Neutral Citation Number: [2023] EWHC 16 (Admin)

Case No: CO/1316/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2023

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

IVOR HARRISON	**Claimant**
- and –	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**First Defendant**
-and-	
SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL	**Second Defendant**
-and-	
WILLIAM GRAIN	**Third Defendant**
-and-	
ELIZABETH GRAIN	**Fourth Defendant**
-and-	
RICHARD GRAIN	**Fifth Defendant**

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Jenny Wigley KC (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Matthew Henderson (instructed by **the Government Legal Department**) for the **First Defendant**
Nina Pindham (instructed by Howes Percival) for the **Fifth Defendant**
The Second, Third and Fourth Defendants did not appear and were not represented

Hearing date: 17th November 2022
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JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. In this case Ivor Harrison, the Claimant , makes an application under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") for an order that a decision of the Secretary of State for Levelling Up, Housing and Communities, the First Defendant, to allow an appeal made section 78 TCPA 1990 and to grant planning permission, be quashed.

2. Permission to proceed with the application under section 288 TCPA 1990 was granted by Lang J on 10th June 2022.

3. The substantive hearing took place on 17th November 2022. Following the hearing further written submissions were made by the parties. The written submissions made by the Claimant are dated 30th November 2022. The First Defendant's submissions are dated 9th December 2022, and the Fifth Defendant's submissions are also dated 9th December 2022. The Claimant's submissions in reply are dated 14th December 2022.

Background Facts

4. By an application made in November 2020 Messrs R and W Grain, and Mrs E Reeve (the Fifth, Third and Fourth Defendants) made an application to South Cambridgeshire District Council (the Second Defendant) for outline planning permission (with all matters reserved save for access) to develop land at St Peter's Street, Caxton, CB23 3PS by: "Erection of up to nine self build dwellings and associated garages. Approval sought for access to be taken from Rosemary Greene Close." ("the Planning Application").

5. A number of documents were submitted in support of the Planning Application, including a Planning and Heritage Statement prepared by Brown and Co ("the PHS").

   i) At paragraph 5.2 the list entry for Caxton Hall (a Grade II* building) is set out.

   ii) Paragraph 5.8 states:

   > "The proposed development will have less than substantial impact upon heritage assets directly, or by altering its setting. Public benefit will be achieved by increasing supply of self-build housing in the district. A small but meaningful economic benefit will be experienced by local shops and services because of the additional spending power of the new inhabitants. Socially, the occupants of the new dwellings will add to the vitality of the local area."

   iii) Paragraph 6.33 states:

   > "The application site falls within Flood Zone 1 (sic) is therefore considered to be at low risk of flooding from any source. It is anticipated that surface water drainage would be via soakaways. Foul water would be disposed of via the public sewer. Once more, such matters can be adequately addressed at reserved matters stage."

6. The Sustainable Drainage Engineer for the Second Defendant provided a consultation response dated 6th December 2020. In that response the drainage engineer:

i) Indicated that the development proposed is acceptable subject to the imposition of conditions.

ii) Stated:

"The proposals are not in accordance with South Cambs adopted Policy CC/7 Water Quality and Policy CC/8 Sustainable Drainage as they have not demonstrated suitable surface water and foul water drainage provision for the proposed development therefore the following conditions are required.

This should include but not limited to:

a) The existing drainage arrangements of the site including discharge location and rate where appropriate;

b) The proposed discharge location in accordance with the drainage hierarchy and reasonable evidence this can be achieved;

c) A site plan identifying indicative locations for sustainable drainage features;

d) Evidence to support b) which must include infiltration/percolation testing or written confirmation from the appropriate water authority/third party that a discharge to its drainage system is acceptable; and

e) Details of foul discharge location

All external areas should utilise permeable surfaces.

List of required conditions:

• Prior to commencement of development a scheme for the disposal of surface water and foul water that can be maintained for the lifetime of the development shall be provided to and agreed in writing with the local planning authority.

Reason

To reduce the risk of flooding to the proposed development and future occupants."

7. The Conservation Officer provided his comments in a consultation response form dated 15th December 2020, stating:

"The site lies outside the Caxton conservation area, but the south-eastern side of the site abuts that conservation area. There are no listed buildings on the site. The Crown House & The Post House, which is a Grade II* listed building lies about 90m away to the south-east. It is screened from the application site by a very substantial belt of trees. Caxton Hall, which is also listed Grade II*, lies about 100m from the site to the south-west. It is also to a limited extent screened by trees

Given the distances involved, and the position and scale of existing trees, The development of this site for self-build dwellings, in the layout illustrated in the application, would not have a harmful impact on the Caxton conservation area, or the setting of the nearby listed buildings

The proposals will comply with Local Plan policy NH/14"

8. A number of local residents made representations to the Second Defendant on the Planning Application. In those representations attention was drawn to a number of matters including concerns relating to flood risk arising from flooding of the Bourn Brook, by reference to photographs and to flood maps. The Claimant made representations in which he contended that the reason given by the drainage engineer for suggesting that a condition be imposed was inadequate.

9. The Second Defendant's officers prepared a report in which they assessed the Planning Application ("the OR"). The OR recommended that planning permission be refused. The OR included the following:

"The proposal, notwithstanding that it is at Outline stage, given its distance from the adjacent listed buildings and Conservation Area and suitable mature landscaping and screening, would lead to less than substantial harm to the Conservation Area and adjacent listed buildings. When assessing this harm, it should be weighed against the public benefits. It is considered that the proposal would provide dwellings to the area, with provision of economic development through jobs for builders and construction works, with social benefits through provision of housing. The public benefit is therefore considered limited, however the proposal would and would not have a harmful impact on the Caxton Conservation Area, or the setting of the nearby listed buildings and would comply with Policy NH/14 of the Local Plan.

