Application by National Highways for an Order granting Development Consent for The Lower Thames Crossing

WRITTEN REPRESENTATION

(Planning Inspectorate Reference: **20035885**)

SUBMITTED ON BEHALF OF STUART MEE, RICHARD JAMES MEE AND A P MEE

17 July 2023

Gateley LEGAL

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1. INTRODUCTION

1.1 This Written Representation is submitted on behalf of Stuart Mee, Richard James Mee and A P Mee **("The Mees" or "Client")** in respect of land known as **Manor Farm**, **Hobbs Hole and South Ockendon** which are located within the wards of Upminster and Ockendon. The Written Representation is in response to National Highways' (the "**Applicant**") application for a development consent order ("**DCO**") for the Lower Thames Crossing ("**LTC**") project ("the Project"). The Project envisages development of parts of the working farm comprised of **Manor Farm**, **Hobbs Hole and South Ockendon** (collectively, "the Farm") which are located within the wards of Upminster and Ockendon. The DCO identifies some of that Farm such land desire to fall within the Order Limits of the Project. Details of the various land holdings/ownerships are shown on the plan attached at Appendix 1 to this submission.

1.2 The following plans at Appendix 2 illustrate the situation of the Farm and the concerns raised:

a) Farm Plan 1: shows an aerial view of the Farm outlined in red and bisected by the M25. The plan has marked on it "A, B, C, and D". Those letters correspond to extracts of the Applicant's General Arrangement Plans that relate to the area of each letter. Thus, Plan A corresponds with location "A" on Plan 1;

b) Farm Plan 2: shows the same plan as Plan 1 but with an Ordnance Survey Base. The letters "A-D" have been shown larger. Immediately to the West (or left) of "D" is the area outlined in red known as "Hobbs Hole";

c) Farm Plan 3: shows the same as Plan 2 but with assets of the Farm also identified. For example, a shop and the fishing lakes operated by the Mees Mee at the Farm;

d) GA Plans (Annotated) and marked "A", "B", "C" and "D": show the general arrangements of the Applicant in the corresponding vicinity of the same letters appearing on Plans 1 and 2 above. Red manuscript numbers inside circles have been added. Plan D shows the area of Hobbs Hole that contains also the number "7" in a circle in land that it otherwise shown dotted and outlined by a blue dashed line.

1.3 The Farm and its land holdings have been in the Mee family for generations. Mr Mee (Snr) was a tenant of Manor Farm from 1961 and then purchased this land in the 1970s. An area of land described as 'Hobbs Hole' was purchased a little later by the early 1970. Most of the land that comprises Manor Farm is classed under the Agricultural Land Classification system as Grade 1 and Grade 2. These land types are designated in Government policy as the "best and most versatile". At a national level, paragraph 174(b) (and Annex 2) of the NPPF 2021 requires that planning decisions should contribute to and enhance the natural and local environment by – "(b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland". Thus, much of the Farm has intrinsic natural and environmental capital of a high order.

1.4 The National Planning Statement National Networks ("NPSNN") also recognises the intrinsic capital and economic and other benefits at a national level. Thus, paragraph 5.168 provides: "Applicants should take into account the economic and other benefits of the best and most versatile agricultural land (defined as land in grades 1, 2 and 3a of the Agricultural Land Classification). Where significant development of agricultural land is demonstrated to be necessary, applicants should seek to use areas of poorer quality land in preference to that of a higher quality. Applicants should also identify any effects, and seek to minimise impacts, on soil quality, taking into account any mitigation measures proposed." To like effect, paragraph 5.176 also requires the Secretary of State: "take into account the economic and other benefits of the best and most versatile agricultural land. The decision maker should give little weight to the loss of agricultural land in grades 3b, 4 and 5, except in areas (such as uplands) where particular agricultural practices may themselves contribute to the quality and character of the environment or the local economy." It is implicit that considerable and significant weight (respectively) be given to agricultural land of Grades 1 and 2.

1.5 The Applicant has identified areas of Manor Farm for its asserted permanent acquisition including as "Potential land required for environmental mitigation or landscape enhancement". On the face of it, permanent acquisition of land would remove a capital area of the "best and most versatile land." Having been involved at all stages of this process, there remains no justification for the taking of that land from Manor Farm against the will of Mr Mee. We do not

consider converting high quality farmland for such purposes is in any way justifiable. The acquisition is ultra vires and would be an excessive use of compulsory powers.

