Neutral Citation Number: [2016] EWCA Civ 936

Case No: C1/2016/0076

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queens Bench Division
Administrative Court - CO/2290/2015
Mr Justice Mitting

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/09/2016

Before:

LORD JUSTICE LAWS
and
LORD JUSTICE SIMON

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Between:

The Queen on the Application of CPRE Kent	**Appellant**
- and -	
Dover District Council	**Respondent**
- and -	
China Gateway International Limited	**Interested Party**

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Mr Ned Westaway (instructed by **Richard Buxton Environmental & Public Law**) for the **Appellant**
Mr Neil Cameron QC and Mr Zack Simons (instructed by **Dover District Council Legal Services**) for the **Respondent**
Mr Matthew Reed (instructed by **Pinsent Masons LLP**) for the **Interested Party**

Hearing date: 1 September 2016

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Approved Judgment

Lord Justice Laws:

INTRODUCTION

1. This is an appeal against the judgment of Mitting J delivered in the Administrative Court on 16 December 2015, by which he gave permission for the appellant to seek judicial review of a planning permission granted by the Dover District Council (the first respondent) on 1 April 2015, but dismissed the substantive claim. The appellant, CPRE Kent, sought permission to appeal to this court on two grounds. On 6 May 2016 Lewison LJ granted permission on Ground 2 but refused it on Ground 1. On 21 June 2016 Sales LJ dismissed the appellant's renewed application for permission on Ground 1.

2. The details of the proposed development are described by Mitting J at paragraphs 1 to 3 of his judgment as follows:

> "1. On 13 May 2012, China Gateway International (CGI) Limited ("CGI") applied for planning permission for an extensive development on two sites on the western fringe of Dover. As originally submitted, the application was for: (a) outline planning permission for: one, the construction of 521 residential units and a 90 apartment retirement 'village' on land at Farthingloe; two, the construction of 31 residential units and a hotel and conference centre at Western Heights; three, the provision of pedestrian access and landscaping work between the two sites; (b) full planning permission for: one, the conversion of the existing buildings on both sites for a variety of purposes; two, the conversion of the Drop Redoubt at Western Heights into a visitor centre and museum.
>
> 2. The Farthingloe site lies in a long, dry valley between the A20 and the B2001 to the west of Western Heights. It compromises of 155 hectares of agricultural and scrubland. All of it lies within Kent Downs area of outstanding natural beauty, which runs westward from the western limits of Dover.
>
> 3. Western Heights is a prominent hilltop to the west of Dover on which a series of fortifications were built before and during the Napoleonic wars to protect the western flank of Dover. They include the Citadel, now used as an immigration detention centre, and the Drop Redoubt and adjacent bowl. They are acknowledged to be the largest, or one of the largest, and best surviving examples of early nineteenth century fortifications in England. The site is a scheduled monument. The surviving fortifications are in a poor state of repair and are on the English Heritage at risk register."

At the end of paragraph 4 of the judgment Mitting J added this:

> "The easternmost edge of the Farthingloe site is 340 metres from the western most fortification and about 1 and half kilometres from the Drop Redoubt."

It is said, and I believe it to be uncontentious, that the scale of the proposed development is unprecedented in an AONB.

3. There were substantial objections to the proposal from the appellant and others. Mr Westaway for the appellant, in the course of introducing the case, showed us documentation from the AONB Executive and from Natural England. However on 13 June 2013 the first respondent local authority resolved to approve the grant of planning permission subject to the completion of a section 106 agreement whose full details I need not rehearse: it included provision for a payment of £5 million to be expended on the refurbishment of the Drop Redoubt and its conversion to a visitor centre and museum.

4. After the resolution of June 2013 Natural England, the Kent Downs AONB Unit and the appellant applied to the Secretary of State to call in the planning application. We have been shown a submission from officials to the Minister which included this statement:

> "If you decide not to call in this application, this could place the protected landscape of the Area of Outstanding Natural Beauty at risk... "

But the Secretary of State decided not to call it in. Notification of the grant of permission was given on 1 April 2015.

