officer is correctly informed of the true position*

A: *Obviously*

Q: *But here it appears that Ms Tiensa thought Councillor Moitt was involved in a decision making role early on and with the declaration position wouldn't be seen as fair-minded – but in fact he had inoculated himself*

A: *I agree with that – subsequently when we looked at the Town Council Minutes it was clear that Phil Moitt had excused himself.*

This was in the context of Mr Smyth suggesting to Councillor Brown that if he had been in Councillor Moitt's position, and had known that the officer was mistaken about his role in the vote, he would have gone to the Chair of the Planning Committee. Councillor Brown said he would have gone to another officer, and that their advice might have been better informed.

27. Resolving the conflict of evidence in this case about the nature of the "advice" given in this phone call is obviously not about deciding who is telling the truth. I have to look at

the common ground, the surrounding circumstances, and the likelihoods. There are some documents, notably references in emails from the time (albeit not written by the parties to the phone call), but there is no note of the phone call to assist.

28. Human memory (to quote paragraph 1.3 of PD57AC) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but is a fluid and malleable state of perception concerning an individual's past experiences, and therefore is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

29. Councillor Moitt's evidence was that when he received this phone call he was in the park. He was (to use his words) "stunned and confused". That provides a ready explanation for why he may have taken the advice he was given as tantamount to an instruction not to bother going to the meeting, when in fact, it was more open advice. For her part, Ms Tiensa was working at speed. She had concluded (wrongly in my judgment) that Councillor Moitt had previously voted on this application when he had attended the Town Council meeting. Her view was that this could be a problem, and it is likely that her advice would have reflected that view.

30. The formulation Councillor Moitt is said to have used nearer the time was that he was deemed to have fettered his discretion; see the Claimant's email of 26 April 2022. Councillor Brown says much the same. On the balance of probabilities, I find that that is the nature of the advice given to Councillor Moitt.

31. Ms Tiensa's advice was given on the mistaken premise that Councillor Moitt had voted against this application at a Town Council Committee meeting, when he had not. It is easy to see how that mistake occurred. The issue arose shortly before a meeting. That was what she had been told by the Vice Chair of the Committee, and the Minutes she saw appeared to her to confirm what she had been told. And she was obviously concerned to ensure that Councillors made the necessary disclosure. Councillor Moitt took that advice seriously, as he was meant to (and he was bound to) and decided not to attend the meeting to vote. Mr Smyth is right to say that the decision was his, and I accept that in their phone call Ms Tiensa would have reminded Councillor Moitt that it was his decision to make. But that is not an answer to the issue in this case. Councillor Moitt was significantly misled by the mistaken advice he was given, and – thinking that he had fettered his discretion - decided not to attend and vote.

32. With the benefit of time and hindsight, it is easy to say that he must have known that this advice was wrong, and should have taken his concerns to the Chair of the Committee, or looked into the Minutes and sought to persuade the Council's officers that in fact there was no problem. But that imposes an unrealistic duty on a Councillor. Councillor Moitt made the decision not to attend and vote in all good conscience, relying reasonably on the mistaken advice given to him by the Council's officer. He was plainly entitled to attend and vote, and but for this advice, he would have done so. That is a material error in the decision making process. Councillor Moitt was significantly misled by the advice he received, and in the circumstances, that is sufficient to justify the Court setting aside the Council's decisions on this application. But for this advice he would have contributed to the debate and voted. The error renders the procedure unfair.

Ground 1

33. Ground 1 as formulated was to the effect that the Committee was significantly misled by the Officers Reports which failed to consider paragraph 196 of the NPPF. As I say, the reason for the absence of reference to paragraph 196 of the NPPF in the Officers Reports was that the officers did not consider that there was any evidence of deliberate neglect. The Defendant's position was that the opinion of the Claimant as to deliberate neglect was not evidence of deliberate neglect (or at best was tenuous) and that the condition of the building was a minor matter, and not material to the decision.

