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CO/5038/2014

IN HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 27th February 2015

B E F O R E:

CHARLES GEORGE QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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ECOTRICITY (NEXT GENERATION) LIMITED

Appellant

-v-

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERMENT

Respondent

(Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
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Official Shorthand Writers to the Court)

Mr J Pike (instructed by Ecotricity) appeared on behalf of the **claimant**
Mr D Kolinsky QC (instructed by Treasury Solicitors) appeared on behalf of the **first defendant**

Mr D Forsdick (instructed by Richard Buxton**)** appeared for the **third defendant**

J U D G M E N T
(Approved)

1. THE DEPUTY JUDGE: This is yet another wind farm case. Under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") as amended the claimant with the unambiguously futuristic name Ecotricity (Next Generation) Limited challenges the decision letter ("DL") of the first defendant, the Secretary of State for Communities and Local Government dated 25 September 2014 refusing its appeal under section 78 of the 1990 Act.

2. The claimant proposed a wind turbine development ("the development") on land at Wood Farm, Church Lane, Shipdham, IP25 7JZ ("the appeal site"). The development comprised two wind turbines of overall height of up to 100 metres and associated infrastructure and access tracks.

3. The officers of the second defendant, the local planning authority, recommended to the elected members that planning should be granted, but wind turbines are still highly controversial, particularly at a local level. Members did not accept that recommendation. They refused to grant the planning permission for a single reason related to impact upon the landscape.

4. Initially the Secretary of State appointed an inspector to determine the claimant's appeal against the refusal of planning permission at a hearing. Subsequently the Secretary of State recovered the appeal for his own determination following a public inquiry ("the inquiry"). There is no suggestion that this was in any way improper.

5. The inquiry took place over six days in November 2013. The very experienced inspector JP Watson BSc, MICE, FIHT, MCMI, produced a report ("the report") seven months later to the Secretary of State dated 6 June 2014, which ran to over 100 pages. He recommended that the appeal be dismissed. The DL summarised and agreed with the conclusions and recommendations.

6. The inspector and the Secretary of State found that the development was in accordance with the development plan but concluded that other material considerations were of such weight that planning permission should nevertheless be refused. This they were entitled to do absent errors of law by reason of section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") which provides:

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

7. Three matters were found by the inspector and the Secretary of State to weigh against the grant of planning permission, despite its accordance with the development plan: (a) effects on the setting of listing buildings which would not be harmful in a way which was counter to the relevant development plan policy but which would be harmful to the setting of listed buildings; (b) the fact that the scheme would fail to protect prized tranquillity contrary to paragraph 123 of the National Planning Policy Framework

("NPPF"); (c) the fact that the scheme would lead to an intensification of risk to aviation by virtue of factors associated with air traffic control at Shipdham Airfield.

Grounds of Challenge.

8. The challenge principally concerns two of these three reasons, (a) and (c) above, and, as reformulated by Mr Pike for the claimant at the start of his opening, the grounds are:

1. Was it lawful for the inspector and the Secretary of State to find against the claimant on an aviation safety matter raised by a third party when the matter had not been raised in objection by any party or objector during the inquiry and also at the preceding hearing?
2. How on the facts of this case could the inspector and the Secretary of State conclude that the development conformed with the development plan as a whole and in particular with the relevant policy DC17 and at the same time conclude that considerable weight had to be given to the effect on the setting of two listed buildings as a result of section 66 of the Town and Country Planning (Listed Buildings) Act 1990 ("the Listed Buildings Act")?
3. Was the decision to refuse flawed for failure to address the test in paragraph 134 of the NPPF where there was less than substantial harm to listed buildings?
4. Was the decision to refuse flawed for failure to address the presumption in favour of sustainable development which arose under paragraph 14 of the NPPF?

Grounds 3 and 4 were introduced and argued by Mr Pike as part of his ground 2, though in my view they raise separate issues which is why I have separated them.

Legal Framework.

9. There is no dispute between the parties as to the relevant legal principles. Forbes J's familiar Seddon principles have now been simulated into a broader and updated formulation under five heads by Lindblom J in Bloor Homes East Midlands Limited v the Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) para 19. The key principles for present purposes are that decisions on appeal "are to be construed in a reasonably flexible way", part of his principle (1); "the reasons for an appeal decision must be intelligible and adequate to understand why the appeal was decided as it was and what conclusions were reached on the principal controversial issues" and "the inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law" (part of his principle (2)); and finally "when it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the principle in question" (part of his principle (5)).

10. Apart from the Bloor Homes principles there are two recent decisions of the Court of Appeal on special aspects of planning aspects. The first is Secretary of State for Communities and Local Government v Hopkins Development Limited [2014] PTSR 1145 dealing with so-called ambush cases. That is highly relevant to ground 1. The second is Barnwell Manor Wind Energy Limited v East Northamptonshire District Council and Others [2014] EWCA Civ 137, dealing with the approach to listed buildings and thus central to ground 2. I shall come to the details of these two cases in due course.

Ground One - Aviation safety.

(a). The report.

11. In a section beginning at para 298 the inspector summarised the written representations which had been received. He referred to the request of Norwich International Airport Limited ("NIA") for conditions for offering no safeguarding objection to the development. At paras 307 to 308 he reported that the Civil Aviation Authority ("CAA") raised no objection, but that it expressly said it had no responsibilities for safeguarding sites other than its own property; and it had commented that site operators remained responsible for providing evidence as to any impact on their businesses. Accordingly, said CAA, its own lack of objection should not be taken to mean that there were no aviation issues or that a comment from an operator lacked weight. At para 309 the inspector reported that National Air Traffic Services ("NATS") confirmed it had no safeguarding objection in terms of effects on the infrastructure of radars, communication systems and navigational aids for which NATS was responsible.

I set out paras 301 to 306 dealing with the objection of the Shipdham Flying Club ("SFC") in full:

> "301. Shipdham Flying Club: by letter to the LPA dated 6 October 2011 (document G14 application representations, page 103): the Club operates Shipdham Airfield. It hoped to start offering pilot training from the Airfield. Norwich International Airport was to extend its controlled airspace to the outskirts of Shipdham, early in 2012. The new airspace would encourage low level general aviation (under 1500 feet) to move further to the west than at present. In conjunction with the Marham Air Traffic Zone this would create a possible low level choke point directly above Shipdham village and the proposed turbine site.
>
> 302. The club's representation dated 20 April 2003 to the inquiry that was held in that year is more valid now than ever. The club is concerned by the consequences of an aircraft straying from the precise position of a perfect circuit or approach and being confronted by a structure in its direct line of flight and at the same height. The problem is twofold.
>
> 303. Firstly, the proposed position of the turbines and their declared height puts them in possible conflict with powered aircraft and gliders using the Airfield's main runway. There is also a secondary runway which when used will bring the aircraft using it somewhere between half a mile and a mile closer to the proposed turbine site. The Airfield is used for converting pilots from one type of aircraft to another which means that there could frequently be a pilot on his/her first solo flight in a new aircraft in the area of the turbines.
>
> 304. Secondly, Shipdham Airfield is a registered distress and diversion ("D&D") airfield in accordance with CAP667 9.2(c) and is listed for this purpose in all commercial aeronautical information publications for this purpose. This means that any pilot with a problem could well be required to negotiate these turbines on their way into the Airfield, in an ailing aircraft. In this situation the pilot would normally fly the natural open

corridor between Dereham town and Shipdham village but with the turbines in place that option would not be available as a primary choice and any D&D inbound aircraft would be far more likely to prefer to overfly the populated areas as the least hazardous option to the aircraft and its passengers.

305. The Airfield is registered with the CAA and holds an aeronautical ground station airfield flight information service radio licence issued by them.

306. By letter dated 9 November (document G 14, appeal representations, page 57) to the planning inspectorate, the club objects to the development on the basis of its proximity to Shipdham Airfield, which is an active airfield, and the consequent risk to air traffic."

12. Under a heading "Whether any harmful effects of the development would be outweighed by other considerations" the report had a heading “Aviation”.. Paras 394 to 396 read as follows:

"394. Aviation - conditions are suggested by Norwich Airport Limited and by the Defence Infrastructure Organisation which would satisfy their individual interests in respect of air safety [300, 310]. The council took the view [172] that air safety is not an obstacle to the scheme because neither the National Air Traffic Service or the Civil Aviation Authority had objected to the scheme; but the perspective of NATS was limited to radar, communications systems and navigational aids for which NATS is responsible, while the CAA is clear that the lack of a statement of objection from the CAA should not be understood to mean that there are no aviation issues [309, 307]. In light of those positions, I consider the written representations put by Shipdham Flying Club [301].

395. Much of those representations would be familiar to inspectors who heard the first and second inquiries. Their reports are presented as documents D23 and D24, and the club has explained that the evidence it previously gave (regarding the risk of collision the turbines would present to aircraft using the airfield) is more valid now than ever. That evidence related to airfield use by what I will term "ordinary" flyers, by trainee pilots and in connection with Shipdham's role as a registered distress and diversion airfield. On that basis, the 2003 inspector concluded that aircraft safety issues were not sufficient to justify refusal of the proposal; and the inspector in 2006 found the same.

396. Subsequently, proposed changes to the controlled airspace associated with Norwich international airport are likely to concentrate low level general aviation traffic (below 1500 feet) directly above Shipdham village and the appeal site so as to create a possible low level choke point [301]. The appeal scheme would introduce a hazard to flying in that area and would thus increase the risk to air traffic to a greater extent than

previously considered, and that must way against the scheme."