The proposal would comply with Policy NH/14 of the Local Plan, Paragraphs 193, 194 and 196 of the National Planning Policy Framework and the Listed Buildings and Conservation Areas Supplementary Planning Documents (SPD).

……

Flood Risk and Drainage

The site lies within Flood Zone 1 (low risk). A Flood Risk Assessment and Supporting Statement have been submitted as part of the application. The surface water drainage for the site is proposed to be via soakaways with the foul water to be disposed via public sewer. Numerous neighbours have raised concerns and comments in regard to known flooding in the area, the proposal causing further problems of surface water, run-off and flooding and proposed soakaways not being suitable for the poor draining site.

The Drainage Officer has commented on the proposal and raised no objections, requesting that planning conditions be recommended in regard to submission of details for the disposal of surface water and foul water for the lifetime of the development.

The proposal would therefore fail to accord with Policies CC/8 and CC/9 of the Local Plan 2018."

10. By a decision notice dated 22nd July 2021 the Second Defendant refused the Planning Application, relying on the following reasons:

" 1. The proposed development would be located in an unsustainable location outside of the existing settlement of Caxton, which currently has poor access to services and facilities, being defined as an infill village in the Local Plan. This is further exacerbated by the lack of any pedestrian link to bus services within the village in close proximity to the application site. The proposed development would therefore result in future occupants being over reliant on the motor

vehicle to access basic day to day needs. The proposed development would therefore be contrary to adopted South Cambridgeshire Local Plan Policies TI/2 and S/7. The fact that the proposed dwellings would be a (sic) self-build dwellings would not be a benefit of sufficient weight to warrant a decision other than in accordance with the development plan policies.

2. The proposed development would result in encroachment on the countryside and would be harmful to the character of the countryside and surrounding area. The Application Site has residential development on its western and northern boundaries, with agricultural fields and open countryside to the south towards Caxton Hall and fields to the east, with a linear development pattern along Ermine Street. There is a clear difference in the character between the west and north side of the site which defines the village and to the south comprising open countryside. THe (sic) application site is adjacent to an existing Public Right of Way No. 6 footpath which runs adjacent to the side of the site to the east. The proposal by virtue of the proposed siting, location and position of the development, which would result in development beyond the development framework and beyond the existing line of built form at Rosemary Greene Close, would result in visual intrusion and harm to the open countryside, which would be evident in public views of the site. For these reasons it is considered that the development of this site for 9 dwellings would result in encroachment on the countryside, contrary to Local Plan Policy S/7. Furthermore, the proposed development would be located such that it would have an adverse impact upon the character of the surrounding countryside and existing landscape character contrary to Local Plan Policies HQ/1 (Design Principles) and NH/2 (Protecting Landscape Character)."

11. The Third, Fourth and Fifth Defendants appealed to the First Defendant against the Second Defendant's decision to refuse to grant planning permission. The First Defendant adopted the written representations procedure to consider the appeal.

12. The Claimant made representations on the appeal. In those representations he contended that the appeal proposal would give rise to increased risk of flooding at Caxton Hall.

13. In a letter dated 26th January 2022, the agent acting for the Third, Fourth and Fifth Defendants responded to the representations made on the appeal. That response was focussed on the arguments raised on behalf of the Second Defendant. The agent's response to third party representations was as follows:

"Comments raised by third parties have been suitably addressed in principle either within the original planning application and are not reasons for refusal or within our appeal statement/additional comments above."

14. The First Defendant's decision on the appeal was communicated by a decision letter dated 1st March 2022 ("DL").

i) The main issues were identified at paragraph 5 ("DL5")

"5. In the light of all the submissions before me, the main issues in the appeal are:

▪ whether the proposed development would comply with the relevant planning policies relating to the location of housing development;

▪ the effects of the development on the character and appearance of the countryside and surrounding area;

▪ and the weight to be given to the need for sites for self-build and custom-build housing in the District."

ii) The inspector considered character and appearance at paragraphs 11 to 15:

"Character and appearance

11. The appeal site comprises an L-shaped parcel of rough grazing land, lying adjacent to the built-up area of Caxton village. On two of its sides it is enclosed by modern housing in Rosemary Greene Close, and on two others by the tree-lined avenue of Caxton Hall and the wooded frontage of St Peters Street. Only on its short south-western boundary, is the site rather weakly enclosed, by a somewhat gappy hedge. In addition, the site also adjoins the defined village framework boundary on two of these sides. In most of these respects therefore, the site is physically well-related to the existing village.

12. On my visit, I saw that there are close-range inward views from a short length of St Peters Street around the junction with Rosemary Greene Close, and additional close views from the public footpath that skirts the site from St Peters Street to Ermine Street. In all these views, the site is seen in the context of the existing housing development, and against a backdrop of mature trees. There appear to be no significant longer or middle-distance views. Development on the site would

therefore have a limited impact on the setting of the village, and a negligible impact on the surrounding countryside.

13. Whilst the appeal site adjoins the Caxton Conservation Area, and is close to the curtilage of the listed Caxton Hall, there would be little intervisibility with these heritage assets. Nor would there be any intervisibility with any of the other listed buildings on Ermine Street, including the Post House or the Crown House. The settings of all of these heritage assets would thus be preserved.

14. Although the design and layout of the proposed development are not currently before me, there seems no reason to doubt that it could be arranged and detailed in a way that would be attractive and sensitive to its local context and surroundings. On my visit, I saw another self-build scheme nearby, at Firs Farm, further along St Peters Street, where a very high quality of development has evidently been achieved, and there seems no reason why a similar standard could not be expected at the present appeal site.