GROUND OF APPEAL SUMMARISED; THE NPPF

5. The sole remaining ground of appeal has been reformulated by Mr Westaway and may, I think, be refined further into two propositions: (1) the Planning Committee, in resolving to grant permission on 13 June 2013, failed properly to apply the requirements of paragraph 116 of the National Planning Policy Framework (the NPPF); (2) the Committee failed to give legally adequate reasons for the grant of permission. On Mr Westaway's presentation the reasons challenge included a distinct assertion that it was impossible to understand from the Minutes of the Committee meeting on 13 June 2013 why one "viability" case was preferred over another: I will return to that in due course.

6. Paragraphs 115 and 116 of the NPPF are at the centre of the case:

> "115. Great weight should be given to conserving landscape and scenic beauty in... Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty...
>
> 116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in

the public interest. Consideration of such applications should include an assessment of:

- The need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
- The cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way;
- Any detrimental effect on the environment, the landscape and recreational opportunities and the extent to which that could be moderated."

The focus of Mr Westaway's submissions is upon the last bullet point.

THE OFFICERS' REPORT

7. A very detailed report by officers of the council was before the Planning Committee on 13 June 2013. The report drew an important distinction between two distinct areas comprised in the Farthingloe development: "FL-B, which is predominantly green fields/agricultural land; and FL-C, at the eastern end of the site located on the former Channel Tunnel workers site..." (paragraph 2.153). FL-B is the more sensitive area (see, for example, paragraph 2.155). As the judge noted at paragraph 23 of the judgment the officer's report "made trenchant criticisms of the density and layout of the development proposed on the Farthingloe site". They start at paragraph 2.157, where it is said that the development design paid no regard to the differences in landscape character between FL-B and FL-C. Thus at 2.158 the officers point out that the proposed density of dwellings within the "more visually sensitive" FL-B is greater than in FL-C, and this is criticised at 2.159 (see also 2.178). There is a point about storey height at 2.160, and another at 2.162 concerning woodland planting and screening – a passage to which I shall have to return in connection with a particular point made by Mr Westaway.

8. The criticisms are pulled together at 2.211. Then at 2.212:

> "Relative to the requirements of Policy DM16 [a provision in the Development Plan]... and the NPPF (paragraph 116), the proposals as presented would have a significant detrimental impact on the landscape and would result in long-term, irreversible harm to both the AONB and the urban edge of the town..."

See also 2.442.

9. Accordingly the officers were in favour of refusing permission for the development in the form proposed. However they recommended substantial modifications. Paragraph 2.215:

> "Achieving a design solution for this location that would help moderate harm to the AONB and deliver a viable quality development is challenging. In view of the concerns relating to the deliverability and marketability of the indicative proposals, Smiths Gore [who had given the council expert advice on the scheme] (as part of the viability assessment) examined an alternative outcome. This suggested a more traditional, lower density development at Farthingloe of around 375 dwelling houses. Smiths Gore concluded that this would be more marketable, financially viable and could also afford the relevant monetary contributions (and £5m heritage payment) currently on offer. This would require a reduction in the Code for Sustainable Homes (CSH) rating from Code 4 to Code 3 (saving build costs of some £4,900 per average unit). This option was included in the information previously sent to and considered by the applicant's viability assessor (BNP Paribas) which has not been challenged and was also subsequently brought to the attention of the applicant, although no comments have been received to date."

See also 2.443, and 2.445:

> "The proposals as presented are considered to fall short of demonstrating any suitable moderating effect. The recommendations in this report, as described, seek to address this and in a manner that safeguards development viability and delivers benefits in terms of housing quality."

A possible refinement of the approach set out at 2.215 was described at 2.216, which would reduce the housing density at Farthingloe to "around 365 units". Suggestions as to the phasing of the development are made at 2.221 and 2.224.

10. Later in the report the officers return to the merits of the proposed modifications:

> "2.447... [I]t is your officers' opinion that offsetting the landscape harm by the modifications outlined in this report would shift the planning balance in favour of the economic and other national benefits of the application. The local economic issues and specific circumstances of this case... are considered to provide a finely balanced exceptional justification for this major AONB development, the benefits of which would be in the public interest. Essential to this conclusion would be seeking all the recommended conditions (changes) and ensuring (by condition/S.106 agreement) the deliverability of all the relevant application 'benefits'. The rationale for the application is as a composite package, and any permission should therefore be framed to ensure the emergence of the proposals in a structured and comprehensive fashion."