1.6 Representations have been submitted to the various public consultations carried out by the Applicant for the LTC project at various stages of the consultation process, both by Shoosmiths and by our Client's appointed surveyors (formerly Strutt & Parker, now Peter Cole of Ceres Property) – dated 19 December 2018; 12 August 2020; 8 September 2021; and 20 June 2022 and 24 February 2023. For completeness, a copy these representations are attached in the Appendix 3

THE PARTICULAR CONCERNS OF THE MEES

1.7 We will now deal with the various aspects of these Written Representations in the following order:

1.7.1 Permanent Acquisition of land at Hobbs Hole as Replacement Land/Open Space - the agricultural field accesses and the NMUs).

1.7.2 Effects on Manor Farm including the Manor Farm shop and other matters.

1.7.3 Land at South Ockendon including NMUs and agricultural field accesses.

2. HOBBS HOLE – SPECIAL REPLACEMENT LAND/OPEN SPACE

2.1 The origins of the interest of the Applicant in Hobbs Hole appear to lie in a Statement of Common Ground with the Forestry England (Document 5.4.5.2) where the views of Forestry England were as follows:

Forestry England has several concerns about replacement land with third party ownership - located in the middle of the Hobb's Hole, they would like to reiterate these concerns.

2.2 The Applicant responded as follows:

National Highways state that the pond remains outside of the Order Limits as there is no legal justification for its compulsory acquisition; however, National Highways is aware of the estate management issues that could arise in future and so will progress discussions with the owner over its management and possible voluntary agreements.

National Highways will continue to engage with Forestry England to explain any progress in estate management.

2.3 The Matter was not agreed by Forestry England.

2.4 Paragraph 4.3.29 et seq of the Statement of Reasons of the Applicant (Document 4.1) relate to the "Thames Chase Forest":

4.3.30 The Thames Chase Community Forest is a dominant feature in this landscape, with many pockets of woodland in an area of 38 square miles of countryside. It straddles the M25 to the north of North Ockendon. The Thames Chase Forest Centre is situated between North Ockendon and Cranham.

4.3.31 The Upminster and Grays Branch railway runs underneath the M25 south of junction 29, through Thames Chase Community Forest, and a registered bridleway connects the railway to Codham Hall Lane, east of the M25, crossing the A127. Registered footpaths link the east of the M25 with Warley Street and also Codham Hall.

4.3.32 To the north of the A127, more mature woodland is present, including the Codham Hall Wood ancient woodland which spans the M25 immediately north of junction 29 and Hobbs Hole ancient woodland immediately to the south-east of junction 29…

2.5 As stated above, Hobbs Hole was purchased by the Mee family in the 1970s as additional farming land to supplement the existing larger farm holding. It is actively farmed.

2.6 Section 7.2 of the Statement of Reasons relies on section 131 of the Planning Act 2008 to advance a contention of the Applicant purporting to justify the taking of Hobbs Hole from the Mees against their will.

2.7 In essence, the Applicant proposes to take compulsorily land on which is situated the Thames Chase Community Forest so that it may develop its Project, and simultaneously the Applicant proposes to take compulsorily land of the Mees as (so-called) 'replacement land' that the

Applicant then proposes to apply for use for the lost part of the Thames Chase Community Forest. There is an inherent flawed circular logic to the Applicant's proposal.

2.8 The genesis of the area of the Thames Chase Community Forest is identified in Table 7.4, Row 6, Column 1, of the Statement of Reasons in which the Applicant identifies the "plots" making up the Thames Chase Forest:

> *Thames Chase Forest Centre (plots 43- 08, 43-22, 43-23, 43- 24, 43-25, 43-31, 43- 33, 43-39, 44-12 and 44-51)*

That is, parts comprised of the Thames Chase Forest Centre are identified as "order land" plots.

2.9 In Table 7.4, Column 2, "Plots of replacement land" are also identified:

42-19, 42-26, 42-33, 43-04 and 44-19

2.10 Plot 43-04 is Hobbs Hole. Thus, Hobbs Hole has been identified by the Applicant as "Plot 43-04" as "replacement land" on Table 7.4, Row 6, of the Statement of Reasons for the Applicant's desired land take at Thames Chase Community Forest.

2.11 Table 7.4 relies on section 131(4) of the Planning Act 2008 as the purported justification for the purported compulsory acquisition of Hobbs Hole from the Mees before the further application of the taken Hobbs Hole to "replacement land" for the plots previously part of the Thames Chase Community Forest.