15. Overall therefore, I conclude that the proposed development would cause no material harm to the character or appearance of the countryside, or that of the village of Caxton, or of the surrounding area. In this respect, I find no conflict with SCLP Policy NH/2, which seeks to protect the character and distinctiveness of the local landscape, nor with Policy NH/14 which protects the District's historic environment, including heritage assets and their settings. For the same reasons, I consider that the development would be capable of complying with SCLP Policy

HQ/1, which requires developments to achieve a high quality of design, contributing positively to their local and wider context, including the urban, rural and landscape context."

iii) The inspector considered 'Other matters' at DL paragraphs 25 to 28. Paragraph 25 states:

"I note the comments of local residents, and accompanying photographs, with regard to flooding from the Bourn Brook, and the development's potential to increase the risks to nearby properties. However, I note that a flood risk assessment has been submitted, and that the Drainage Officer is satisfied with this information, subject to conditions. On the evidence before me, I have no clear reason to disagree with the Officer's conclusions on this aspect of the scheme."

iv) At DL 36 the inspector gives reasons for imposing condition 4:

"36. Condition 4, relating to foul and surface water drainage, is needed to minimise any risk of flooding. However, the list of requirements in the suggested draft version is over-prescriptive and unnecessary, as the Council will have the power to refuse details which they consider to be inadequate, or insufficiently justified. I have therefore amended the condition accordingly."

v) Condition 4 provides:

> "No development shall take place until a scheme for the disposal of foul and surface water drainage has been submitted to the local planning authority and approved in writing. The scheme shall include details of how the foul and surface water systems are to be managed and maintained throughout the life of the development. Thereafter, no dwelling shall be occupied until the foul and surface water drainage infrastructure to serve that dwelling has been installed and brought into operation."

15. The Second Defendant wrote to the Court, in a letter dated 9th May 2022, in which they stated no flood risk assessment was submitted as part of the Planning Application. All parties before the court are agreed that no flood risk assessment was submitted in support of the Planning Application and that the statement at paragraph 25 of the DL that a flood risk assessment has been submitted is a mistake of fact.

16. All parties before the court are also agreed that the Second Defendant did not send to Historic England a copy of the notice publicising the fact that the Planning Application had been made.

The grounds of claim

17. There are two grounds which are relied upon by the Claimant.

    i) Ground 1:

"Ground (1) – Error of Fact and/or taking into account an immaterial consideration relating to the consideration of flood risk. And, as a result, failure to take into account representations relating to flood risk : The Inspector wrongly considered that issues raised by objectors relating to flood risk had been addressed in a flood risk assessment which had been considered by the Drainage Officer. This was a misunderstanding – no flood risk assessment had been submitted or considered by the Drainage Officer. The Inspector further erred by drawing conclusions without the benefit of seeing the flood risk assessment on which he was relying."

ii) Ground 2:

"Ground (2) – Breach of s.66(1) of the Listed Buildings Act by failing to give careful consideration to the evaluation of the level of any harm to the Grade II* listed building and its settings; by failing to take into account policy requirements in the NPPF and the Local Plan as to the assessment of impact on heritage assets and their setting, by failing to take into account the officer's report which found the proposal would lead to less than substantial harm to listed buildings; by failing to take into account the appellant's own conclusion that the development would impact upon Caxton Hall either directly or by altering its setting; by failing to take into account the potential for increased risk of flooding to Caxton Hall; by failing to identify the setting of Caxton Hall and by eliding the concept of curtilage with setting."

18. The argument in relation to Ground 1 was developed so as to include the following points:

    i) The statement that a flood risk assessment had been submitted was a mistake of fact, which played a material part in the inspector's reasoning.

    ii) By stating that a flood risk assessment had been submitted the inspector took into account an immaterial consideration.

    iii) By virtue of the provisions of Article 33(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the DMPO") and regulations 13(1), 13(2)(e), 15(1) and 16(1) of the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 ("the 2009 Regulations") the inspector was obliged to take into account the representations made by third parties, and failed to do so, as he failed to take into account the substance of representations made in relation to flooding.

19. In relation to Ground 2, the Claimant also argues that, when dealing with the planning application, the Second Defendant failed to comply with the duty imposed on them by regulation 5A(3) of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 ("the 1990 Regulations") to send to the Historic Buildings and Monuments Commission for England ("Historic England") a copy of the regulation 5A(2) notice, and that when considering an appeal under section 78 of the Town and Country Planning Act 1990 ("TCPA 1990") there was an implied duty on the Secretary of State to remedy that error by seeking the views of Historic England.

The Legal Framework

The Statutory Framework

20. Section 70(2) of the TCPA 1990 provides:

"(2) In dealing with [an application for planning permission or permission in principle] the authority shall have regard to

(a) the provisions of the development plan, so far as material to the application,

(aza) a post-examination draft neighbourhood development plan, so far as material to the application,

(aa) any considerations relating to the use of the Welsh language, so far as material to the application;

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations."

21. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

"(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be

made in accordance with the plan unless material considerations indicate otherwise."

22. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("LBA 1990") provides:

"(1) In considering whether to grant planning permission [or permission in principle] for development which affects a listed building or its setting, the local planning authority 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."