13. Then finally at para 412 under the heading "Overall Conclusions" the report said:

> "I have further found that the scheme would lead to an intensification of risk to aviation by virtue of factors associated with air traffic control and Shipdham Airfield and I attribute moderate weight to that danger."

14. This was the precursor to the conclusion in para 413 that:

> "in my view the material considerations that would arise from harm associated with the scheme would outweigh the benefits it would bring."

(b) the Decision Letter.

15. Under the heading "Shipdham Conservation Area" the DL said:

> "23. The Secretary of State also agrees with the inspector that the Shipdham Conservation Area would be subject to minimal change and slight harm (IR393).
>
> 24. The Secretary of State further agrees with the inspector's analysis and conclusion at IR394 that although neither the Civil Aviation Authority nor the National Air Traffic Service objected to the scheme both perspectives were limited. He notes the inspector's remarks that Norwich Airport limited propose changes to the controlled airspace, and it is likely to concentrate low level flying directly over Shipdham village creating a possible low level choke point. The Secretary of State agrees that this would introduce a hazard to flying and must weigh against the scheme (IR396)."

16. Then under the heading "Overall conclusion" para 30 read:

> "30. However, the Secretary of State, like the inspector has also found considerations that weigh against the scheme. Its effects on the setting of listed buildings while not harmful in a way that is counter to the development plan policy DC17, would be harmful to the settings, and in view of section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, considerable weight is attributed to that harm. The Secretary of State also agrees with the inspector that the scheme would fail to protect prized tranquillity contrary to paragraph 123 of the framework, and would also lead it an intensification of risk to aviation by virtue of factors associated with air traffic control and Shipdham airfield; he agrees that moderate weight is attributable to that danger."

17. This led on to the Secretary of State's agreement with the inspector that the material considerations that would arise from harm associated with the scheme would outweigh the benefits it would bring (para 31).

(c) Pre Inquiry Action by the Claimant and Local Planning Authority.

18. The SFC letter of 6 October 2011 was accompanied by a plan showing the revised configuration of the proposed controlled airspace in the vicinity of Norwich International Airport, which, was said in the letter to:

> "Create a possible low level choke point directly over head Shipdham village and ... not we would suggest a good point to erect a 100-metre unlit obstruction."

19. It was accompanied by a letter dated 20 April 2003 from the then chairman of SFC setting out in greater detail the safety concerns as at 2003.

20. On being notified of SFC's objection in October 2011, the claimant responded promptly to the local planning authority on 31 October 2011, noting that a very similar point had been raised in relation to planning appeals for two turbines on the appeal site in 2003 and 2006 and had been rejected by the inspectors on the grounds that the possibility of conflict with pilots in distress was extremely remote and that the objections on grounds of compromising aircraft safety were not sufficient to justify refusal. The claimant's letter ended:

> "If Breckland council would like Ecotricity to submit further evidence to support this view we are happy to do so. However we hope the above summary is enough to satisfy you. If you require further information, please do not hesitate to ask."

21. The letter of 31 October 2011 failed to respond to the specific safety issues raised by SFC, some of which could not have been addressed at previous inquiries because they involved more recent changes to the airspace above Shipdham, including the offer of training at Shipdham Airfield.

22. The claimant accepts that the inspector and the Secretary of State appear not to have seen the claimant's letter of 31 October 2011. The letter was available at all times on the local planning authority's website, but it seems not to have been supplied by the local planning authority to the planning inspectorate, as it should have been. Mr Pike's skeleton argument expressly states that:

> "Whether or not the inspector saw the 31 October 2011 letter is neither here nor there as far as this ground of claim is concerned."

23. The local planning authority did not ask the claimant to provide any further information following receipt of the claimant's letter of 31 October 2011. Its officer report to members of 9 July 2012 noted the SFC objection of proximity to turbines and the suggestion of an "obvious" danger to air traffic. The conclusion was that on the basis of the conclusion by the last inspector at the 2006 appeal there was no unacceptable impact on, among other things, aviation. That officer report was available to the inspector and discussed at the inquiry.

(d) What happened after the appeal was lodged.

24. Following the members' decision to refuse planning permission against officer advice the claimant appealed. The matter was initially to have been the subject of a hearing.

This triggered the objection letter dated 9 November 2012 from SFC, referred to in para 306 of the report. It was a one page two sentence letter, restating SFC's objection:

> "Please note that the management of Shipdham Flying Club wish to object to the proposed erection of this wind power station on the basis of its proximity to Shipdham Airfield and the obvious danger to air traffic. With structures of this size so close to an active airfield it is not a matter of if there is the likelihood of an accident it is a matter of when an accident will happen."

25. The letter said nothing of the claimant's letter of 31 October 2011, which may or may not have been forwarded to SFC. Nor did it comment on the officer advice to members.

26. The hearing was eventually replaced by an inquiry. A statement of common ground was agreed by the claimant and the local planning authority. This stated that the main issues in the appeal were first landscape and visual impact and second the benefits of the proposed development. It did not refer to any other issue being material, or suggest that the local planning authority's earlier analysis of the SFC objection had changed.

27. About a fortnight before the start of the planning inquiry the inspector issued a letter identifying what he saw to be the principal issues at the inquiry. These did not include aviation safety.

28. Para 3.1 of the letter read:

> "The following are matters about which the inspector particularly wishes to be informed."

And then there are three bullet points:

> "The extent to which the proposed development conforms to the proposed development plan;
>
> The extent to which the proposed development conforms to the national planning framework;
>
> Whether any permission should be subject to conditions and if so the form they should take."

29. Para 3.2 read:

> "Whilst the above matters appear to the inspector to be the principal ones that need to be addressed, from the evidence available to him at the date of this note, he is not precluded from hearing evidence on any matters that he may consider relevant to the appeal."

30. There then followed a heading "evidence" and then in 4.1:

> "In preparing his report, the inspector will have regard to:

- evidence submitted to the inquiry in writing also including plans, diagrams and pictures;

- evidence given orally at the inquiry, whether in examination or otherwise;

- evidence submitted in writing to the hearing that was held in March 2013;

- evidence received by Breckland Council that had had subsequently made available to the inspector through the planning inspectorate."

31. The SFC letter of 9 November 2012 fell within the third point in that paragraph and its letter of 6 October 2011 fell within its fourth point.

32. Para 4.2 of the inspector's letter stated that there was no need to resubmit material that was in either the third or the fourth category. Para 4.3 stated:

> "There is no obligation on any party to appear at the inquiry. TCP rule 11 lists those who are entitled to appear and says that the inspector may permit other persons to appear at the inquiry."

33. Para 8 of the report states:

> "Main issues.
>
> 8. In opening the inquiry I expressed my view that the main issues in this appeal are as follows. No Party expressed a different view at the inquiry.
>
> - the extent to which the proposed development conforms to the development plan;
>
> - the extent to which the proposed development conforms to the National Planning Policy Framework;
>
> - whether any permission should be subject to conditions and, if so, the form they should take;
>
> ... all with particular reference to the landscape and visual effects the development would have, its acoustic effects, and any other harmful or beneficial effects it would have."

34. At the inquiry the inspector accepted the agreed position between the claimant and NIA that there should be an aviation safeguarding condition. The inspector did not raise any other aviation safety concerns, let alone those of SFC, during the course of the inquiry. However, in his opening submissions to the inquiry, counsel for the claimant raised aviation impacts when he said:

> "As is often the case where a wind energy development is proposed, a

> range of other matters, such as impact upon aviation, users of rights of way, and the impact of construction traffic, have been raised in objections made to this proposal, and those matters have been addressed in the written evidence of Mr Dobson, and will be further addressed in his oral evidence."

35. Mr Dobson was the claimant's expert planning witness. He set out the issues that he was going to cover in his proof of evidence, which was available one month before the public inquiry, at paras 3.2 and 3.3, including as follows:

> "3.2 ... it is noted that there were a significant number of third party representations made in respect of the planning application, which were considered by the planning authority when determining its decision. On the basis that such third party residents had indicated they were likely to submit similar representations in respect of this appeal, the following points have been identified from their representations that may also require further consideration ...
>
> (g) health and safety issues, particularly in relation to proximity to Shipdham Airfield;... "

And then in his para 3.3 he continued:

> "Many of these issues raised by third parties were also considered at earlier appeals. Nonetheless, as this is a new appeal all of these issues must be addressed again to a greater or lesser extent, in the evidence presented by myself and other specialist witnesses."

There is an obvious and unexplained contrast between "may" in 3.3 and "must" in 3.4.

36. There was nothing in the remainder of Mr Dobson's proof relating to Shipdham Airfield, until in his conclusions Mr Dobson reverted to the matter in paragraph 10.7, which stated:

> "In addition to the council's single reason for refusal, the 38 per cent of objectors responding to the council consultation raised a variety of other issues, including ...
>
> (g) health and safety issues, particularly in relation to proximity to Shipdham Airfield."

And then in his para 10.8 he said:

> "Many of these issues were raised by third parties at earlier appeals but will need to be addressed again to a greater or lesser extent as part of the appeal process."

37. Dr Lee Hoare, the third defendant in these proceedings and the planning director of the Renewable Energy Foundation, gave evidence at the inquiry for the residents of Daffy Green. Her uncontroverted evidence in the present proceedings is that aircraft safety, including any issues relating to Shipdham airfield, was not covered in any oral

submissions made by Mr Dobson during the inquiry, nor was it referred to in the written rebuttal evidence which Mr Dobson gave to the inquiry.