34. The Officers Reports did make reference to the condition of the milking shed as follows:

> *The Principal Historic Buildings Officer comments that the former milking shed which is proposed to be demolished does not contain any original internal features of possible interest and that the level of harm to the principal listed building that would arise from the proposal would be less than substantial. In addition to this, it is considered that the proposed building to be demolished is not in the best condition with vegetation along the external walls into the structure. In addition to this, from the exterior, the building does not contain many original features of interest either with replacement roofing materials and doors installed, along with new guttering which has caused detrimental impacts to the historic fabric.*

The reference to the condition of the building is to be read in context. It is an additional factor, rather than the central reason for the view the officer formed.

35. However, that was not the end of the matter, for in the course of the Committee's debate at the meeting on 7 April 2022, the issue of the condition of the building, and who was responsible for its condition, became a live issue. Counsellor Maxwell is recorded as raising the matter; see the transcript at CB 214 line 108. She says this:

> *And also whose responsibility is it to make sure that that as a curtilage listed building or as a commercial building is kept up to a good standard? Because it was also mentioned more than once in those talks about and in fact in Tom's, you know, discussion as well – presentation I should say about the poor condition of that particular building. But it kind of feels uncomfortable to me that if it's – who's responsible for doing that and is it a case of we've let the building come into disrepair and now it's not suitable to be occupied…*

36. The response from the Chair was as follows:

> *But that's not a planning application issue. That's for a tenancy agreement or a landlord – Cat [a planning officer] would you like to come in?*
>
> *I would concur with what Cllr Richardson has said with regard to that. With regard to the condition of a building in private ownership, the responsibility is on the owner or the tenant… It's not something we get involved in.*

37. In giving permission I took the view that it was arguable that it was for the Committee to decide whether the evidence of deliberate neglect was weak or tenuous, and that it appeared that the matter was arguably material to the Committee's decision because the question (or something similar) was in Councillor Maxwell's mind. At the full hearing Mr Smyth accepted that there was a material error of law. The Officers Reports were "defensible", but given the debate at the meeting. the Committee should have been advised about paragraph 196 of the NPPF.

38. Mr Smyth maintained that, in context, the poor condition of the building (and thus whether it was due to the deliberate neglect of the applicant) was a minor matter, and that there was a good defence to this ground under section 31(2A) of the Senior Courts Act 1981. That section provides as follows:

> *The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review, and*
>
> *(b) may not make an award under subsection (4) on such an application,*
>
> *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.*

39. The approach to the section was considered by Mr Justice Holgate in *Pearce v SSBEIS and anor* [2021] EWHC 326 (Admin) at [152] - [153]:

> *[152] The Court of Appeal has laid down principles for the application of s.31(2A) in a number of cases, including R (Williams) v Powys County Council ; R (Goring-on-Thames Parish Council) v South Oxfordshire District Council ; and Gathercole. The issue here involves matters of fact and planning judgment, and so the court should be very careful to avoid trespassing into the Defendant's domain as the decision-maker, sometimes referred to as "forbidden territory" (see e.g. R (Smith) v North Eastern Derbyshire PCT at [10]). Instead, the court must make its own objective assessment of the decision-making process which took place. In this case it was common ground that the Court should consider whether the Defendant's decision would still have been the same by reference to untainted parts of the Defendant's decision (as in Goodman Logistics Developments (UK) Limited v Secretary of State for Communities and Local Government [2017] J.P.L. 1115).*
>
> *[153] Although the test in s.31(2A) is less strict than that which applies in the case of statutory reviews (see Simplex GE (Holdings) Limited v Secretary of State for the Environment [2017] PTSR 1041), it nevertheless still sets a high threshold. In R (Plan B Earth) v Secretary of State for Transport the Court of Appeal held at [273]: -*
>
> > *"It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial*

> *review. If there has been an error of law, for example in the approach the executive has taken to its decision-making progress, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore. although there is undoubtedly a difference between the old Simplex test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ as he then was, in R (Public and Commercial Services Union) v Minister for the Cabinet Office ... at [89]"*

40. In short terms:

    (1) the threshold is a high one;

    (2) the court should be very careful not to trespass on the role of the decision maker; and

    (3) when asking the question – is it highly likely that the outcome would be the same
- the court should only rely upon the "untainted parts of the Defendant's decision"

41. Mr Smyth submits that it is highly likely that the decision would have been the same. He makes these points in addition to his central submission:

    (i) Despite the fact the Claimant spoke in support of his objection at the meeting (as did his partner) neither of them referred to the allegation that there had been deliberate neglect.