I should also cite paragraph 2.457:

> "The application has been presented by CGI as a 'once-in-a lifetime opportunity to deliver regeneration for Dover'. It would be open to the Committee (having regard to the relevant requirements of the NPPF) to review the economic, housing delivery, heritage and other benefits associated with the proposals and come to a view as to whether these, and/or any other material planning considerations, would be sufficient to justify permission without one or more of the conditions/restrictions recommended. Based on anticipated concerns from the applicant, the Committee might consider what scope, if any, might exist to increase the residential density on say, FL-C, from that recommended... However, the officer position is that the conditions/changes as set out in this report (informed by independent legal and financial viability advice) are well founded and that all are necessary to deliver the right composite package, including the economic benefits, so that an on balance recommendation of approval can reasonably be made."

BNP PARIBAS

11. The developers, the second respondents, took professional advice from BNP Paribas, who were supplied with the officers' report. On 11 June 2013 (two days before the Planning Committee met) they wrote to the second respondents as follows:

> "... I note with concern the Planning Officer's comments at paragraph 2.215 that our not having commented on a sensitivity analysis by the Council's advisors should be taken as agreement to the findings...
>
> I am writing to confirm that I fundamentally disagree with the outcome of the Smiths Gore sensitivity analysis. As you are aware, we had a dialogue with Smiths Gore on the inputs to and the outputs from our appraisals. The result of this dialogue was that Smiths Gore concluded that the Application Scheme maximised the benefits from a residential development on the site.
>
> We have not endorsed the Smiths Gore assessment that a smaller scheme could deliver the benefits provided by the Application Scheme. We did not respond specifically on the sensitivity analysis, as Smiths Gore had agreed that the Application Scheme maximised the benefits and could provide no more...
>
> We have re-run our appraisals to test the impact of the removal of 156 units, as suggested by Smiths Gore. The result is to turn a positive land value of £5.85 million to a negative land value of -£3.03 million. On the basis of this result, the scheme would not secure funding and could not proceed.

> For the avoidance of doubt, we do not agree with the planning officer's assessment that the benefits provided by the Application scheme could also be provided by the sensitivity analysis mooted by Smiths Gore. Indeed, our view is that such a scheme would not be capable of providing the benefits offered and could not proceed as it would be incapable of providing a competitive return to the landowner and developers, as required by the National Planning Policy Framework."

12. It seems that this letter was not before the Committee, although Mr Cameron QC for the first respondent told us that his instructions were that the Chairman of the Committee had sight of it. However the minutes of the Committee's deliberations contain a summary of what BNP Paribas had said:

> "On viability, the applicant's consultant, BNP Paribas, had stated since the report was written that they disagreed with the conclusions of the sensitivity analysis carried out by Smiths Gore, the Council's advisers. In their view, a lower density scheme would turn a positive land value into a negative value and, on this basis, it would not be able to secure the necessary funding. The viability of the scheme would be further undermined by the report's recommendation for graduated payments, when a substantial up-front payment of £1 million had been offered. It was suggested that the density details outlined in the report did not fairly or accurately represent the applicant's proposals. The Principal Planner advised the Committee that, having considered the further views of BNP Paribas, Smiths Gore stood by their analysis that a lower density scheme would be viable and would deliver the same monetary benefits as currently on offer. Officers therefore recommended that a lower density scheme should be approved as it was viable, not excessive for the site and would be compliant with the Core Strategy."

13. Mr Westaway accepted that this was a fair summary of the letter (though I note that the letter contains no reference to the effect of graduated payments). At all events it is clear that the views of BNP Paribas played a very significant part in the outcome of the Planning Committee meeting.