38. In closing submissions counsel for the claimant did not refer to the SFC objection, merely saying:

> "46. A range of other matters have been raised in objections made to this proposal. Those matters were addressed in the written evidence ... and oral evidence of Mr Dobson, and none of them are capable of carrying any real weight in this appeal."

Relevant Legal Framework.

39. In Hopkins the Court of Appeal reviewed the authorities (including London Borough of Croydon v the Secretary of State for the Environment [1999] EWHC (Admin) 748; Castleford Homes Limited v the Secretary of State for the Environment [2001] EWHC (Admin) 77; R (Gates) Hydraulics Limited) v the Secretary of State for Communities and Local Government [2009] EWHC 2187 (Admin)) pertaining to procedural fairness in the context of planning appeals and in particular planning public inquiries).

40. Hopkins had appealed against a refusal of planning permission to construct 58 dwellings on a field at the end of Wincanton (para 19). The inspector's conclusion following an inquiry was that the adverse impacts of the proposals, including adverse effects on the tranquil and rural character of the area and the fact it was not in a sustainable location, would significantly outweigh the benefits, which included making a contribution towards meeting the substantial shortfall in the five year housing land supply. Hopkins' section 278 application succeeded at first instance on the ground that the inspector's failure to warn the parties that she was minded to rely upon character/appearance and sustainability, which had not originally been among the main issues identified by the inspector, constituted a breach of natural justice. On appeal and in a comprehensive review of the relevant legal principles Jackson LJ said:

> "I would formulate the principle of natural justice or procedural fairness, which is in play in this appeal, as follows. Any participant in adversarial proceedings is entitled (a) to know the case which he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case."

41. Then having discussed Lord Russell's phrase "fair crack of the whip" in Fairmount Investments Limited v Secretary of State for the Environment [1976] 1 WLR 1255, HL, Jackson LJ said at paragraph 49:

> "49. This stark phrase, which now has somewhat strange overtones, appears in a number of authorities, both before and after Fairmount. With all due respect to those great jurists who use it, this phrase is not helpful either as elucidation of the principle or as a guide to its application. What I think is meant by not having a "fair crack of the whip" is that there has been procedural unfairness which materially prejudiced the applicant. This pedestrian phrase is perhaps more useful as a test."

42. Then following his review of the cases he said para 61:

> "Let me now stand back and review the terrain. The 2000 Rules enable the inspector to focus the hearing without confining its scope at the outset. The Rules provide a framework, within which both the inspector and the parties operate. It remains the duty of the inspector to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the hearing.
>
> 62. From reviewing the authorities I derive the following principles:
>
> (i) any party to a planning inquiry is entitled (a) to know the case which he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
>
> (ii) if there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the inspector's decision.
>
> (iii) the 2000 Rules are designed to assist in achieving (i), avoiding pitfall (ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness.
>
> (iv) a rule 7 statement or a rule 16 statement identifies what the inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the inquiry proceeds.
>
> (v) the inspector will consider any significant issues raised by the third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the inspector expressly states that they need not do so.
>
> (vi) if a main party resiles from a matter agreed in the statement of common ground prepared pursuant to rule 15, the inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged."

43. Turning to review the evidence of that case, Jackson LJ held:

> "68. In those circumstances the question of sustainability was

clearly a live issue in the inquiry. The fact that the inspector had not identified the issue in her written rule 7 statement of her oral rule 16 statement was no more than an indication of her preliminary views. It did not remove the issue of sustainability from the arena.

69. Hopkins was or ought to have been aware that lack of sustainability was part of the case which it had to meet. Hopkins had a reasonable opportunity to adduce evidence and make submissions on that topic. There was no procedural unfairness in this respect."

44. At para 70 Jackson LJ said that the issue of character/appearance, whilst not identified as a main issue, had been raised by a number of third parties, including those who had not appeared at the inquiry to give evidence (see his paras 31, 71 and 72).

45. Then at para 76 he said:

"As a separate point, the character and appearance of the area is a matter of aesthetics and subjective impression. Hopkins may not have achieved much by making submissions about the matter. I do accept, however, that Hopkins might have slightly improved its position by demonstrating (if it were the case) that all possible sites in the area were of similar beauty and tranquillity."

46. In a much briefer judgment Beatson LJ said:

"88. The question is thus whether Hopkins had a reasonable opportunity to put its case on sustainability and character and development at the inquiry. As my Lord has explained, extensive evidence was adduced by the main parties and others in the inquiry on the issue of the sustainability of the development in the sense that term is used in the national planning policy framework ("NPPF"). The NPPF regards sustainable development "a Golden thread running through both plan making and decision taking" and states (paragraph 14) that "a presumption in favour of sustainable development lies at its heart". At the outset of the appeal the Council made it clear that it relied on lack of sustainability as a reason for resisting the appeal although this was not one of the reasons it had been given for refusing the application for planning permission. As to character and appearance, a number of third party objectors raised this issue before the inspector.

89. It is clear that, although neither sustainability nor character and appearance had been identified by the inspector as a "main issue" in her statements pursuant to Rule 7(1) of the 2000 Rules before the inquiry and pursuant to Rule 1616 at the start of the inquiry, they were live issues at the inquiry. There was, moreover, no agreement between the main parties, Hopkins and the planning authority, that sustainability and character and appearance were not problematic in the context of Hopkins' application. Their statement of common ground prepared pursuant to

> Rule 15 of the 2000 Rules, referred to by my Lord, did not record agreement as to the sustainability of the proposed development. That is significant in view of the importance accorded to the sustainability by the NPPF and the fact that it is have commonly an issue in inquiries. As to the character and appearance, while it stated that there was no objection to the site in landscaping terms, the statement of common ground said nothing about the impact of the development on the character and appearance of the area.
>
> 90. The authorities on planning inquiries considered by my Lord show that in this context what is needed is knowledge of the issues in fact before the decision maker, the inspector, and an opportunity adduce evidence and make submissions on those issues: see Castleford Homes Limited v the Secretary of State for the Environment, Transport and the Regions [2001] EWHC 77 (Admin) at [65] and R (Tatham Homes Limited) v First Secretary of State [2005] EWHC 3538 (Admin), reported at [2008] JPL 185."

47. And finally Beatson LJ said:

> "95. It is of course important that inquiries focus on the main issues in dispute. But it is also important to remember that the main parties are not the only parties and it is not only the issues identified by the inspector before or at the commencement of the inquiry which are relevant. This is clearly seen from Rules 16(3) and 16(12) of the 2000 Rules. Rule 16(3) explicitly permits any party at the inquiry to refer to issues which that party considers relevant to the appeal but which are not issues identified by the inspector as main issues. Rule 16(12) permits the inspector to take into account any written representation or evidence received before or during the inquiry provided that it is disclosed at the inquiry.
>
> 96. Although Rule 16 of the 2000 Rules is concerned with procedure at the inquiry whereas rules 18 is concerned with procedure after the inquiry, the difference in the provision made in the two rules is also of assistance in this context. Rule 18 deals, inter alia, with the position, after the close of the inquiry, of new evidence and new matters of fact not raised at the inquiry which the inspector considers to be material to his decision. It requires the inspector to notify those who appeared at the inquire inquiry of the matter and to afford them an opportunity of making written representation to say him or asking for the reopening of the inquiry. Had the rule maker wished to require the inspector to make some formal statement about an issue not identified as a main issue in the Rule 7 and Rule 16 statements before taking it into account, it could have done so in that Rule by making it a requirement in a similar way to the way Rule 18 requires the inspector to notify and to afford an opportunity to those who appeared at the inquiry to make representations. The submissions on behalf of Hopkins, if accepted, would in effect reduce the distinction between the procedure in relation to issues that are not

identified as main issues but emerge during the inquiry and the procedure after the inquiry for evidence not raised at it very significantly, and indeed almost to vanishing point.

97. In this case two issues not identified in the Rule 7 and 16 statements as a main issue clearly emerge as significant issues as a result of the evidence of the third parties at the inquiry. I have concluded that a developer who does not avail himself of the opportunity to test evidence adduced about such an issue (if necessary by seeking an adjournment to adduce further evidence) or to make submissions about it may not complain of procedural unfairness if the inspector's decision is based in whole or in part on that issue. This conclusion follows from the fundamental nature of "natural justice"/"procedural fairness" the structure of the 2000 Regulations and the approach of the authorities on planning inquiries."

48. In explanation of Beatson LJ's reference to certain parts of Rule 16 of the Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 I set out those provisions:

"Rule 16.

(2) at the start of the inquiry the inspector shall identify what are, in his opinion, the main issues to be considered at the inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear.

(3) nothing in paragraph (2) shall preclude any person entitled or permitted to appear from referring to issues which they consider relevant to the consideration of the appeal but which were not issues identified by the inspector pursuant to that paragraph ...

(12) the inspector may take into account any written representation or evidence or any other document received by him from any person before an inquiry opens or during the inquiry provided that he discloses it as the inquiry."

49. The inquiry with which the present application is concerned was not held under those specific rules but under the Town and Country Planning (Inquiries Procedure) Rules (England) 2000, but Rules 15(2) and 15(12) are identically worded to those which apply in Hopkins and so is Rule 15 (3), save for an immaterial addition.