23. Article 33(1) of the DMPO provides:

"(1) A local planning authority must, in determining an application for planning permission, take into account any representations made where any notice of, or information about, the application has been—

(a) given by site display under article 13, within 21 days beginning with the date when the notice was first displayed by site display;

(b) served on an owner of the land or a tenant of an agricultural holding under article 13, within 21 days beginning with the date when the notice was served on that person provided that the representations are made by any person who they are satisfied is such an owner or tenant;

(c) published in a newspaper under article 13, within the period of 14 days beginning with the date on which the notice was published;

(d) given by site display under article 15, within 21 days beginning with the date when the notice was first displayed by site display;

(e) served on an adjoining owner or occupier under article 15, within 21 days beginning with the date when the notice was served on that person, provided that the representations are made by any person who they are satisfied is such an owner or occupier;

(f) published in a newspaper or a website under article 15 , within the period of [14 days] beginning with the date on which the notice or information was published; and

(g) served on an infrastructure manager under article 16, within 21 days beginning with the date when the notice was served on that person provided that the representations are made by any person who they are satisfied is such an infrastructure manager."

24. Regulation 13 of the 2009 Regulations provides:

"(1) The local planning authority shall give written notice of the appeal within [1 week] of the starting date to—

(a) any person notified or consulted in accordance with the Act or a development order about the application which has given rise to the appeal; and

(b) any other person who made representations to the local planning authority about that application.

(2) A notice under paragraph (1) shall—

(a) …

(e) state that any representations made to the local planning authority in relation to the application, before it was determined, will be sent to the Secretary of State and the appellant by the local planning authority and will be considered by the Secretary of State when determining the appeal unless they are withdrawn, in writing, within [5 weeks] of the starting date; and

…"

25. Regulation 15(1) of the 2009 Regulations provides:

"(1) If a person notified under regulation 13(1) wishes to send representations to the Secretary of State, they shall do so, in writing, within [5 weeks] of the starting date."

26. Regulation 16(1) of the 2009 Regulations provides:

"(1) The Secretary of State may proceed to a decision on an appeal taking into account only such written representations as have been sent within the relevant time limits."

27. Regulation 5A of the 1990 Regulations provides:

"(1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority, or the Secretary of State under section 62A of the principal Act, and the authority think or, as the case may be, the Secretary of State thinks that the development would affect—

(a) the setting of a listed building; or

(b) the character or appearance of a conservation area.

(2) [Subject to paragraph [(2A)] , the local planning authority] shall—

(a) publish in a local newspaper circulating in the locality in which the land is situated a notice indicating the nature of the development in question and naming a place within the locality where a copy of the application, and of all plans and other documents submitted to it, will be open to inspection by the public at all reasonable hours during the period of 21 days beginning with the date of publication of the notice;

(b) for not less than 21 days display on or near the said building a notice containing the same particulars as are required to be published in accordance with sub-paragraph (a); and

(c) for not less than 21 days publish on a website maintained by the local planning authority the following information—

(i) the address or location of the development in question;

(ii) the nature of the development;

(iii) the date by which any representations about the application must be made, which shall not be before the last day of the period of 21 days beginning with the date on which the information is published;

(iv) where and when the application may be inspected; and

(v) how representations may be made about the application.

(2A) …

(3) The local planning authority shall send to the Commission a copy of each notice under paragraph (2) in the following circumstances—

(a) where paragraph (1)(a) applies, the listed building is classified as Grade I or Grade II*; or

(b) where paragraph (1)(b) applies—

(i) the development involves the erection of a new building or the extension of an existing building; and

(ii) the area of land in respect of which the application is made is more than 1,000 square metres.

(4) [The] application shall not be determined by the local planning authority [or, as the case may be, the Secretary of State] before [each] of the following periods have elapsed, namely–

(a) the period of 21 days referred to in paragraph (2); and

(b) the period of 21 days beginning with the date on which the notice required by that paragraph to be displayed was first displayed,[and]

(c) the period of 21 days beginning with the date on which the information required by sub-paragraph (c) of the said paragraph (2) was first published,

and in determining any application for planning permission to which this regulation applies, the local planning authority shall take into account any

representations relating to the application which are received by them before [each] of those periods have elapsed."

Challenges under Section 288 TCPA 1990

28. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

29. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

30. The principles to guide the court when considering a section 288 challenge were re-stated by Lindblom LJ at paragraphs 6-7 in ***St Modwen Developments Limited v. Secretary of State for Communities and Local Government*** [2017] EWCA Civ 1643.

Mistake of Fact

31. The approach to be taken to a mistake of fact giving rise to unfairness was set out by Carnwath LJ (as he then was) giving the judgment of the Court of Appeal in ***E v. Secretary of State for the Home Department*** [2004] EWCA Civ 49 at paragraph 66:

"66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB . First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been (sic) have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

32. In ***R (Loader) v. Rother District Council*** [2016] EWCA Civ 795, the mistake under consideration was to report that a national amenity society had made no comment on a planning application when the true position was that the council's attempt to consult them had been abortive and they had not responded. Lindblom LJ (with whom the other members of the court agreed) stated (at paragraph 57):

"57. And fourthly, Mr Flanagan and Mr Cameron, having rightly conceded that the officer's report was in this respect misleading, urged us to act on the distinction between an officer's advice that is "significantly" – or, as Mr Cameron put it, "seriously" – misleading and advice that is misleading but not "significantly" so. That there is such a line to be drawn is clear from the authorities. Where it is drawn in any particular case will always depend on the

context and circumstances in which the misleading advice was given and the possible consequence of it. In this case, in my view, there can be no question but that the mistake made by the officer in his report was, in its context and circumstances and in its possible consequence, sufficiently misleading to invalidate the committee's decision. It was "significantly" – or "seriously" – misleading on a material matter, and it was left uncorrected before the decision was taken. In the context of the duty in section 66(1) of the Listed Buildings Act , the committee was misinformed on the consultation of a national amenity society, which had been an objector to a similar proposal, and whose views on this application the council had chosen to seek and might have made a difference to its decision. In taking this misinformation into account, it could be said to have proceeded on the basis of an error of fact. But I think the unlawfulness here is better described as the taking into account of an immaterial consideration."