THE COUNCIL'S DECISION

14. Such reasons as the Planning Committee gave for their resolution of 13 June 2013 granting planning permission have to be gleaned from the minutes of the meeting. I should note, however, that the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 applied to the case, so that the Council was obliged to make and keep a statement containing "the main reasons and considerations on which the decision is based…" and "a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development" (Regulation 24(1)(c)(ii) and (iii). No such document was produced. At paragraph 22 Mitting J observed:

> "Mr Westaway accepts that if the only respect in which the decision making of the local planning authority is flawed is its failure to fulfil its statutory duty to make a statement of reasons, the acknowledgement of that failure... will suffice, and no further remedy... is required."

In his skeleton argument in this court, however, Mr Westaway places a somewhat oblique reliance on the obligation imposed by the EIA Regulations: "[t]he need to provide adequate reasons was especially important given that this was an EIA application..." (paragraph 35). I shall return to this.

15. In the minutes of the June 2013 meeting such reasons as are given for the resolution appear from the record of individual councillors' contributions. I will cite a slightly longer passage than that set out by the judge (at paragraph 21 of the judgment):

> "Councillors G Cowan, R S Walkden and P Walker spoke in favour of the proposals, stating that the application offered a rare opportunity for regeneration and investment and should be grasped. Its approval would encourage developers to invest in Dover and act as the catalyst for further regeneration of the town. Moreover, it would assist in safeguarding the town's heritage assets and revive the Western Heights area of the town as a tourism destination. Dover lacked a first-class hotel and building one with conference facilities would help to realise the potential of Dover's High Speed rail link and cruise terminal. Approval would be a courageous step but was necessary to give Dover's young people a future. However, it was felt that the application should not be restricted in the way proposed in the recommendation as this could jeopardise the viability of the scheme, deter other developers and be less effective in delivering the economic benefits. The Committee had to assess whether the advantages outweighed the harm that would be caused to the AONB. When seen from the ground and with effective screening, it was believed that this could be minimised. In these exceptional circumstances it was considered that the advantages did outweigh the harmful impact on the AONB.
>
> Councillor B Gardner raised concerns regarding the security of the £5 million heritage payment, the phasing of the development to ensure that all the houses were built and English Heritage match funding. Given the significance of the heritage benefits, it was imperative that the development went ahead as planned to ensure that heritage assets were restored. The Principal Heritage and Urban Designer advised that English Heritage could not provide funding, but the developer's £1 million up-front payment would be used to kick-start funding from other sources...
>
> [Councillor Cronk spoke against the proposal.]

> Councillor K E Morris welcomed the public speakers' contributions which had given the Committee food for thought. It was felt that the proposed development would have a balancing effect on recent job losses in the district. The fact that there were developers who were still interested in Dover despite wider economic uncertainties was to be welcomed. There were questions around the scheme's commercial sustainability and for this reason it was suggested that the density of housing at Farthingloe-C should not be reduced as recommended by Officers, nor should linkages be made between construction at Farthingloe-B and the Western Heights. Councillor P M Beresford added that there was a responsibility to make Dover an attractive place to live and work, and to care for the town's heritage. Dover was in great need of regeneration, and by construction and conservation working hand in hand this could be achieved in a sustainable way."

And so the proposal was approved by a majority.

WAS THERE A FAILURE TO APPLY THE REQUIREMENTS OF NPPF PARAGRAPH 116?

16. As I have indicated, Mr Westaway submits that the Committee failed to apply NPPF paragraph 116 according to its terms, and that this was an error of law quite apart from what he says was the legal inadequacy of their reasons. He supports this overall contention with a number of individual points. Thus BNP Paribas' assertions about viability (upon which the Committee clearly relied) had nothing to say about the extent of harm to the AONB threatened by the proposed scheme, or the scope for moderating it, in particular as regards Farthingloe; there is no reference to paragraph 116 (or the emphasis on "great weight" in paragraph 115); on the contrary, the Committee's approach was to apply a simple balancing exercise ("whether the advantages outweighed the harm that would be caused to the AONB"); a number of specific matters, all relevant, were not considered (paragraph 26 of Mr Westaway's skeleton sets them out: I need not repeat them); the reference in the minutes to "effective screening" flies in the face of the evidence about screening.