50. A previous Court of Appeal decision not mentioned in the judgment in Hopkins is Francis v the First Secretary of State and Another [2008] EWCA Civ 890. This

concerned an inspector's decision following a hearing rather than a full inquiry. Two short citations will suffice from the judgment of Pill LJ. At para 30 he said:

> "An inspector has his duties but he is entitled to rely upon a properly represented appellant to put the case fully to him."

And at para 36 he said:

> "An inspector's duty to investigate ... does not relieve an appellant of the responsibility of preparing and setting out a case which can form the basis of the discussion at the meeting. It is not for the inspector always to root out a case which the appellant has singularly, with respect, failed to put; particularly where, as in this case, the appellant is represented by someone skilled in the field of planning."

51. Next there is the decision of Patterson J in Halite Energy Group Limited v the Secretary of State for Energy and Climate Change [2014] EWHC 17 (Admin), where a development consent order had been refused by for an underground gas storage facility on grounds of uncertainty relating to the qualities of the surrounding rock salt. The refusal was quashed as a result of procedural unfairness in its examination by the then Major Infrastructure Planning Unit. A statement of common ground had been agreed between the developer and both the local planning authority and the mineral planning authority relating to the suitability of the surrounding rock salt and submitted to the examining panel. This issue was still contested by third parties. The panel decided to hold some issue specific hearings but the qualities of the rock salt were not among the issues addressed, so that there was no reason for the developer to anticipate that this issue might, as it did, become a reason for refusal. Paras 81 and 86 read:

> 81. …… the enhanced role which the inspector has to play in an informal hearing is not dissimilar to the role of the ExA carrying out an examination under the 2008 Act. As a rule there is no cross-examination at the hearings or on the written documents submitted in response to the Panel's questions. The onus is, therefore, on the ExA to ensure that material matters of concern, which may or may not have been raised by others who have made representations on the planning application are raised with all parties in a fair and transparent way. In particular, where matters raised or of concern relate to the principal controversial issues, there is a duty upon the ExA to provide all parties with the opportunity to comment upon them before reaching their final conclusions.
>
> 86. A SOCG has been described by the PINS as a crucial component of the inquiry process. As part of the highly focused modern inquiry regime parties are entitled to rely upon the content of the SOCG as determinative, as between themselves, of the issues contained within it. Although an examination is not an inquiry I can see no basis for any lesser weight to attach to a SOCG in an examination process. Of course, an ExA is not bound by the SOCG. In this case with their own expert adviser on geological issues it was entirely foreseeable that they would examine its contents critically. However, if there was to be a fundamental

> disagreement with the contents of the SOCG it was reasonable to expect that would be raised with the experts in a transparent manner. If an ISH was not considered necessary by the ExA then, at the very least, further questions should have been raised which made clear the areas of concern to the ExA and which gave the claimant the opportunity rebut the various scenarios and "extreme circumstances" which were postulated in the Panel Report. In the absence of either of those events as the examination progressed it was not unreasonable for the claimant to expect that geological issues were no longer a main controversial issue."

52. Finally, because it was relied upon by Mr Forsdick QC for the third defendant, I set out paragraph 1.14.4 of the Procedural Guidance on Planning Appeals and Called in Planning Applications issued by the Planning Inspectorate PINS 01/09:

> "In practice, interested persons need only submit further representations at the appeal stage if they wish to add to the comments they made at the application stage, or if they did not comment at the application stage. If the comments made on the planning application remain valid at the appeal stage, and there is nothing further to add, there is no need for interested parties to repeat them at the appeals stage. They will be forwarded to the planning inspectorate to the local planning authority for consideration by the Inspector when determining the appeal."

Submissions of the Claimant on Ground 1.

53. Mr Pike contends that his opening and closing submissions did not refer to the SFC objection because there was no need to do so, as it had not been raised by any party or the inspector. Similarly, Mr Dobson did not need to give any evidence at the inquiry relating to the SFC objection because nobody raised the issue. He complains that the claimant had no opportunity to know that the inspector had any concerns about Shipdham Airfield until it received the DL accompanied by the report. The claimant's position as far as procedural unfairness is thus very similar to that in the Halite case, it being irrelevant that the facts of Halite did not involve a planning inquiry, but a different form of examination on the Secretary of State's behalf. He further complains that the inspector took no steps to investigate this matter before reaching the conclusion that the "development" would introduce a hazard to flying and would thus increase the risk to air traffic to a greater extent than previously considered. He refers to Lord Diplock's dictum in the Secretary of State for Education and Science v Thameside Metropolitan Borough Council [1977] AC 1014 at 1065:

> "The question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information on enable him to answer it correctly?"

54. The approach of the inspector, which materially influenced the DL, constituted, he says, a clear breach of natural justice and procedural fairness. Mr Pike relies upon Hopkins and the authorities reviewed therein for the proposition that where a matter is not raised as an objection by the inspector or any other party during a public inquiry, a party to the inquiry cannot be expected to foresee that the matter is in issue. It will be a

breach of natural justice to reach findings on that matter against the party in those circumstances. In particular, Mr Pike places reliance on what was said in Castleford Homes Limited v the Secretary of State for Environment, Transport and the Regions [2001] PLCR 29 by Ouseley J at paragraph 65:

> "Whilst an inspector can reasonably expect parties at an inquiry to explore and clarify the position of their opponents, if an inspector is to take a line which has not been explored, perhaps because a party has been under a misapprehension as to the true position of its opponents, as in my view happened here, fairness means that an inspector give the party an opportunity to deal with it. He need not do so where a party ought reasonably to have been aware on the material and arguments presented at the inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed."

55. Mr Pike criticises the inspector's finding on this issue as irrational and as an ambush on the claimant. It could not be, he said, on any reason reasonable basis that the claimant "ought reasonably have been aware", to use Ouseley J's term, that this point had to be dealt with at the inquiry or that the inspector was not content with the answer given to the SFC objection by previous inspectors and in the Officer Report to the local planning authority. To conclude that the development would give rise to a safety hazard and to attach "moderate weight" to it was irrational. This was particularly so when the conclusion had been reached in the absence of having sought comment or advice from the CAA and NIA, given that air traffic associated with and the controlled airspace surrounding Norwich International Airport were said by SFC to be implicated in this material risk to aviation safety.

56. Had the claimant been given the opportunity to deal with the matter at or after the inquiry (and on other issues, the opportunity had been provided after the inquiry for further representations to be made) it would have explained why there would be no material increase in risk to aviation safety and/or that the matter should not carry any material weight against the grant of planning permission. Here, reliance is placed by Mr Pike on an expert report from Osprey Consulting Services Limited dated 12 November 2014, exhibited to a witness statement of the claimant's in house legal counsel. The Osprey report was claimed to be admissible for showing the sort of evidence that the claimant would have placed before the inquiry if it had been fairly treated.

57. If the "moderate weight" attributed to this factor had not been included in the Secretary of State's balancing act, there was at the very least a possibility that those other matters which the inspector and the Secretary of State found to be adverse impacts would not have outweighed the fact of compliance with the development plan.

Submissions of the Defendants on Ground 1.

58. These contentions are robustly objected by Mr Kolinsky QC for the Secretary of State and of Mr Forsdick QC for the defendant. Mr Kolinsky warned of the danger of over-much concentration on what went on at the inquiry itself; it was not the totality of the process. Written representations were fully part of the material which the inspector

and Secretary of State had to take account of and there was no duty on an inspector specifically to draw SFC's objections to the claimant's attention in circumstances where there was no suggestion that these had not been properly disclosed at the inquiry in accordance with rule 15(12) of the relevant procedure rules.

59. The points put forward by RFC related to material changes which had recently taken place and which exacerbated the position it had previously identified. There had simply been no considered response to those points, either in the claimant's letter of 31 October 2011 (whether or not this was seen by the inspector) or in the officer report to the local planning authority.

60. Mr Kolinsky put at the forefront of his argument Beatson LJ's comment in paragraph 43 of Hopkins that each case of alleged procedural unfairness is "acutely fact sensitive." He also underlined the significance to the facts of the present case of in particular points (i), (iv) and (v) in para 62 of Jackson LJ's judgment in that case.

61. Here the claimant was on notice of the SFC objection. It was plain to all properly informed participants at the inquiry that the inspector would need to consider that objection in making his decision, as the extract from Mr Dobson's planning evidence demonstrates. SFC's objection highlighted a harmful effect of the scheme, all of which the inspector had expressly said at the opening of the inquiry he would be considering in connection with the main issues he had identified.

62. Whether because the claimant took its eye off the ball or otherwise, it did not address the substance of the point through Mr Dobson or even by referring to its letter dated 31 October 2011, as providing what it regarded as the answer to the point.

63. The inspector, said Mr Kolinsky, did his job by engaging with the concern expressed by SFC and expressing his conclusions on the point. It was rational, fair and lawful of him to recommend that moderate weight be placed on this concern. The Secretary of State acted lawfully in agreeing with the recommended approach.

64. Since the claimant was aware of the SFC objection as shown by Mr Dobson's evidence the claim to have been "ambushed" was hollow. They had no right to be surprised. The statement of common ground at the present case was readily distinguishable from that in the Halite case because the latter expressly dealt with the qualities of the rock salt whereas the statement in common ground in the present case was silent as to aviation safety. Additionally, the examination process of development planning consent was an inquisitorial process, quite unlike that that applied in the present case and he referred to what Keene J had said in the London Borough of Croydon v the Secretary of State for the Environment [1999] EWHC 748 (Admin) referred to in Francis, para 25:

> "No one suggests that an inspector is required to engage in a search for material not put before him."