2.12 In asserted reliance on section 131(4), the Applicant says this:

"No less area"

The replacement land is not less in area because the proposed replacement land is 15.61 hectares (which is in excess of the 10.14 hectares proposed to be permanently acquired as per section 131 and the 3.02 hectares over which rights are proposed to be permanently acquired and replacement land provided as per section 132)

Reasons replacement land is no less advantageous than existing site ('the Order land') as per section 131(4) & (12)

The replacement land would be larger in quantity, equally or more accessible, useful and attractive, and its overall quality would be comparable, the time gap between impacting the existing land and the provision of replacement land is offset by the larger area of replacement land being provided. See the Appendix D of the Planning Statement (Application Document 7.2) for further details. Accordingly, the replacement land is no less advantageous to the public There are no persons entitled to rights of common or other rights.

2.13 The Applicant's proposal arises in the following statutory context. Section 122 authorises the compulsory taking of land against a person's will only if certain criteria are satisfied:

> *1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*
> *2) The condition is that the land—*
> a) *is required for the development to which the development consent relates,*
> b) *is required to facilitate or is incidental to that development, or*
> *is replacement land which is to be given in exchange for the order land under section 131 or 132.*
> *3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*

2.14 Section 131 includes:

> *1) This section applies to any land forming part of a common, open space or fuel or field garden allotment.*
>
> *2) This section does not apply in a case to which section 132 applies…*
>
> *12) In this section –*

"common" , "fuel or field garden allotment" and "open space" have the same meanings as in section 19 of the Acquisition of Land Act 1981 (c. 67)

"the order land" means the land authorised to be compulsorily acquired;

"the prospective seller" means the person or persons in whom the order land is vested;

"replacement land" means land which is not less in area than the order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public…

2.15 *Section 19 of the Acquisition of Land Act 1981 defines "common" , "fuel or field garden allotment" and "open space" to mean:*

4)"common" includes any land subject to be enclosed under the Inclosure Acts 1845 to 1882, and any town or village green,

"fuel or field garden allotment" means any allotment set out as a fuel allotment, or a field garden allotment, under an Inclosure Act,

"open space" means any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground.

2.16 On its proper and lawful construction in the sphere of compulsory purchase, section 122(2)(c) provides for a condition that the "land is replacement land which is to be given in exchange for the order land *under* section 131 or 132"; and section 122(3) also requires there to be a compelling case or the land to be acquired compulsorily. Thus, "replacement land" derives from under section 131 and is not a freestanding criterion under section 122(2)(c).

2.17 Section 131(1) expressly states that it applies to any land forming part of a specified description. The description is defined by section 131(11). If land does not qualify under subsection (1), then the section cannot apply. In that instance, section 122(2)(c) is unavailable in law to be able to be satisfied by the Applicant.

2.18 In this matter, there is no *evidence* that Hobbs Hole is a field set out by an Inclosure Act nor that it is "open space used for the purposes of public recreation" nor that it is a "disused burial ground" nor that it is laid out as a public garden.

2.19 Hobbs Hole does not in fact qualify as land within section 19(4) of the Acquisition of Land Act.

2.20 It follows that the inclusion of Hobbs Hole (Plot 43-04) in Table 7.4 and as any kind of order land is ultra vires section 131 and 122(2)(c).

2.21 It further follows that Hobbs Hole (and any and all other plots not on the evidence rationally qualifying within the section 131(11) descriptions) must in law be excluded by the Secretary of State from the scope of sections 131 and 122(2)(c). In turn, those Plots must be deleted from the Statement of Reasons Table 7.4.

2.22 The Mees recognise that this analysis may have consequences for further plots and for the balancing exercise.

2.23 Without prejudice to the foregoing, the Mees further contend as follows.

2.24 Assuming hypothetically that Hobbs Hole was a field "*set out as a field … under an Inclosure Act"* (which it was not), then section 131(3) would require there to be a special parliamentary procedure unless the Secretary of State was satisfied that at least one of subsections (4) to (5) applied.

2.25 In this matter, the Applicant relies on subsection (4) and no other subsection.

2.26 Subsection (4) uses the phrase "replacement land". That phrase is defined under subsection (12) to mean: "land which is not less in area than *the* order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public." And in the context of "the other land" being a defined term meaning: " means *the* land authorised to be compulsorily acquired".

2.27 On its proper and lawful construction in the sphere of compulsory purchase, *because* the defined meaning of "replacement land" includes a reference to "*the* order land", then the extent of "replacement land" cannot in law *be itself* "*the* order land".

2.28 Further, on its ordinary reading, "replacement land" is a comparator with "the order land" because of the phrase "than the" before "order land", and, in consequence, "replacement land" cannot in law simultaneously be also "the order land" per se.

2.29 Furthermore, subsection (4)(a) requires land to have been "given" or "will be given". It is axiomatic that land that is compulsorily acquired cannot qualify as having been *given* nor that it will be *given*. Indeed, the foregoing proper interpretation is consistent with section 131(11) that makes special provision for vesting declarations in relation to replacement land "given" (not taken) in exchange as mentioned in subsection (4)(a).