17. The proposition that a statutory decision-maker has failed to apply the test or criterion to his decision which the statute enjoins is different in character from the proposition that the reasons he has given do not demonstrate that he has indeed applied the right test. The first of these propositions is not necessarily to be inferred from the fact that the second is made out. In this case the officers' report is replete with references to paragraph 116 and the policy which it enshrines. The first paragraph of the minutes themselves refers to the AONB as being "protected at the highest level by the National Planning Policy Framework (NPPF)." In my judgment it is not reasonable to attribute to the councillors who supported the resolution in June 2013 an ignorance or misunderstanding of the requirements of NPPF paragraph 116. Mr Westaway's real case is that the Committee has failed to give legally adequate reasons for their decision.

REASONS – THE APPLICABLE LAW

18. There was some controversy at the Bar as to the standard of reasons required of a local planning authority determining an application in such circumstances as these. Mr Cameron for the first respondent placed particular reliance on observations made by Lang J in *Hawksworth Securities PLC* [2016] EWHC 1870 (Admin), to which I shall come directly. To set the scene I should cite this familiar passage from Lord Brown's speech in *South Bucks v Porter (No 2)* [2004] 1 WLR 1953, which was concerned with the quality of reasons given by the Secretary of State's inspector on a planning appeal:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

19. This approach may with respect be described as mainstream; it reflects the thrust of many earlier decisions on the law of reasons. Lord Brown's observation that "the degree of particularity required depend[s] entirely on the nature of the issues falling for decision" has, as I shall show, a particular resonance in the circumstances of the present case. Mr Cameron, however, seeks to distance the approach in *South Bucks* from what he says is needed here. In *Hawksworth* Lang J was dealing, not with a decision of the Secretary of State's inspector, but with the grant of a planning permission by the local authority: though in that case, in contrast to this, the Planning Committee agreed with its officers. This is what Lang J said:

> "87. I agree with the submission made by the Defendant and the IP that Lord Brown's formulation in *South Bucks*, which applies where a minister or inspector is giving a decision on appeal, is not the standard to be applied to a local planning

> authority's decision to grant planning permission. Planning appeals are an adversarial procedure, akin to court or tribunal proceedings, in which opposing parties make competing submissions, and the decision-maker adjudicates upon them, giving reasons for his conclusions on the '*principal important controversial issues*', limited to '*the main issues in dispute*' not '*every material consideration*' (per Lord Brown in *South Bucks* at [36]). In contrast, a local planning authority is an administrative body, determining an individual application for planning permission. Its reasons ought to state why planning permission was granted, usually by reference to the relevant planning policies. But it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission.
>
> 88. Moreover, as Lady Hale said in *Morge v. Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268, at [36], '*[d]emocratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them...*'. They are politicians from all walks of life, not trained judges or civil servants. As Sullivan LJ said in *Siraj*, at [14], whereas a minister's decision on appeal is intended to be a 'stand-alone' document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal, a local planning authority's reasons for granting planning permission by their very nature do not present a full account of the local planning authority's decision making process, in which the planning officer's report is a crucial part. It is expected that the report will form the background to the reasons. I also consider it would be unduly onerous to impose a duty to give detailed reasons, as proposed by the Claimant, given the volume of applications which have to be processed.
>
> 89. For these reasons, I consider that where a local authority planning committee gives reasons for a grant of planning permission it need only summarise the main reasons for the decision and can do so briefly. The committee is not required to set out each step in its reasoning, nor indicate which factual matters were accepted or rejected..."

20. I would by no means suggest that this reasoning is wrong in principle: the differences between an inspector's decision after a planning inquiry and a planning authority's resolution to grant permission are real enough. Mr Cameron, supported by Mr Reed for the second respondent (the developers), was at pains to submit that the law should not impose on planning authorities an unduly onerous duty to give reasons, which would delay or complicate the processing of planning applications. The sceptic (cynic?) might say that this is just a plea to administrative inconvenience, but it was

endorsed by Lang J ("the volume of applications which have to be processed") and there is a clear public interest in the expeditious resolution of planning issues. That said, I think that Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State.

21. In any event, there are in my judgment a number of features in the present case which point away from Lang J's approach. There is, first, the pressing nature of the policy expressed in NPPF paragraphs 115 and 116: "Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty..." A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must surely give substantial reasons for doing so. This is no more than an application of Lord Brown's observation that "the degree of particularity required depend[s] entirely on the nature of the issues falling for decision".