65. This was particularly so at an inquiry where the claimant was represented by planning counsel, as to which see Francis, para 36. The other matters on which post-inquiry

representations had been sought were of an entirely different character concerning new issues which could not have been dealt with at the inquiry. There was no irrationality. The inspectors had in mind NATS and CAA in the decision, but also appreciated correctly that their position reflected their respective specific remits rather than showing there were no aviation issues. Here there was a coherent objection to which the claimant had provided no answer. Therefore the inspector was entitled to attribute to it "moderate weight".

66. Further, if the claimant has an answer to SFC's concerns, it can apply again for planning permission, address that concern and argue that the planning balance should be struck differently. That is relevant to the question of discretion if there is any force in the claimant's points (which was denied).

67. Mr Forsdick aligned himself with these submissions, emphasising that there was plainly an outstanding material planning objection from the SFC which the claimant had to address and which the claimant ought to have addressed at the inquiry. He relied strongly from the passages of Pill LJ's judgment in Francis which I have set out above, and on para 1.14.4 of PINS 01/2009 to which I have already referred.

68. His client, Dr Hoare, in her witness statement of 17 November 2014, drew attention to what both counsel for the claimant and Mr Dobson had said and not said at the inquiry. Dr Hoare's belief, there set out, is that the claimant, whilst recognising the necessity to engage with the issue raised by is SFC, simply forgot to do so. Whether or not that be the case, Mr Forsdick says that the claimant knew the case it had to meet and failed to do so. There was no unfairness and the history of past inquiries in respect of the appeal site should have brought home to the claimant that there were strong differences on planning matters between the local planning authority and local residents, who included SFC. The claimant was seeking a second bite of the cherry, having forgotten or chosen not to make aviation safety an issue. In circumstances where there were simply no evidence to contradict what RFC was asserting, the inspector had been entitled to accord “moderate weight” to what was said on aviation safety.

69. Conclusions on Ground 1.

70. If there was procedural unfairness to use the "pedestrian phrase" preferred by Jackson LJ in Hopkins para 49, I would unhesitatingly reject Mr Kolinsky's argument that discretionary relief should be refused because of the availability of a remedy by means of a new planning application, supported by appropriate aviation evidence, to rebut the SFC objection. On that approach all or nearly all ambush challenges would necessarily fail. Nor is it the approach adopted in other forms of section 288 challenge. If there has been a material error of law, in this case real procedural unfairness, and if this had prejudiced the claimant, the decision ought, save most exceptionally, to be quashed.

71. But has there been procedural unfairness here? I have no doubt that the claimant was surprised on reading the inspector's report to find that moderate weight had been given to the SFC objection, which it considered to be misconceived and/or of minimal weight, as apparently did the local planning authority. But the claimant knew of the objection, having seen SFC's letters of 24 April 2004, 6 October 2011, 9 November 2012. Its only

response was to send the letter of 31 October 2011 to the local planning authority, which did not engage with the detail of the objection being made. It must have been obvious to the claimant that the inspector would have to deal with the SFC objection and afford it whatever weight was appropriate when writing his report. To do otherwise would not have been fair to SFC and would have been a breach of the inspector's own obligations. Yet the claimant did not even draw its own rather adequate letter of 31 October 2011 to the attention of the inspector.

72. This court cannot know whether it was, as Dr Hoare suggests, forgetfulness which explains why the claimant did not expressly deal with the SFC objection at the inquiry. It may have been a tactical decision which with hindsight badly misfired. But whatever the reason for what occurred, the claimant plainly "ought reasonably to have been alerted to the need to address the issue" which is the test Ouseley J applied in Castleford para 65 and on which Mr Pike himself relies in support of his own submissions.

73. Factually this case is entirely distinguishable from cases such as Castleford (where there was no indication that on site provision for residents alone was under consideration in the event that the inspector rejected the local planning authority's primary position and accepted the inappropriateness of the site for provision of a local area play which non-residents might use, see para 64).

74. In R (Gates Hydraulics Limited) v the Secretary of State for Communities and Local Government [2009] EWHC 2187 (Admin) at issue was the question of external noise from proposed employment uses on the living conditions of future neighbouring residents. It had been in agreed in the statement of common ground that mitigation of this noise should be treated as a reserved matter and covered by appropriate noise conditions. In evidence and under cross-examination, the council's noise witness had confirmed that the recommended noise mitigation measures would provide adequate protection. In those circumstances the appellant did not call its own noise witness. However, the inspector rejected the appellant appeal on grounds which included the occupants of the dwellings were likely to be subject to noise and disturbance from the surrounding industrial noise. The deputy judge said at para 30:

> "... the claimant had a reasonable expectation that upon the conclusion of the statement of common ground, upon confirmation of its status in cross-examination, that noise and disturbance were no longer a main issue at the public inquiry. If it had appeared to the inspector that she was of a different view, then that was something that she should have made clear to enable the claimant to have a fair crack at [sic]the whip."

That is a far cry from the situation here.

75. I also regard the position as very different from that which prevailed in Halite, on which Mr Pike places undue weight, for the reason given by Mr Kolinsky.

76. The circumstances here are much more akin to those in Hopkins, though no two cases are identical. In that case, as shown in the citations above, the two issues of character/appearance and sustainability had been raised, whether at the inquiry or in

letters from local residents. I have already set out an extract from the judgment of Beatson LJ para 95, where he emphasised that "the main parties are not the only parties" and this is entirely apposite in the case of SFC. The issue having been raised by SFC's letters, which were before the inspector, the claimant, has only itself to blame for not dealing with the matter head on by calling its own expert evidence at the inquiry, or at least tendering an expert report on the issues raised by SFC.

77. I do not consider that the inspector was bound to raise the matter expressly at the inquiry, though it would have been better and would have produced a more informed report if he had done so. Nor was he bound to seek additional advice from NATA and NIA before attributing “moderate weight” to the objection. He had to decide the matter on the evidence before him and the only evidence on this matter was that in SFC's letters. That described a worsening situation in which:

> " it is not a matter of if there is a likelihood of an accident, it is a matter of when an accident will happen."

78. There was accordingly "no procedural unfairness which materially prejudices the party" so as to call for quashing; see Jackson LJ in Hopkins para 62. Nor was there any irrationality.

79. For the avoidance of doubt I consider that the late expert report on which Mr Pike sought to place some reliance was inadmissible in section 288 proceedings such as these and I have paid no attention to its contents.

80. Accordingly the claim on Ground 1 fails.

Ground 2. Listed Buildings.

(a) The Development Plan.

81. The relevant policy concerning listed buildings and their settings was policy DC17 in the local planning authority's Core Strategy and Development Control Policies Development Plan Document. This provides under the heading "historic environment":

> "Any development that will affect a Listed Building or a Conservation Area will be subject to comprehensive assessment. New development will be expected to preserve and enhance the character, appearance and setting of Conservation Areas, Scheduled Monuments, Historic Parks and Gardens and other areas of historic interest. Where a proposed development will affect the character or setting of a Listed Building, particular regard will need to be given to the protection, preservation and enhancement of any features of historic or architectural interest."

82. I shall shortly set out section 66 of the Listed Buildings Act which, as expounded in Barnwell, provides the statutory framework within which policy DC17 has to be applied.

(b) The Report.

83. The inspector found that there would be some "slight harm" to the setting of two listed buildings. There then follows:

"390. Policy DC17 of the LDF ("historic environment") includes the following provision, among others:

> "Where a proposed development will affect the character or setting of a listed building, particular regard will need to be given to the protection, press variation and enhancement of any features of historic or architectural interest."

No case is put that any feature of historic or architectural interest in the setting of any listing building, or in any listed building, would be affected by the scheme. It therefore seems to me that in that respect the development would satisfy policy DC 17.

391. Having regard to the judgment in the Barnwell Manor case it seems to me that it does not follow that if the harm to the listed buildings or their settings is found to be less than substantial, the subsequent balancing exercise undertaken by the decision maker should ignore the overarching statutory duty imposed by section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. This provides that:

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

392. There is therefore a need to give considerable weight to the desirability of preserving the setting of all listed buildings in this appeal, including grade 2 listed buildings as well as grade 1 listed buildings."

84. Then at para 411 in his Overall Conclusions, the inspector said:

> " I have also found there to be considerations that weigh against the scheme. Its effects on the settings of listed buildings would not be harmful in a way that would be counter to LDF policy DC17; but there would be harm to the settings nevertheless and, in view of section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, I attribute considerable weight to that harm."

85. This was one of the three factors that led to his recommendation that the appeal be dismissed, notwithstanding its benefits and its compliance with the development plan.

(c) The DL.

86. In paras 20 to 21 of the DL the Secretary of State agreed the inspector's assessment of the "slight" effect on the setting of two listed buildings. In para 22 he said:

> "The Secretary of State agrees with the inspector's regard to judgment in the Barnwell Manor case (IR391) and his conclusion (IR392) that considerable weight should be given to the desirability of preserving the setting of all listing buildings in this appeal."

87. Then in his own Overall conclusions it was said:

> "However, the Secretary of State, like the inspector has also found considerations that weigh against the scheme. Its effects on the settings of listed buildings while not harmful in a way that is counter to development plan policy DC 17, would be harmful to the settings, and in view of section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, considerable weight is attributed to that harm. The Secretary of State also agrees with the inspector that the scheme would fail to protect prized tranquillity contrary to paragraph 123 of the framework, and would also lead to an intensification of risk to aviation by virtue of factors associated with air traffic control and Shipdham airfield; he agrees that moderate weight is attributable to that danger.
>
> The Secretary of State agrees with the inspector that the material considerations that would arise from harm associated with the scheme would out- weigh the benefits it would bring. Those material considerations, taken together and including the overarching statutory duty imposed by section 66(1), make unacceptable the impact of the development and are sufficient to overcome the presumption established by section 38 (6) of the Planning and Compulsory Purchase Act that determination should be in accordance with the development plan.".