    (ii) There was no real evidence to support the allegation that the neglect was deliberate.

    (iii) In any event, the condition of the building was a minor matter. The extent of the "neglect" was not serious. The growth of ivy was something which could be remedied. It was not suggested that the building was on the verge of collapse or anything of that sort.

    (iv) The key issue in the passage of the Officers Report where the condition of the building was mentioned (see para 34 above) was that the building had no original features and no other use.

42. Whilst those points are persuasive, I am not satisfied that the high threshold required for a successful defence under section 31(2A) has been met. Whilst I would conclude that the condition of the building was a minor matter in the context of the issues on this application, and that the allegation that there had been deliberate neglect was indeed weak and tenuous, there was at least one Councillor who thought that the condition of the building was worth raising in debate, to the extent that she questioned who was responsible for it's repair, and seems to have been asking whether the Committee should be taking the matter into account if it was the applicant who had let the building get into that poor condition. She was met with advice that the responsibility for the condition of the building was not material, when (potentially at least) it was. I agree with Mr Parkinson's submission, that I would be stepping into forbidden territory if I found that the defence was satisfied.

Ground 2

43. This raises the issue of whether section 66 of the Listed Buildings Act was correctly applied. The challenge is not to weight, but to whether the balancing exercise required by the section was carried out. There is no real difference between the parties on the law. Section 66(1) provides that:

> *In considering whether to grant planning permission or permission in principle for development which affects a listed building or its setting, the local planning authority … shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.*

The section is set out in terms in both Officers Reports; CB 180 and 198, and reference is made to the relevant parts of the NPPF and other relevant policies, in particular NPPF 202, which provides as follows:

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

44. The balancing exercise in paragraph 202 of the NPPF must be undertaken in accordance with the duty in section 66(1). The requirement in section 66(1) that the planning authority have *"special"* regard to the desirability of preserving or enhancing the character or appearance of a conservation area, has been interpreted to mean that this "*desirability*" must be given *"considerable importance and weight*". The point was explained by Lindblom J (as he then was) in *R. (Forge Field) v Sevenoaks DC* [2014] EWHC 1895 at [48]-[49]:

> *[48] As the Court of Appeal has made absolutely clear in its recent decision in Barnwell, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in Barnwell it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.*
>
> *[49] This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in Barnwell, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a*

statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.

45. Mr Parkinson accepts that it is for the Claimant to establish the ground, and that he starts with a presumption against him. He draws attention to the following passage from the judgment of Lewison LJ in *R. (Palmer) v Hertfordshire Council* [2016] EWCA Civ 1061 at [7]:

> *The existence of the statutory duty under section 66(1) does not alter the approach that the court takes to an examination of the reasons for the decision given by the decision maker: Jones v Mordue [2015] EWCA Civ 1243; ... It is not for the decision maker to demonstrate positively that he has complied with that duty: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has. Where the decision maker refers to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan there is an inference that he has complied with it, absent some positive indication to the contrary: Jones v Mordue at [28]."*

46. Given that there is a section 31(2A) defence on this ground as well, it is simplest to set out the section of the Officers Report on the application which deals with the "Impact on local heritage assets at CB 187-188] The Listed Building consent report has a section headed "Material Considerations" which is essentially the same; see CB 199-200.