22. Secondly there is the fact that in this case the Planning Committee did not accept the officers' recommendation but departed from it. *Mevagissey Parish Council* [2013] EWHC 3684 (Admin) concerned an application for a housing development in a coastal AONB. The Planning Committee differed from the officers. Hickinbottom J said this:

> "54. It was the Planning Committee's duty to exercise their own judgment on the application. In doing so, they were of course entitled to come to a different conclusion from that of the officer. However, they could not do so without, in their summary reasons, (i) indicating that they had correctly identified, understood and applied the relevant policies, notably paragraphs 115-116 of the NPPF; and (ii) explaining, if but briefly, why they had come to the conclusion they had, and thus why they considered the officer's conclusion wrong."

Where the Planning Committee is disposed to disagree with the Council's officers – especially in an AONB case – it must ("if but briefly") engage with the officers' reasoning.

23. Thirdly, this was as I have explained a case in which the council owed a statutory duty to give reasons, imposed by the EIA Regulations: a duty that was not fulfilled by any document produced for the purpose. In those circumstances it seems to me that the decision should be quashed unless the reasons disclosed in the minutes were, so to speak, just as good.

REASONS – WAS THERE A BREACH OF DUTY?

Viability: Smiths Gore and BNP Paribas

24. As I have indicated, the appellant's reasons challenge included a distinct assertion that it was impossible to understand from the minutes of the Committee meeting on 13 June 2013 why one "viability" case was preferred over another: that is, why BNP Paribas' view that the "lower density scheme would turn a positive land value into a negative value and, on this basis, it would not be able to secure the necessary

funding" prevailed over Smiths Gore's view that the "lower density scheme would be viable and would deliver the same monetary benefits as currently on offer" (the quotations are from the minutes, already cited).

25. I do not accept this submission. BNP Paribas referred in terms to the reduction of a positive land value to a negative value. If it is permissible to look at BNP Paribas' letter of 11 June 2013 (which seems to me doubtful to say the least, given that all we know about its distribution is Mr Cameron's statement on instructions that it was before the chairman of the Committee; but I will assume for present purposes that we may have regard to it), more detail is given: "[t]he result [of a re-run appraisal] is to turn a positive land value of £5.85 million to a negative land value of -£3.03 million". It is to be noted that the preference expressed in the minutes for BNP Paribas' view is put in terms of risk rather than certainty – "*could* jeopardise the viability of the scheme" (my emphasis), and that is a point to which I will return. But whether it was seen as a risk or a certainty, there was a basis before the Committee for BNP Paribas' view of viability, however thinly expressed.

26. But that is not to say that the Committee's conclusions on viability were adequately reasoned. As I have said the material from BNP Paribas which was before the Committee was (to say the least) thin. They do not appear to have considered whether the grant of permission with "one or more of the conditions/restrictions recommended" (officers' report paragraph 2.457) might be viable. These points, however, have to be viewed as part and parcel of what I regard as the fundamental basis of the appellant's reasons challenge: the Committee's treatment (or lack of it) of the extent of harm to the AONB.

Harm to the AONB

27. I may introduce this by reference to a central submission advanced by the respondents. This was that given the terms of the officers' report (and the experts' views) the Committee in giving reasons for their decision had in effect only to deal with one issue: the question whether the harm to the AONB might be reduced by the suggested modifications to the scheme: in effect the Smiths Gore proposals described by the officers at paragraph 2.215 of the report. In the circumstances, on the respondent's case, that would appear to mean that the Committee's reasons had to focus only on the issue of viability; and the minutes show that that is what the Committee did.

28. But the premise of this submission is that the Committee was under no obligation to say anything – or anything more than they did – about the degree of harm to the AONB which would be occasioned by the proposed scheme. The contention must be that if they were satisfied that the Smiths Gore modifications were not viable because they "would not be able to secure the necessary funding" – or even if that *might* be so – they were entitled to conclude that the scheme as proposed should be accepted without advancing any further reasons as to the harm it would cause: in effect, without saying anything more about the strictures of NPPF paragraph 116.