(d) Relevant Legal Framework.

88. In Barnwell the Court of Appeal upheld the first instance decision quashing a planning permission granted on appeal for a four turbine wind farm. At issue was the effect of the proposed development on a group of heritage assets at Lyvedon New Bield which, as was common ground, was of a "cultural value of national importance if not international significance" (para 5). The closest wind turbine would have been around 1.3 kilometres from the boundary of the registered park and 1.7 kilometres from New Bield itself. The inspector found that the effect on the setting of these heritage assets "would not reach the level of substantial harm" (para 7) and that "the significant benefits of the proposal in terms of the energy it would produce if from a renewable source outweigh the less than substantial harm it would cause to the setting of designated heritage assets and the wider landscape" (para 8).

89. At issue was the construction and practical application of section 66(1) of the Listed Buildings Act, the terms of which I have already set out.

90. A lengthy citation from the judgment of Sullivan LJ, with whom the other members of the court agreed, is appropriate:

> "16. What was Parliament's intention in imposing both the section 66

> duty and the parallel duty under section 72(1) of the Listed Buildings Act to pay "special attention ... to the desirability of preserving or enhancing the character or appearance" of conservation areas? It is common ground that, despite the slight difference in wording, the nature of the duty is the same under both enactments. It is also common ground that "preserving" in both enactments means doing no harm: see South Lakeland District Council v the Secretary of State for the Environment [1992] 2 AC 141, per Lord Bridge at paragraph 150.
>
> 17. Was it Parliament's intention that the decision maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area) and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision maker thought appropriate; or was it parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision maker should give particular weight to the desirability of avoiding such harm?"

91. Then, following an analysis of the Bath Society v the Secretary of State for the Environment [1991] 1 WLR 1303, South Lakeland and Hetherington UK Limited v the Secretary of State for the Environment [1995] 69 P&CR 374 Sullivan LJ continued at para 22:

> "I accept that [subject to certain caveats expressed later in the judgment] the inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment. But I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view Glidewell LJ's judgment [in Bath] is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which a decision maker must give "considerable weight"."

92. Sullivan LJ then continued:

> "That conclusion is reinforced by the passage to the speech of Lord Bridge in South LakeLand to which I have referred (paragraph 20 above). It is true, as Mr Nardell submits, that the ratio of that decision is that "preserve" means "do not harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance after conservation area precisely because the desirable of preserving the character or appearance of the area is a consideration of "considerable

importance and weight".

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

93. Then follows:

"28. It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE 9.4 and HE 10.1 should ignore the overarching statutory duty imposed by section 66(1), which properly understood (see Bath, South Somerset and Hetherington) requires considerable weight to be given by the decision makers to the desirability of preserving the setting of all listed buildings, including grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed.

29. For these reasons, I agree with Lang J's conclusion that parliament's intention in enacting section 66(1) was that decision makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. The Inspector appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyvedon New Bield, as a less than substantial objection to the grant of planning permission."

94. Later in para 29 and summarising his conclusions Sullivan LJ said this:

"... there is a marked contrast between the "significant weight" which the inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal, having regard to the policy advice in PBS22, and the manner in which he approached the section 66(1) duty. It is true that the inspector set out the duty in

> paragraph Section 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings."

95. Thus the rather surprising consequence is that section 66(1) of the Listed Buildings Act has been held to require that decision makers give "considerable importance and weight" to the desirability of preserving the setting of listed buildings regardless of whether the harm to such a heritage setting is less than substantial or presumably even if it is less than significant. That this should be so is not immediately apparent from the wording of the statute, but the statute now has glosses of such high judicial authority that at the level of this court the interpretation is binding, however anomalous the consequences. As Lindblom J said in R (Forge Field Society) v Sevenoaks District Council [2014] EWHC 1895 (Admin) para 55 where the decision challenged was one of a local planning authority rather than on appeal:

> "Once [the officer] had found that there would be some harm to the setting of the listing building and some harm to the conservation area, the officer was obliged to give that harm considerable importance and weight in the planning balance."

(e) Submissions for the Claimant.

96. Mr Pike finds it incomprehensible that, given the finding of "slight" harm to the setting of the listed buildings, the inspector did not find the development to conflict with the second sentence of policy DC 17, which he said must plainly be read as including listed buildings and their settings within the words "and other areas of historic interest."

97. There was therefore a conflict between his finding of compliance with DC 17 and his finding that there was harm, albeit only slight, to the setting of the two listed buildings.

98. Additionally, if the harm to the setting of the two listed buildings was only slight and if there was, as the inspector found, compliance with paragraph DC 17, it was irrational to place considerable weight on that harm, or alternatively more reasoning was required from both the inspector and the Secretary of State.

(f) Submissions for the Defendants.

99. Mr Kolinsky contended that the second sentence of policy DC 17 did not apply to the listed buildings or their settings but to the different matters to which they specifically referred. Assuming there had been comprehensive assessment, as required by the first sentence of policy DC 17, and that was not in dispute, then listed buildings and their setting only fell to be considered under the third sentence. The inspector and Secretary of State should properly construe the policy and reached a rational conclusion in respect of compliance with the third sentence. As the inspector had said, no one had identified "any features of historic or architectural interest" to which the later part of the third sentence could apply. The harm to the setting described by the inspector was harm to the visual relationships of the landscape which forms part of the setting, not the features of historic or architectural interests.

100. The inspector's application of Barnwell to the facts as he had found them to be could not be faulted. He had found that the proposal would fail to preserve or enhance the setting of the two listed buildings. This was a conclusion which then triggered the duty under section 66 of the Listed Buildings Act to place considerable weight and importance on the harm so identified, even if the harm was slight,that is slightly adverse.

101. Mr Forsdick also argued that there had been a proper approach in the light of Barnwell and also the exposition and application of that case by Lindblom J in Forge Field Society, especially paras 55 and 58. The claimant was taking the erroneous approach, criticised in Barnwell, that a finding of less than substantial or slight harm to setting of the house and barn equated to only a slight or less than substantial objection to the grant of planning permission.

(g) Conclusion on Ground 2.

102. Mr Kolinsky's interpretation of policy DC 17 is in my view correct and that of Mr Pike wrong. There is simply no basis to read more words into its second sentence. There is therefore no inconsistency between the finding of slight harm to the setting of two listed buildings and the finding of compliance with policy DC 17. I confess I find it difficult to envisage the circumstances in which harm to the setting of a listed building would be damaging to "any feature of historic or architectural interest", but that is not a matter that I have to decide. I have already indicated that it is somewhat surprising that "considerable weight" should have to be given to only "slight harm" to the setting of listed buildings, but that is the law in the light of Barnwell and the cases it interpreted and followed. The consequence is to give rather greater weight to listed building considerations that may have been contemplated when section 66(1) and its predecessor sections were enacted. The inspector and the Secretary of State and also this court must apply the law as it has recently been confirmed and expounded in Barnwell. That is what they did and there is no irrationality, defect of reasoning or other error of law. The challenge on ground 2 fails.

Ground 3 – NPPF para 134.

(a) The NPPF.

103. Para 134 of the NPPF states:

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset this harm shall be weighed against the public benefits including its optimum viable use."

(b) The Report and the DL.

104. It is common ground that there was no reference to paragraph 134 of the NPPF.

105. (c)Submissions for the Claimant.

106. The inspector and Secretary of State should have applied this policy, which is that of the Secretary of State, in relation to listed buildings. Had the slight harm to the setting of the two listed buildings been weighed against the public benefits of the proposal as required by para 134, the slight weight given to the listed building objection might have

been further reduced or eliminated altogether. It was impossible to know how it might have affected his overall assessment of the development.

(d) Submissions by the Defendants.

107. It was accepted by Mr Pike, said Mr Kolinsky, that his planning witness had not referred to para 134 of the NPPF in his evidence to the inquiry nor had it been mentioned by Mr Pike in his opening or closing submissions to the inspector. In these circumstances there was no merit in the point now taken. Ideally the inspector and the Secretary of State would have dealt with para 134 but the "public benefits" appraisal had been taken into account in the overall assessment by the inspector and Secretary of State and there was no need for para 134 to have been separately articulated.

108. Mr Forsdick added that the fact that the inspector and the Secretary of State did not refer explicitly to para 134 does not of itself show that they have failed to have regard to them, see R (Cash) v the Secretary of State for Communities and Local Government [2013] EWHC 2028 para 31.

(e) Conclusion on Issue 3.

109. I find it surprising and a little disturbing that such a key part of the NPPF in relation to listed buildings was not expressly referred to by the inspector or in the DL. On the other hand they were in good company, since the claimant's very experienced planning witness similarly made no mention. I am, however, satisfied on the facts of this case that there was no misunderstanding of the policy, see principle (5) in Bloor Homes. If there was an error of law (omission of a relevant consideration) it was wholly immaterial here. The inspector's recommendation and the Secretary of State's refusal were made in full awareness that the proposal did offer some important public benefits.