Duties in relation to heritage assets

33. That duty imposed by section 66(1) of the LBA 1990 applies when considering whether to grant planning permission for development which affects a listed building or its setting. The first step is for the decision maker to make a judgment as to whether the development affects a listed building or its setting. The question of whether a proposed development affects a listed building or its setting is a matter of planning judgment for the decision maker (***Catesby Estates Ltd v. Steer*** [2018] EWCA Civ 1697 at paragraph 24).

34. If a development does affect a listed building or its setting, the duty to 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" applies.

35. The statutorily desirable objective of preserving the building or its setting or any features of special architectural or historic interest which possesses is achieved if the building or its setting or those features are left unharmed (***South Lakeland District Council v. Secretary of State for the Environment*** [1992] 2 AC 141 at page 150F – that case was concerned with the duty imposed in relation to conservation areas, not, as in this case, listed buildings).

36. In ***East Northamptonshire DC v. Secretary of State for Communities and Local Government*** [2014] EWCA Civ 137 the duty imposed by section 66(1) of the LBA 1990 was considered. Sullivan LJ (with whom the other members of the Court of Appeal agreed) stated:

"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?

…

> 24. While I would accept Mr. Nardell's submission that *Heatherington*n does not take the matter any further, it does not cast any doubt on the proposition that emerges from the *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.
>
> …
>
> 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. …"

37. In the event that a decision maker is called upon to balance harm to the significance of a listed building and the public benefits of a development proposal, "considerable importance and weight" is to be given to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses when carrying out the balancing exercise.

38. It is not for the decision maker to demonstrate positively that he or she has complied with that duty, it is for the challenger to demonstrate that at the very least there is substantial doubt whether she or he has (***R (Palmer) v. Herefordshire Council*** [2016] EWCA Civ 1061 at paragraph 7).

39. The question to be asked when determining whether the obligation to carry out the publicity requirements contained in regulation 5A(2) and (3) 1990 Regulations arises, is not whether a proposed development would affect the setting of a listed building so seriously as to justify a refusal of planning permission, but whether it would affect the setting (***R (Friends of Hethel Ltd) v. South Norfolk DC*** [2010] EWCA Civ 894 at paragraph 36).

Ground 1

40. All parties are agreed that the first three matters identified in paragraph 66 in the case of ***E*** are present in this case. It is the fourth matter which is at issue, namely whether the mistake of fact played a material (not necessarily decisive) part in the inspector's reasoning.

41. Ms Wigley KC for the Claimant submits:

i) The facts in this case are similar to those considered in ***Simplex GE (Holdings) Ltd. v. Secretary of State for the Environment*** [2017] PTSR 1041, and that issues of materiality and discretion 'merge'.

ii) That the approach set out at paragraph 152 in ***Pearce v. Secretary of State for Business, Energy and Industrial Strategy*** [2021] EWHC 326 (Admin) should be followed, and the question to be asked is whether the decision would have been the same by reference to the untainted parts of the decision, i.e. if the tainted parts, in particular the second sentence in DL25 were omitted.

iii) In assuming that there was a flood risk assessment, the inspector would have assumed that the policy requirement (in local plan policy CC/9(1)(d), and in the NPPF paragraph 167) that it should be ensured that a development does not give rise to increased flood risk elsewhere, had been considered.

iv) The duty imposed by Article 33(1) of the DMPO and regulations 13, 15 and 16 of the 2009 Regulations was not fulfilled as account was not taken of the third party representations on flooding. In support of that submission Ms Wigley submitted

a) The substance of those concerns was not considered in a flood risk assessment.

b) Those concerns were not considered by the Second Defendant's drainage officer.

v) Condition 4 attached to the planning permission granted by the inspector was not a condition intended to deal with concerns about potential for increase in flood risk elsewhere. The Council will not be able to insist upon a scheme to address flood risk elsewhere when considering whether to approve details submitted pursuant to condition 4.

vi) If the inspector had not made the mistake, he may have dismissed the appeal or imposed more stringent conditions.

42. Mr Henderson for the First Defendant submits:

i) The second sentence in DL25 is not an operative reason. The decision is not only untainted, but is not impacted upon, by that second sentence.

ii) In his consultation response the drainage officer does not refer to a flood risk assessment. The drainage officer's views were not tainted by the mistake that the inspector made.

iii) The inspector's approach was to prefer the views of the drainage officer over those of local residents.

iv) The mistake was not material to the outcome of the appeal.

v) The mistake was not material to the form of the planning permission that was granted.

vi) The reason given for imposing condition 4 was to minimise any risk of flooding (as referred to at DL36).

vii) Condition 4 does not prevent a range of flood risk issues, including off site flood risk, being dealt with at the discharge of condition stage. In making that submission Mr Henderson referred to ***R v. Newbury DC ex parte Chieveley Parish Council*** [1997] JPL 1137 at page 1156. The principle relied upon is that terms of the outline planning permission are to be examined in order to determine the principle established by the grant of the planning permission. In ***Chieveley*** it was held that, on a correct interpretation, the planning permission left all matters of detail, including scale to be settled at a later stage (page 1156), and that approval in principle had not been given to a particular size of building or the traffic generated by it (page 1157).

viii) There was no failure to take account of the representations made by third parties, the inspector refers to those representations in the first sentence of DL25.

43. Ms Pindham, for the Fifth Defendant, aligned her client's position with Mr Henderson's submissions. Ms Pindham:

i) Submitted that the third sentence of DL25 is independent of the second sentence.

ii) Emphasised the fact that the inspector relied upon the view of the specialist drainage engineer. The drainage engineer's views were not tainted by the mistake that the inspector made.