29. In my judgment that is not a tenable position. First, it is by no means entirely clear whether the Committee accepted their officers' assessment of the harm which would be inflicted by the development as proposed. They do not say so; there is no acknowledgement of "a significant detrimental impact on the landscape and... long-

term, irreversible harm to... the AONB" (paragraph 2.212 of the officers' report, already cited). If they did not accept that view, their decision is certainly flawed: they would have failed to articulate any judgment upon an issue which is clearly at the very centre of the policy expressed in NPPF paragraphs 115 and 116. But if (and this is perhaps the fairer view) the Committee is to be taken as having accepted the officers' assessment of harm to the AONB, the position is hardly any better. They would have opted to inflict irreversible harm on the AONB on the exiguous material before them from BNP Paribas – whose letter of 11 June 2013 made no reference at all to harm to the AONB – without apparently considering whether some of Smiths Gore's modifications might be put in place. It is not clear, moreover, whether their view was that the proposed modifications *would* render the scheme unviable or *might* do so. If they concluded that that was no more than a risk, and not a certainty, then their obligation to address the issue of harm was surely all the more acute.

30. It is of course right that the Committee made some reference to the harm issue. I repeat this passage from the minutes: "[t]he Committee had to assess whether the advantages outweighed the harm that would be caused to the AONB. When seen from the ground and with effective screening, it was believed that this could be minimised." But this compounds the difficulties. First, the reference to "outweighed the harm" appears to suggest that policy requires no more than the striking of a balance; and although I have held that it is not reasonable to attribute to the councillors an ignorance or misunderstanding of the requirements of NPPF paragraph 116, it is not possible to glean from this passage in the minutes what the councillors made of the strictures of the NPPF policy in light of the strong view of harm taken by the officers. Secondly, the reference to effective screening has to be set against what was said by the officers at paragraph 2.162 of their report:

> "The applicant refers to woodland planting being introduced to the west of FL-B to part screen this area. Even with a substantial increase in the area of planting however, the change in levels east of any planting would mean that, over time, screening would still be largely ineffective."

Mr Westaway also referred to a passage concerning screening in a document from his clients, which I need not cite. The upshot is that if the Committee believed that screening would make a substantial difference to the harm to the AONB threatened by the proposed development (as described by the officers), that view is fragile at best and would have to be supported by reasoning a good deal more substantial than the sentence in the minutes.

CONCLUSION

31. In all these circumstances I would allow the appeal. I consider that the Committee failed to give legally adequate reasons for their decision to grant planning permission. A statutory statement of reasons made under the EIA Regulations would have been required to grapple with the issue of harm much more closely than what the minutes disclose; and the strictures of NPPF paragraph 116 demand no less.

32. I should add this. This is an unusual case. As I stated at the outset, the scale of the proposed development is unprecedented in an AONB. This judgment, if my Lord agrees with it, should not be read as imposing in general an onerous duty on local

planning authorities to give reasons for the grant of permissions, far removed from the approach outlined by Lang J in *Hawksworth.* As Lord Brown said in *South Bucks*, "the degree of particularity required depend[s] entirely on the nature of the issues falling for decision".

Lord Justice Simon:

33. I agree.

34. The judge set out his conclusion on the point in issue on this appeal at paragraph 25 of his judgment:

> "It is plain from the minutes already cited that the majority of councillors concluded that the reduction proposed by the planning officers would jeopardise the scheme and so put at risk the benefits which they were anxious to secure for Dover. It is necessarily implicit in that reasoning that although they assessed the extent to which the detrimental effects on the environment and landscape could be moderated, they concluded that the proposal for moderation advanced by the planning officers would jeopardise the scheme and so could not be accepted. Accordingly, they voted to reject that advice and approve the scheme at the original density. In doing so, they fulfilled the obligation of the authority to make the assessment required by paragraph 116 of the National Planning Policy Framework (emphasis added)."

35. In disagreement with the judge, I have concluded that the implication that should properly be drawn from the material we have seen is that the Committee's reasons for its decision were not legally adequate.

36. I would also wish add my specific agreement to Laws LJ's observation in [32] of his judgment.