110. I therefore reject the challenge on ground 3.

Ground 4 – NPPF para 14

(a) NPPF para 14

111. Paragraph 14 is as follows:

> "At the heart of the national planning policy framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan making and decision taking...
>
> For decision taking this means:
>
> - approving development proposals that accord with the development plan without delay; and
>
> - where the development plan is absent, silent or relevant policies are out of date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably out weigh the benefits, when assessed against the policies in this framework taken as a whole: or

- specific policies in this framework indicate development should be restricted.

Land can perform many functions (such as for wildlife, recreation, flood risk mitigation, carbon storage, or food production):

- conserve heritage assets in a manner appropriate to their significance, so that they can been enjoyed for their contribution to the quality of life of this and future generations:

- actively manage patterns of growth to make the fullest possible use of public transport, walking and cycling, and focus significant development in locations which are or can be made sustainable: and

- take account of and support local strategies to improve health, social and cultural well being for all and deliver sufficient community and cultural facilities and services to meeting local needs."

112. There is a footnote to the heading "for decision taking this means" which reads "unless material considerations indicate otherwise."

(b) The Report and the DL.

113. It is common ground that there was no mention of para 14 of the NPPF in either document.

(c) Submissions of the Claimant.

114. Para 14 of the NPPF and the presumption in favour of sustainable development is “a golden thread” that runs through plan making and decision making. The proposed development which was found to accord with the development plan should have benefited from that presumption separately from the statutory presumption in favour of development which accorded with the development plan under section 38(6) of the 2004 Act which latter presumption was admittedly recognised by the inspector and the Secretary of State.

115. The claimant's planning witness had made several mentions of para 14 in his evidence to the inquiry, even though counsel for the claimant had not referred to para 14 in his closing submissions.

116. Either the Secretary of State considered that the “golden thread” of the presumption in favour of sustainable development had no application or utility in a case where a development proposal should benefit from that presumption, in which case the Secretary of State's understanding of his own policy is erroneous and unlawful, and/or irrational; or he failed to take into account a relevant consideration; or he failed to give adequate reasons in this respect. Failure to provide any reasons on a principal controversial issue at the inquiry was materially prejudicial to the claimant, who is

unable to tell what if any significance to this appeal the presumption has in the mind of the Secretary of State.

(d) Submissions on behalf of the Defendants.

117. The claimant's submissions ignore the footnote at paragraph 14 that "unless material considerations indicate otherwise". The inspector was entitled to conclude as he did that the in the specific circumstances of this case the harm identified outweighed the development plan support for the proposal. This was a lawful exercise of planning judgment based on a proper understanding of the various legal duties in play. Para 31 of the DL expressly referred to the presumption established by section 38(6) of the 2004 act that development should be in accordance with the development plan. But the Secretary of State held, as he was entitled to hold, that:

> "The material considerations that would arise from harm associated with the scheme would outweigh the benefit it is would bring."

118. This, together with section 66(1) of the Listed Buildings Act, were enough "to overcome the presumption established by section 38(6)". Therefore there could be no complaint that reference was not specifically made to para 14.

119. Additionally, it was clear from the way that the inspector had set out the claimant's case in the report that that case was based, as the inspector recognised, on policies within the NPPF which supported sustainable development, in particular paras 17, 93 and 97 of the NPPF. It was clear that the claimant had not placed strong reliance on para 14 and that the inspector and Secretary of State were well aware of the sustainability benefits of the proposal.

120. Mr Forsdick repeated his reliance on Cash. Given the other material adverse considerations there was no basis for applying presumption under para 14 of the NPPF.

(e) Conclusion on Ground 4.

121. I have found the absence of express reference to para 14 of the NPPF more troubling than the absence of reference to para 134, which is ground 3 above. But it is apparent that the presumption under para 14 as opposed to the presumption under section 38(6) did not play any major part in the claimant's case at the inquiry, despite mention being made to it by Mr Dobson. Furthermore I cannot see that express reference to it in the report would have made any difference in that there were plainly material adverse considerations which would have displaced the presumption just as they did in the case of the section 38(6) presumption (if these presumptions are truly different which it is not necessary to determine, any more than it is necessary for this court to decide precisely what is "sustainable development" for the purposes of para 14). There is no substantial doubt as to whether the inspector or the Secretary of State "went wrong in law", for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds, to cite from principle (2) in Bloor Homes.

122. Accordingly, for these brief reasons ground 4 fails.

123. Even had I considered grounds 3 and 4 as part and parcel of ground 2, which is how Mr Pike argued them, this would not have affected the outcome.

Disposal.

124. I have some sympathy for the claimant in respect of ground 1 albeit that the claimant has largely itself to blame for what happened; and to a lesser extent in respect of grounds 3 and 4, where one would have expected the NPPF policies to have been explicitly addressed in a case such as this. I have, however, no doubt that the present challenge must fail.

125. MR KOLINSKY: I am grateful to my Lord for the judgment. May I raise one matter of potential correction.

126. THE DEPUTY JUDGE: Certainly.

127. MR KOLINSKY: Which is in relation to the third defendant's identity. My Lord, Dr Lee Hoare is female, and you may wish to mention that when the transcript is approved.

128. THE DEPUTY JUDGE: If Dr Hoare is in court, I apologise for that. I don't think I could probably have known it, but I certainly note it down as an important matter to correct. Now, what else have I got wrong?

129. MR KOLINSKY: That is what I wished to raise, my Lord.

130. MR PIKE: My Lord, at the beginning of your judgment your Lordship referred to the claimant as Ecocentricity, it is simply Ecotricity, my Lord.

131. THE DEPUTY JUDGE: Thank you. Yes, that is paragraph 1.

132. MR KOLINSKY: My Lord, on ancillary matters, as far as the first defendant is concerned I would seek an order for my costs and invite your Lordship to make a summary assessment. As I understand it there is no dispute to the principle or indeed to the amount. It has been ever so slightly revised from that in the schedule but the figure as agreed is £13,777.

133. MR PIKE: My Lord, the claimant is content with that.

134. THE DEPUTY JUDGE: As always, one is impressed by the economy which is exercised by the Treasury Solicitor in these cases and certainly the sum seems appropriate. Is there any application from you before I make any order on that?

135. MS RING: My Lord, I appear for the third defendant in Mr Forsdick's unavoidable absence. We are claiming the third defendant's costs. You should have a schedule of costs.

136. THE DEPUTY JUDGE: I haven't. Just bear with me a second to see what I have got here. I have two versions of the claimant's one, and I haven't got one signed by Mr Buxton. I now have one from Mr Buxton.

137. MS RING: My Lord, this was served on, I am just trying to think where we are, Wednesday at 10.30. So it was served within the rules, de minimis 5 minutes, so 24 hours before the hearing on the parties and on the admin court. The costs claimed are £3,875.88, VAT inclusive. As explained to the parties, when we served this, the costs relate to reviewing the claimant's case, filing an acknowledgement of service, identifying the factual errors in the claimant's case.

138. THE DEPUTY JUDGE: Sorry, where am I reading? You look as though you are reading something; I have one sheet.

139. MS RING: Yes, when we emailed, in the email we set out what this was.

140. THE DEPUTY JUDGE: Right. Reviewing the claimant's case, filing the AoS, yes.

141. MS RING: Identifying the factual errors in the claimant's case. Responding to those errors with evidence. We have not claimed our costs of attendance at the hearing yesterday or today. If perhaps I could elaborate, we are claiming those costs because in line with the case of Bolton, which I do have a copy of if you wish.

142. THE DEPUTY JUDGE: Yes, I remember Bolton is Lord Lloyd's case.

143. MS RING: That's right.

144. THE DEPUTY JUDGE: A rather peculiar case where, having effectively said the second defendant couldn't claim the costs they went on to award them, as I recall.

145. MS RING: Yes, he essentially said that it was not correct to set down any hard rules about costs, that was the rule that there are no hard rules. But he set out some guidelines. In that case he did award costs because he said there were a number of special features.

146. THE DEPUTY JUDGE: If you have a copy of it you had better let me have it.

147. MS RING: Yes I do have it for counsel as well.

148. THE DEPUTY JUDGE: Fine, if it is only the key page. This is the proposition from page 1178, is it?

149. MS RING: That's right. It is at character F.

> "What then is the proper approach? As in all questions to do with costs the fundamental rule is that there are no rules. Costs are always in the discretion of the court and a practice, however widespread and longstanding, must never be allowed to harden into a rule. But the following propositions may be supported."

150. Am I am sure that my Lord is familiar with those, but they are 1, 2, 3 and 4.

151. THE DEPUTY JUDGE: More likely to be awarded at first -- yes.

152. MS RING: A second set of costs is more likely to be awarded at first instance than in the Court of Appeal. Over the page at 1179, just above B, he says "but the case has a number of special features." In that case.

153. THE DEPUTY JUDGE: Sorry, where is that, letter B?

154. MS RING: It is the last --

155. THE DEPUTY JUDGE: "The case also has a number of special features", yes.

156. MS RING: That turned on the facts of that particular case.

157. THE DEPUTY JUDGE: What is the special feature here that you rely upon?

158. MS RING: The special features that we rely upon here is when we studied the claim we identified that there were at best factual gaps in it, if not positively misleading. For example in the claimant's grounds of challenge at paragraph 16 it was said that aviation did not feature in any evidence or submissions at the inquiry and also the first witness statement of Dawn Bodwell (?) for the claimant failed to exhibit relevant material.