> ***Impact on local heritage assets***
>
> *As part of the proposal, a curtilage listed building would be required to be demolished to make way for several proposed affordable dwellings. The building in question is an early 20th century milking shed which (due to the close distance and historical layout of the site) would have formed part of the historic curtilage of the nearby grade II listed building of no 252 Braunstone Lane which itself is an historic 16/17th Century farmhouse. In addition to this, as part of the proposal there would be a partial loss of the open land surrounding the former milking shed which historically would have been used as part of the farm (which contributes to the historic fabric/ character of the manor house of 252 Braunstone Lane). This loss of the surrounding land would further add to the cumulative loss of the former farmhouse's curtilage which has previously been eroded by the existing commercial estate (where previous farm buildings have been lost to the present commercial units). As such, the loss of the curtilage listed building and the presence of new built development within the surrounding land would cause harm to the setting of the designated heritage asset of 252 Braunstone Lane, a view shared by Leicestershire County Council's Principal Historic Buildings Officer.*
>
> *Paragraph 199 of the National Planning Policy Framework states that "when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's*

conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance". Paragraph 200 requires any harm or loss of significance of a designated heritage asset to have clear and convincing justification.

The Principal Historic Buildings Officer comments that the former milking shed which is proposed to be demolished does not contain any original internal features of possible interest and that the level of harm to the principal listed building that would arise from the proposal would be less than substantial. In addition to this, it is considered that the proposed building to be demolished is not in the best condition with vegetation along the external walls into the structure. In addition to this, from the exterior, the building does not contain many original features of interest either with replacement roofing materials and doors installed, along with new guttering which has caused detrimental impacts to the historic fabric.

Furthermore, the setting of no.252 Braunstone Lane has changed substantially over time with modern commercial buildings having been erected within its original curtilage, and modern residential properties surrounding the site. The original curtilage has been subdivided which has eroded the original character and setting of the building such that the curtilage no longer plays such an important role in the significance of the listed building that it once did, and the building is now surrounded by modern commercial and residential properties.

Paragraph 202 states that "where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use". In this case, the benefits of providing 13 affordable units in a location where there is significant affordable housing need and few opportunities or sites to provide new affordable housing due to the urban, built up nature of Braunstone Town, are considered to offer significant public benefits in favour of the development. ***Given the curtilage listed building has been significantly altered both internally and externally, and is no longer viewed as part of the curtilage of the original farmhouse, and the setting of the listed building has been eroded by other modern development in its vicinity, it is considered that the public benefit is sufficient to outweigh the less than substantial harm caused by the demolition of the milking shed and development within the setting of 252 Braunstone Lane.***

In addition to the proximity to the listed building, the development site is also within the vicinity of the Braunstone Conservation Area (which is entirely within Leicester City's administrative area with the boundary on the opposite side of Braunstone Lane). However, given the boundary of the conservation area is defined by mature trees along the north side of Braunstone Lane, which provide substantial screening, and the proposed development (which is in excess of 70 metres from the conservation area boundary) would only be glimpsed at a distance along the existing commercial estate access drive, it is not considered that the proposal would cause harm to the setting of the Braunstone Conservation Area.

[my emphasis]

47. In simple terms, the Claimant's case is that the Paragraph 202 balancing exercise undertaken in the section of the Officers Report I have emphasised, fails to give "considerable importance and weight" to the less than substantial harm to the listed building. It simply proceeds to balance that harm against the benefits of the development.

48. The Court's approach to Officer's Reports is well established; see Lindblom LJ in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 @ 42(2):

> *The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: … Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: … The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different— that the court will be able to conclude that the decision itself was rendered unlawful by that advice.*

49. The reports read as a whole make repeated reference to the heritage issues which arose on this application. I have set out the particularly relevant section above, but there are other references. The Committee could not have failed to have been aware of those matters. The report was written for Councillor's with local knowledge. Blaby is a rural area, and the Defendant's case is that this Committee was well versed in the issues which arise on applications involving listed buildings and conservations areas. The Defendant undertook an analysis of the applications which came before the Committee which involved heritage matters, and produce a summary at CB 75. Whilst this sort of analysis can only ever be a high level indicator, it supports the point the Defendant makes. These would have been familiar issues for this committee. Mr Smyth describes them as "bread and butter".