Conclusions

44. There was a mistake as to an existing fact. At DL 25 the inspector noted that a flood risk assessment had been submitted and that the drainage officer had been satisfied with 'this information'. No flood risk assessment had been submitted, and the drainage officer had not been satisfied with it.

45. The mistake is uncontentious and objectively verifiable. The Second Defendant, in their letter dated 9th May 2022 say that no flood risk assessment was submitted as part of the Planning Application.

46. The Claimant was not responsible for the mistake.

47. The issue to be determined is whether the inspector's mistake in noting that a flood risk assessment had been submitted, and that the drainage officer was satisfied with it, played a material (not necessarily decisive) part in the inspector's reasoning.

48. Ms Wigley argues that the facts of this case are similar to those considered in ***Simplex*** and that issues relating to materiality and to discretion 'merge'. In ***Simplex*** it was held that one of the reasons given by the Secretary of State for disagreeing with the recommendation of an inspector was factually incorrect. The factual inaccuracy related to the reasons why a local council had decided to retain land as Green Belt. Purchas LJ came to the conclusion that the error was a significant factor in the decision making process carried out by the minister (page 1060B), and that it was impossible to say that the judge at first instance was entitled to come to the conclusion that the minister would necessarily have reached the same conclusion if he had not acted on the erroneous factor (page 1060C).

49. Ms Wigley also draws attention to the approach taken in ***Pearce***. In ***Pearce*** Holgate J considered the application of the provisions of section 31(2A) of the Senior Courts Act 1981, namely whether it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In ***Pearce*** it was common ground (as recorded at paragraph 152) that the court should consider whether the Secretary of State's decision would still have been the same by reference to the untainted parts of the decision. In ***Pearce*** the court was considering a different question to the one which is under consideration in this

case. In this case the question is not whether it appears to the court highly likely that the outcome for the applicant would not have been substantially different, but whether the mistake played a material (not necessarily decisive) part in the inspector's reasoning.

50. By virtue of the provisions of Article 33(1) DMPO and the provisions of the 2009 Regulations, the inspector was under an express duty to take into account the representations made by third parties, including those relating to flooding. The issue in dispute is whether the reference to the representations made in the first sentence of DL25 was sufficient to discharge that duty.

51. An inspector does not have to rehearse every argument relating to each matter in every paragraph (***St Modwen*** at paragraph 6(1)). In the first sentence in DL25 the inspector does not merely note that representations were made. He refers to the fact that those representations were accompanied by photographs and related both to existing flooding from Bourn Brook and to the development's potential to increase the risk to nearby properties. The inspector did not just set out the essential points raised in the representations, he also engaged with those points. He went on to refer to, and to rely on, the views of the specialist officer who provided a consultation response on drainage and flooding issues. Given the fact that flood risk was not identified as a main issue, and did not form a reason for refusal, in my judgment the reference to the representations made, and to the substance of the points made, and the inspector's analysis of them, was sufficient to discharge the duty imposed upon the inspector to take account of those representations.

52. My finding that the inspector took account of the representations made by the local residents is not sufficient to dispose of Ground 1. The second sentence of DL25 contains a mistake of fact, namely the statement that a flood risk assessment has been submitted, and that the drainage officer was satisfied with that information, subject to conditions. The question for the court to consider is whether that mistake played a material (not necessarily decisive) part in the inspector's reasoning.

53. If a site specific flood risk assessment had been submitted, those preparing it would have been expected to have regard to the advice given in the Cambridgeshire Flood and Water Supplementary Planning Document that "A site specific flood risk assessment must demonstrate that the new development is safe in flood risk terms and does not increase flood risk elsewhere."

54. In determining the appeal the inspector was under a duty to have regard to the provisions of the development plan so far as material to the application (section 70(2)(a) TCPA 1990). The provisions of the development plan included policy CC/9 in the South Cambridgeshire Local Plan. Policy CC/9(1)(d) provides that "In order to minimise flood risk, development will only be permitted where: (d) There would be no increase in flood risk elsewhere, ….".

55. Mr Henderson submits that the decision was not only untainted by, but was not impacted by, the second sentence in DL25. Mr Henderson points to the fact that the drainage officer, in the consultation response, does not refer to a flood risk assessment. Mr Henderson submits that the second sentence of DL25 was not material to the outcome of the appeal, and not material to the form of the permission granted, and in particular to condition 4.

56. I am mindful that the court must not trespass into the First Defendant's domain as decision maker. The court must make an objective assessment of whether the mistake of fact played a material part in the inspector's reasoning. That assessment must consider the mistake in the context of the decision letter, and of the decision, as a whole. The exercise considered in ***Pearce***, of considering whether the First Defendant's decision would still have been the same by reference to the untainted parts of the decision is a factor to take into account, but the essential question is broader, namely whether the mistake of fact played a material (not necessarily decisive) part in the inspector's reasoning.

57. In my judgment the mistake of fact in the second sentence of DL25 did play a material part in the inspector's reasoning as:

    i) In DL25 the inspector is addressing the representations made by local residents. As reflected in the first sentence of DL25 those representations included concerns related to the potential of the development to increase flood risk to nearby properties.

    ii) A flood risk assessment, if it had been carried out, would have been expected to have been carried out in accordance with the advice given in the Supplementary Planning Document, and to have considered whether the development would have increased flood risk elsewhere.

    iii) In the second sentence of DL25 the inspector does not only note that a flood risk assessment was submitted, but also notes that the drainage officer was satisfied with 'this information'. The mistake of fact extended beyond merely noting that a flood risk assessment was

submitted; the inspector also states that the drainage officer was satisfied with the information in the (non-existent) flood risk assessment.

iv) In the third sentence of DL25 the inspector states that 'On the evidence before me' he had no clear reasons to disagree with the drainage officer's conclusions. Whilst it is right to say that the drainage officer's conclusion was not based upon a mistaken assumption that there was a flood risk assessment, the inspector's agreement with the drainage officer's conclusions was said to be based upon the evidence before him, which he (the inspector) mistakenly thought included a flood risk assessment. The conclusion in the third sentence of DL25 cannot be said to be untainted by the mistake of fact in the second sentence of DL25.