159. THE DEPUTY JUDGE: It is you, really, who put in and alerted everyone to the way it had been addressed by Mr Pike in his opening and more particularly to what Mr Dobson had said.

160. MS RING: That's right. We made that plain, the gaps in the material in Dr Hoare's first and second witness statements, particularly the first witness statement and we exhibited the opening statement of Mr Pike, the proof of Mr Dobson and the closing submissions, and highlighted where they had referred to aviation. This ensured that the Secretary of State's counsel and the court fully understood the key factual points.

161. THE DEPUTY JUDGE: Are you claiming any costs which follow the date of putting in that witness statement?

162. MS RING: I will just check, my Lord.

163. THE DEPUTY JUDGE: The list of matters you have given me ends with the respondent putting in your evidence.

164. MS RING: There are some costs, I think, of filing that evidence.

165. THE DEPUTY JUDGE: That is all part of the evidence.

166. MS RING: But we certainly haven't claimed for the attendance at court. We would have claimed for taking instructions, drafting, et cetera. We are also claiming for a consultation with Mr Forsdick about, essentially, the claim and --

167. THE DEPUTY JUDGE: Was that conference with counsel before you filed the witness statement or was that recent?

168. MS RING: That was before.

169. THE DEPUTY JUDGE: Yes, well I think I have your submissions, thank you. Mr Pike, any observations?

170. MR PIKE: My Lord, yes. First of all as far as the principle is concerned in my submission this application doesn't fall within what is said in Bolton because as far as principle two is concerned, which is page 1178H, the application for costs doesn't disclose that there was a separate issue on which the third defendant was entitled to be heard, that is an issue not covered by counsel for the Secretary of State or alternatively an interest which requires separate representation. So it simply doesn't come within that.

171. As far as the issue of special features is concerned, what was envisaged by the House of Lords in that case is some particular and unusual features relating to the position of defendants other than the first defendant, ie important matter of principle arising in the case in relation to government policy and a difference in approach or position between the Secretary of State and the developers and an unusual case in which a number of local authorities had all joined together to resist.

172. In my submission it doesn't come within what was contemplated by the House of Lords in Bolton at all and therefore in my respectful submission there would be no justification in making a costs order here.

173. As to what is then said about what the third defendant did, well, my Lord, with the greatest of respect in your Lordship's reasoning the question of what was said by the claimant during the inquiry which, as your Lordship noted, was very little, wasn't a material aspect, I suspect with respect, for your Lordship's reasons of finding that the claimant should have been aware that this was a matter it should respond to. No doubt had the first defendant wanted to refer to the documents which the third defendant produced, he could have done so.

174. As far as the claimant's witness statements are concerned, one of them related to a matter which is whether or not the Ecotricity letter was before the inspector, it wasn't an error of fact in the sense that the claimant had got it wrong and known it was wrong, the claimant didn't realise that the letter wasn't before the inspector and again no doubt the Secretary of State would have raised that any way on looking through the inspector's file.

175. My Lord as far as the matters which are said to have incurred these costs are concerned, in any event the filing of an acknowledgement of service is not something that the third defendant should be entitled to even if it came within any sort of special exception to the Bolton principles because in those circumstances every additional defendant would be entitled to claim for the filing of an acknowledgement of service.

176. THE DEPUTY JUDGE: But if it wanted to put in a witness statement it had to serve an acknowledgement of service. You had served them, had you not?

177. MR PIKE: We had, my Lord, yes.

178. THE DEPUTY JUDGE: You didn't actually have to make them a defendant, you could have just made them an interested party.

179. MR PIKE: My Lord, with respect, what happened, although your Lordship will not know this, is because of Dr Hoare's previous involvement Ecotricity expressly asked Dr Hoare before the proceedings were served whether or not she wanted to be served, because we didn't want to be accused of having left her out and equally we didn't want to be accused of having dragged her into the proceedings against her wishes. So the question was expressly asked and we were told she did wish to be served and that is why she was joined as a party.

180. My Lord, there is just one matter of detail as far as the costs schedule is concerned --

181. THE DEPUTY JUDGE: If she said today she was quite content to be an interested party, would she then serve an acknowledgement of service? If she wanted to put in a witness statement she would have to take some step, wouldn't she?

182. MR PIKE: My Lord, yes, but if it was a question in the end, as it was, of saying here is a document, it should be included. Either she could have written to the court or claimant and said this document should be before court and with the greatest of respect the claimant would hardly have turned round and said "no we don't agree", given it is the claimant's own document. The alternative would be Dr Hoare could have said to the Treasury Solicitor that "you should put this document in as well." Going to the trouble and expense in terms of putting the documents before court in my submission wasn't necessary. My Lord, generally the claimant simply doesn't accept that the principle or the exceptions in Bolton ought to extend in this case.

183. THE DEPUTY JUDGE: Anything you want to say?

184. MS RING: There is really not much more to say, except to be able to take part and file evidence one would have to be a defendant.

185. THE DEPUTY JUDGE: No, an interested party can file evidence.

186. MS RING: I don't have any experience of being an interested party in section 288 proceedings.

187. THE DEPUTY JUDGE: In judicial review can they can, certainly.

188. MS RING: In judicial review, but in our experience in section 288 proceedings one is a defendant or nothing.

189. THE DEPUTY JUDGE: Very well.

190. I think plainly the Secretary of State is entitled to the costs, which are agreed in the sum of £13,777.

191. It is a rather unusual application made by the third defendant for what I may call some of their preliminary costs, including the costs of filing a witness statement, but not

including their costs of being represented at the inquiry. My attention is drawn to the celebrated case of Bolton Metropolitan District Council v the Secretary of State [1995] 1 WLR 1176 and the indication by Lord Lloyd that a second set of costs is more likely to be awarded at first instance and that there are no hard and fast rules in the matter, which means that one has to look and see in each case whether there are any special features.

192. It seems to me that in this case there were special features. I think that it was necessary, given the way in which the claim was formulated, and in particular paragraph 16 of it, that it should be made quite clear that Mr Dobson in particular had made various references in his proof of evidence to this Shipdham Flying Club issue and certainly in trying this case I paid attention to that witness statement and was assisted by it.

193. In all of the circumstances it seems to me that exceptionally something should be allowed. I am not satisfied that it was really necessary to instruct counsel in this matte. The third defendant had got the benefit of extremely experienced planning solicitors and therefore what I propose to do is to knock off £500 from the £3,875.88 which then comes down to £3,375.88 if my mathematics is right and it seems to me unusually it would be right in the circumstances of the case to order that amount.

194. Can I, before parting with the case, express my gratitude to those who managed to get the documentation into exemplary order so that it was very easy for me to pick it up. That, unhappily, is not very often the case and here I appreciated it.

195. MR PIKE: My Lord, forgive me, I was waiting for the costs application to be made before I made my application for permission to appeal. I am sorry to trouble your Lordship, but I must make the application.

196. THE DEPUTY JUDGE: Of course, yes. You may make the application.

197. MR PIKE: I am grateful.

198. My Lord, I submit that there is a real prospect of success and/or some other compelling reason why permission to appeal should be granted. If relation to ground 1, I respectfully submit that your Lordship's judgment did not recognise or address the importance of statements of common ground, as recognised in the Halite decision. My Lord, with respect I submit that your Lordship's decision effectively makes the identification of "main issues" by an inspector irrelevant to all practical purposes, because all issues are potentially going to be determinative and your Lordship did indeed note that it would have been better had the inspector raised this as a main issue, which in my respectful submission supports the point I am making. What it will do, my Lord, is require each party in practice to deal in detail with every potentially relevant point, no matter whether it is pursued by anyone at a hearing or inquiry and despite, unusually in this case, a lapse of time of three years since the point has been raised.

199. My Lord, I also submit, as I submitted to your Lordship in my opening, there is a need for inspectors to make clear if something is goes to become a principal important

controversial issue in the judgment, to make clear their concern about that issue to the parties before the inquiry closes. If, as I submitted to your Lordship, plainly this matter was not regarded as a principal important controversial issue before the inspector's report was issued, it is hard to understand how it became such in the inspector's report without it having been raised.

200. That is why I say there are real prospects and important points of principle here in ground 1.

201. As far as grounds 2, 3 and 4 are concerned, my Lord, I submit that in the light of your Lordship's very interesting observations about section 66 and East Northants there is some compelling reason why permission to appeal to the Court of Appeal ought to be granted. Now of course the Court of Appeal will be bound by its previous decision, but it may be that the matter would then go further.

202. As far as grounds 3 and 4 are concerned I simply say my Lord that if the Secretary of State's policy is to have some meaning, particularly in relation to ground 4-paragraph 14, then with respect the Secretary of State should have given some reasons in relation to his own policy. I say in relation to paragraph 14 of the NPPF, given that this is a central part of the NPPF and given people have been scratching their heads about it since it was adopted and exactly what it meant, that is some compelling reason why the Court of Appeal should consider, what exactly paragraph 14 means and whether the Secretary of State should address it in his decisions.

203. I am grateful to your Lordship.

204. THE DEPUTY JUDGE: Well Mr Pike I am not persuaded that your appeal does have a realistic prospect of success but I am prepared to extend your time for appealing so that it doesn't start until you receive a copy of transcript, because I am aware that if you are contemplating appealing it is very difficult until you have the transcript and it may be that with the benefit of that you are able to persuade someone at the Court of Appeal that they should look an at it. But I am not myself persuaded that there is a realistic prospect.

205. MR PIKE: My Lord, I am grateful for that.