50. The Committee's discussion on 7 April 2022 provides further support for that view. The Defendant relies in particular upon the further advice given by Ms Ingles (a Planning Officer) at point 70 of the Transcript at CB 222:

> *I'm just thinking of something that might help in the way that you're thinking about the application. So under the NPPF, when it comes to this planning application, the one we're considering right now, you need to be considering the impact of the development on any designated heritage and non-designated heritage assets. So you are still considering that impact.*
>
> *So under the NPPF it talks about level of harm and you'll see set out in the report some information about the level of harm, so even when there is less than significant harm, under the NPPF the presumption should still be against development unless there are such public benefits that outweigh any of that harm. So within the report it sets out how that balancing exercise has been done by*

> *Officers and how we have taken what we consider to be the benefits of the development.*
>
> *We have addressed the fact that there is harm, we have mentioned the level of that harm and we have balanced those matters, and in recommending the application for approval, we acknowledge that there is harm to heritage assets, but our recommendation is that the public benefits, not anything to do with private benefits, the public benefits, the main public benefit here being the provision of much-needed affordable housing in a sustainable location, they outweigh that harm. So it's for you as the Committee to also I suggest consider that balancing exercise yourself. Okay? Does that help a little bit?*

51. Mr Parkinson would say that this still omits any reference to the less than substantial harm involved in the loss of the milking shed being given "considerable importance and weight" Those words are not used, but standing back and looking at the substance of the report and the advice given at the meeting, I conclude that that was what the Officers and the Committee were doing. No one was suggesting that this "less than substantial harm" was other than something of importance, and it was being given considerable weight in the decision making process. The reports refer to the significance of the desirability of preserving or enhancing heritage assets; CB 290 and 297. Ms Ingles bolsters that approach by referring the Committee to the presumption against development when giving the Committee some further assistance during the debate.

52. There is no substantial doubt that this Committee has complied with Section 66(1). To conclude otherwise would be to adopt an overly legalistic approach. Ground 2 fails.

53. Had I concluded that there was an error of law, the Defendant would rely upon section 31(2A). Given my overall view, I deal with the issue only briefly. Whilst the section of the Officer's Report which deals with the balancing exercise would (in this scenario) be "tainted", the many references to the importance of listed buildings and heritage assets would not be. Nor would the advice given in the course of the meeting or the views of the Historic Buildings Officer which are set out in detail in both reports. Section 66 and the relevant paragraphs of the NPPF are all set out in the report. Even excluding the tainted material, my reading of the way this issue was presented to the Committee and the nature of the debate leads me to conclude that it is highly likely that if the requirements of section 66 had been followed to the letter, the outcome would have been the same.

Ground 3

54. This ground relates to the advice given by Planning Officers at the meeting on 7 April 2022, to disregard, or to give no weight, to the "emerging" extension of the Braunstone Town Conservation Area.

55. There was no reference to the emerging plan in the Officers Reports. The issue was raised by a Councillor de Winter at point 115 of the transcript; CB 229. He drew attention to the work being done by the Defendant with the Town Council in relation to the extension of the Conservation Area, that the building they were discussing was relevant to that, the importance of Conservation Areas generally and this one in particular, and asked that the Council defer their decision until some more work had been done.

56. The response from the Chair was as follows:

> *Thank you. I have just asked the Officer about this Conservation Area issue and it's very early on and it would only – the same inspection and the same look at these buildings would occur in the same way later on. It would be the same that came up,* ***so it doesn't have a weighting as such to this application,*** *okay.*
>
> [my emphasis]

57. A little later on in the meeting, Mr Cox from the developers referred back to the Councillor's request to defer the decision, saying that would be unreasonable. The Chair responded to some other points and then said this; CB 232:

> *... because the Braunstone Town Conservation Area discussions are just beginning,* ***we are unable to give that weighting to this application*** *or these applications today. So I'll just put that out there and now I'll open the floor for Members' debate.*
>
> [my emphasis]