58. I consider that that unlike in ***Loader***, where the unlawfulness was described as taking into account an immaterial consideration, the error in this case is properly described as a material mistake of fact.

59. For the reasons I have given, Ground 1 is made out.

Ground 2

60. Under Ground 2 the Claimant contends that the First Defendant:

i) Breached the duty imposed upon him by section 66(1) by failing to give careful consideration to the evaluation of the level of harm to the Grade II* listed Caxton Hall and its setting.

ii) Failed to comply with an implied duty to notify Historic England of the appeal application, being an application for planning permission which would affect the setting of a Grade II* listed building.

61. In support of Ground 2 Ms Wigley submits:

i) The inspector failed to consider the extent of the setting of Caxton Hall, and wrongly elided the concept of curtilage with setting, and failed to consider the impact of the development on the tree-lined avenue which provides access to Caxton Hall and forms part of its grounds and its setting.

ii) The inspector failed to take into account the fact that the First Defendant's officer's report and the Planning and Heritage Statement submitted in support of the planning application identified harm to the setting of Caxton Hall.

iii) The inspector failed to take into account the potential for development to increase the risk of harm to Caxton Hall by flooding.

iv) The absence of an explicit duty on the First Defendant to consult external consultees in cases where the local planning authority has failed to comply with the duty imposed upon them to do so, is a lacuna in the statutory regime.

v) An implied duty on the First Defendant on appeal to consult or notify relevant specialist consultees (whose views have not already been sought) arises as a necessary implication from the context and purpose

of the statutory provisions (***R (Black) v. Secretary of State for Justice*** [2018] AC 215 at paragraph 36).

vi) Where an inspector learns that a local planning authority has failed, in breach of the duty imposed on them, to consult, a hearing or inquiry is likely to be adjourned in order to allow the views of the consultee to be sought. In acting in this way an inspector is complying with the public law duty on a decision maker to take reasonable steps to equip themselves with the information necessary to make an informed decision (***Secretary of State for Education and Science v. Tameside MBC*** [1977] AC 1014, at page 1065B). Where there is a clear legislative intention to ensure that specified consultee's viewers are obtained, the only reasonable way forward is for an inspector on a planning appeal to allow such views to be obtained.

vii) Where an inspector 'thinks' that an appeal proposal affects the setting of a Grade II* listed building, and where Historic England have not been notified, the only rational response is for the inspector is to ensure that Historic England is notified before determining the appeal.

62. Mr Henderson, on behalf of the First Defendant, submits:

i) The inspector had regard to the potential impact on the proposed development on Caxton Hall, and, in a lawful exercise of planning judgment, concluded that the setting would be preserved.

ii) There was no need for the inspector to rehearse national policy or guidance, especially as impact on the setting of Caxton Hall was not a reason for refusal and was not a main issue.

iii) The inspector addressed the relationship between the proposed development and Caxton Hall, stating that there would be little intervisibility (at DL13).

iv) The inspector did not wrongly elide curtilage and setting.

v) The duty imposed by regulation 5A of the 1990 Regulations is a duty imposed upon the local planning authority.

vi) The alleged legislative lacuna is not a sufficient reason to find that there is an implied duty imposed upon the First Defendant.

vii) If the local planning authority fail to consult a statutory consultee, when considering an appeal the First Defendant has a discretion as to whether to consult, and the exercise of that discretion is reviewable on ***Wednesbury*** principles.

viii) A duty on a decision maker to equip themselves with the information necessary to make an informed decision does not mean that it will be necessary in all cases to carry out consultation at the appeal stage where no consultation was carried out at the application stage.

63. Ms Pindham for the Fifth Defendant submits

i) The inspector expressly addressed his mind to the impact on all relevant heritage assets.

ii) Regulation 5A(3) of the 1990 Regulations does not impose a duty on the First Defendant at the appeal stage.

Conclusions

64. Section 66(1) of the LBA applies when the First Defendant is considering whether to grant planning permission for development which affects a listed building or its setting. The duty imposed by section 66(1) is that the First Defendant 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.

65. It is for the person challenging the grant of planning permission to demonstrate whether, at the very least, there is substantial doubt whether the decision maker has complied with the duty (***Palmer*** at paragraph 7).

66. Impact on heritage significance was not relied upon by the Second Defendant as a reason for refusal, and was not identified by the inspector as a main issue. Although the Claimant, in his letter of objection, did raise risk of flooding of Caxton Hall as an issue, he did not raise flood risk as being a matter giving rise to adverse impact on heritage significance.

67. At DL11 the inspector referred to the tree-lined avenue of Caxton Hall. At DL13 the inspector referred to the fact that the appeal site was close to the curtilage of Caxton Hall, and expressed the view that there would be little intervisibility with Caxton Hall as a heritage asset. The inspector then concluded that the setting of the heritage assets to which he had referred, which included Caxton Hall, would be preserved. The inspector did not elide the concepts of curtilage

and setting. In the first sentence of DL13 the inspector makes a statement of fact, namely that the appeal site is close to the curtilage of Caxton Hall. In the last sentence of DL13 the inspector exercised his judgment applying the correct test, he considered whether the setting of the heritage assets would be preserved; he made no reference to curtilage in the last sentence of DL13. The conservation officer, the planning officer and the consultants acting for the applicant, had all expressed their own views on impacts on the setting and significance of heritage assets. It was for the inspector, as an expert tribunal, to form his own view on the issue; he did so, when (at DL13) he found that the settings of all of the heritage assets he had referred to would be preserved.