58. Councillor Maxwell raised the question of the Conservation Area again at point 134; CB 233, making the point that if the building was demolished, might that not affect the Conservation Area proposal. She asked for some advice (or clarity as he put it). The first response was from Cat Hartley, a Planning Officer. She said this:

> *... we are supportive of looking at this Conservation Area and that that motion was agreed at Council and we're working proactively with Braunstone Town Council to do that. What I would say though, and it has already been said, is that it's very early days and that process can take a while, but as part of that process, specialists will have a look at the merit of various buildings to determine whether there is any merit in extending the Conservation Area.*
>
> *The process that's gone through this planning application is basically identical to the process that we'd go through in terms of looking at that assessment, so the same people, the same experts would be looking at these buildings and so it's very unusual really for them to come to a different conclusion, given that that work's going to be taking place this year, so I wouldn't expect them to come to a different conclusion.*
>
> *So I guess what I'm really saying is that really detailed work at looking at the merit of the buildings is sort of almost happening. It's happening as part of this planning application – sorry, listed building consent application in advance of the Conservation Area being looked at, but essentially it's the same process. That's where we are.* ***It's very, very difficult to give weight to a Conservation Area in a planning decision when we are so early on in the process*** *unfortunately and I would reiterate that that has already been said. In terms of the other point you made, I think in terms of the roof I'm going to have to hand over to one of my colleagues for that I'm afraid.*
>
> [my emphasis]

59. Ms Hartley handed over the Stephen Dukes. He also referred to the fact that the matter was being looked at by a heritage expert used by the Defendant. Their assessment had already been passed on to the Committee. He then said this:

> *... on the second part I'll just add to what Miss Hartley said about the Conservation Area and the lack of weight we can give to that, I'll just add that*

> *this. The curtilage listed building has statutory protection, even though it's not in a Conservation Area, it's a curtilage listed building, so, yes, in effect if it was in a Conservation Area as well, there's an additional sort of consideration you have to have, but it still has protection at the moment by virtue of the fact that if it was an unlisted building, it wouldn't in the same way, but because it's listed, it does have that element of statutory protection anyway without – even if it's not in a Conservation Area.*

60. I also note the passage at point 154; CB 236; where Mr Dukes speaks of the expert's view that the historic interest of this building is low, given the alterations, the lack of original internal fixtures and fittings associated with the former dairy use and the loss of context as a result of the surrounding development.

61. Mr Parkinson submits that the contributions by the Chair were to the effect that the Committee could not give any weight to the emerging Conservation Area, and that the effect of that direction was not retrieved by the subsequent advice from the planning officers. He submits that the Committee were misled.

62. Mr Smyth submits that read benevolently, these are not directions to disregard the matter, simply advice to the effect that its difficult to give weight to something which is at such an early stage. Phrases such as "weighting as such" are consistent with that approach – "we are unable to give that weighting" less so.

63. Mr Smyth's second submission is that the position was retrieved (or clarified) by the officer's later advice, that it was difficult to give weight to something that was at such an early stage. That does not have the quality of a direction, or of advice to the effect that no weight can be given.

64. But it is Mr Smyth's third set of submissions which I find the most compelling. Standing back, none of this was really material to the decision. As the planning officers explained, the issues which would arise in relation to the Conservation Area aspect were being looked at by the Historic Buildings expert anyway. Those views were referred to in the reports, and summarised by Mr Dukes. The Conservation Area issue added nothing of any significance. Consequently, even if the advice was wrong, I agree with Mr Smyth's submission that it did not materially mislead the Committee.

65. The same point can be made in support of a section 31(2A) defence. Mr Smyth submits that I can be satisfied that the decision would have been the same because of the level of protection this building attracted from being part of the curtilage of a Grade II listed building. The weight to be given to that listed status would have always been greater than the weight to be given to the preservation of the building because it was within an emerging Conservation Area. I agree.

Disposal

66. The claim succeeds on grounds 1 and 4. Grounds 2 and 3 fail. The grant of planning permission and listed building consent for the demolition of the old milking shed will be set aside. I make an order in the terms of the minute agreed by the parties.