68. The inspector also found (at DL15) that there was no conflict with local plan policy relating to heritage assets, NH/14.

69. The inspector's treatment of heritage issues in the decision letter, albeit brief, does not raise any substantial doubt as to whether he had complied with the duty imposed by section 66(1) LBA 1990. The inspector addressed the essential question which lies at the heart of the section 66(1) duty as it applied in this case, namely whether the development for which planning permission was sought would preserve the setting of the listed buildings. The inspector made a finding that the settings of the heritage assets would be preserved. There was no need to make express reference to flood risk when addressing heritage issues in the decision letter, as flood risk had not been raised as being a matter giving rise to adverse impact on heritage significance.

70. Ms Wigley refers to Article 18 of the DMPO in her submissions. Article 18 of the DMPO imposes a duty on a local planning authority to consult with the

authority or person mentioned in the Table in Schedule 4 when a development falls within a described category. In this case the provision in issue is not Article 18 of the DMPO, but regulation 5A of the 1990 Regulations.

71. Regulation 5A(1) of the 1990 Regulations provides that the regulation applies where an application for planning permission for any development of land is made to a local planning authority and the authority think that the development would affect the setting of a listed building. When the regulation applies the local planning authority are to publish a notice in a local newspaper, a site notice, and a notice on their website. If the listed building the setting of which the local authority thinks that the development would affect is classified as Grade I or Grade II*, the local planning authority shall send a copy of the notice to Historic England.

72. In this case the Second Defendant did not send a copy of a notice to Historic England.

73. The point at issue is whether, once the application had been appealed to the First Defendant, he was under an obligation to consult Historic England. The Claimant accepts that Regulation 5A does not impose an express duty on the First Defendant to carry out consultation at the appeal stage, but argues that he was either under an implied duty to do so, or that applying the ***Tameside*** duty he was obliged to take reasonable steps to acquaint himself with the relevant information, and that such information included the views of Historic England on the impact of the proposals on the setting of the Grade II* listed Caxton Hall.

74. It is clear that the duty imposed by regulation 5A(1) is a duty imposed upon the authority to whom a planning application is made, either the local planning

authority or if an application is made direct to the Secretary of State pursuant to section 62A TCPA 1990, the Secretary of State. Regulation 5A does not, in express terms, impose a duty on the Secretary of State when an appeal is made to him under section 78 TCPA 1990.

75. Mr Henderson submits that an alleged lacuna is the statutory framework is insufficient to justify the implication of a duty on the Secretary of State at the appeal stage. Ms Wigley relies upon the statement made by Lady Hale (with whom the other members of the Supreme Court agreed) at paragraph 36 in ***Black***, and in particular the statement at paragraphs 36(3) and (4):

"(3) The goal of all statutory interpretation is to discover the intention of

the legislation.

(4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose. In this context, it is clear that Lord Hobhouse of Woodborough's dictum in *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 616, para 45, that "A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context" must be modified to include the purpose, as well as the context, of the legislation.

76. In ***Black*** the matter under consideration was whether the Crown was bound by the prohibition of smoking in most enclosed public places and workplaces contained in Chapter I of Part 1 of the Health Act 2006. The Supreme Court considered the statement of principle that a statutory provision does not bind the Crown save by express words or 'necessary implication'. In paragraph 36 of

her judgment, Lady Hale set out propositions relating to the 'test' or principles to be applied when determining whether a statute binds the Crown. Ms Wigley seeks to rely upon those principles for a different purpose, namely to seek to imply a duty upon a person upon whom no such duty is expressly imposed by the 1990 Regulations.

77. In my judgment the arguments advanced by Ms Wigley do not justify the court holding that a duty is to be implied. The 1990 Regulations impose no express duty at the appeal stage. The implication sought by Ms Wigley would go beyond interpreting the words of the 1990 Regulations. In my judgment, it is not possible, even when considering purpose and context, to interpret the words used in the 1990 Regulations as imposing a duty on the Secretary of State at the appeal stage to consult those persons who were not consulted at the application stage.

78. I agree with the submissions of Mr Henderson that if a local planning authority fail to consult a statutory consultee at the planning application stage, at the appeal stage the First Defendant has a discretion as to whether to consult, and the exercise of that discretion is reviewable on ***Wednesbury*** principles.

79. The Claimant submits that where the Secretary of State (acting through his inspector) thinks that an appeal proposal affects the setting of a Grade II* listed building, and where Historic England have not been notified, the only rational response is for the inspector on appeal to ensure Historic England is notified before determining the appeal. In my judgment that submission fails to recognise and reflect the extent of the discretion vested in the First Defendant. In the absence of any substantive argument as to why it is said that the First

Defendant erred in the exercise of his discretion, as to whether to consult with Historic England, this element of this ground of claim fails.

80. For the reasons I have given I reject this ground of challenge.

Discretion

81. It cannot be said that the First Defendant would necessarily have made the same decision if he had not made the material mistake of fact as it is not clear whether or not the inspector concluded that potential off site flood risk had been considered in a flood risk assessment and found to be acceptable.

82. Therefore this not a case where the decision should not be quashed in the exercise of the court's discretion.

Final Conclusion

83. The challenge on ground 1 is made out, and therefore the application succeeds and the First Defendant's decision to allow the appeal is quashed.