2.30 By contrast, subsections (4A) to (5) address types of land that are "the order land" (subsection (4A)(a) and (4B)), are not land of the *other* descriptions within subsection (1)), or are small areas of order land (subsection (5)).

2.31 In this DCO, the Applicant has identified "Plot 43-04" (and numerous other plots) as "order land" plots on its Land Plans. For example, Hobbs Hole has a plot reference Plot 43-04 and is also coloured pink. There is no evidence that Plot 43-04 qualified within section 131(1).

2.32 Since the same logic applies to the remainder of Table 7.4, columns 1 and 2 cannot simultaneously qualify as both "the order land" by reason of a plot reference) and "replacement land" (by reason of a plot reference) order land, and there remains no evidence of the satisfaction of section 131(1), it follows that Table 7.4 would appear to collapse and falls to be deleted.

2.33 It further follows that the absence of replacement land results in the increase of harm from the Project and the overall balancing exercise of the Applicant appears thereby flawed. These are matters for the Examining Authority ("ExA") and the Secretary of State to evaluate under the NPSNN and the NPPF (2021).

2.34 The Mees invite the Secretary of State to revaluate the exercise as above.

2.35 "Replacement land" cannot be simultaneously both replacement land and also order land. If it were so, the definition of replacement land would include the phrase "to be compulsorily acquired".

2.36 To assist the ExA and Secretary of State, it will be recalled that Thames Chase Community Forest is an area of designated open space / special category land which straddles the section of the M25 located to the north of North Ockendon, and which is contended as required in connection with the LTC project for roadbuilding (i.e. the construction of the M25 northbound slip road and earthworks) and utilities diversions.

2.37 The land at Hobbs Hole amounts to 11.9 HA and is proposed for permanent acquisition by the Applicant and subsequent transfer to Thames Chase Trust and/or Forestry England/Essex County Council to provide an area for ecological habitat creation – specifically for new woodland, biodiversity mitigation and open space. Mr Mee maintains the strongest objection to this acquisition and is not satisfied that the Applicant has properly or lawfully considered any alternatives and /or provided the evidence to justify the Applicant's case.

2.38 Our Client maintains a fundamental objection to the permanent acquisition of Hobbs Hole and fails to understand why it has been specifically identified at all because its seizure appears to be ultra vires the scope of the Planning Act 2008.

2.39 The Applicant has asserted also that Hobbs Hole land meet the definition of 'replacement land' contained in sections 131 *and* 132 of the Planning Act 2008. But section 131(2) makes clear that section 131 is mutually exclusive to section 132.

2.40 Bircham Dyson Bell sent a letter on behalf of the Applicant to our Client's legal representative on 3 March 2021 (which is included at Appendix 4 which purported to address the desired need for the freehold transfer of the Hobbs Hole land point but simply repeated the (unlawful) operation of Section 131 *and* 132 of the Planning Act 2008. The Applicant's letter highlights the lack of proper or lawful examination by the Applicant during the DCO process to demonstrate the characteristics of the replacement land meet the required statutory criteria.

2.41 During our discussions with the Applicant in early 2021 we asked to what extent the replacement land had been *appraised* by the Applicant as the Applicant maintained that they had *thoroughly* explored this matter. They had not. They appear to have overlooked the definitions of section 131(12) and the statutory criteria of (1) as the gateway to apply section 131.

2.42 We specifically then expected full disclosure of detail of its comparative analysis of the characteristics of the land being taken at TCCF (i.e., accessibility, topography, landscape character, quality, condition etc, use etc.) and the candidate replacement land, as well as the search criteria and the results of its assessment of the performance of any candidate replacement land parcels (including Hobbs Hole) against those criteria. There was none then and to date this information has still not been provided.

2.43 Instead, it remains a matter for the Applicant to choose whether they would like to treat with the Mees for the voluntary purchase of Hobbs Hole and, if so, at what premium.

2.44 Mr Mee and his legal/professional representatives was subsequently provided (sometime later) with a brief 8-page report entitled: "Lower Thames Crossing: Thames Chase Forest Centre – Survey results and reasonable alternatives" (version 1 dated September 2022) as the justification for the selection of our Client's land. The inclusion of "reasonable" in the title of a document does not convert it into a document about lawful alternatives. Although this report comments on an August 2021 survey we were not provided with a copy of it in advance of Mr Mee's letter of further representation dated 8 September 2021. In that letter reference was made to the fact that the documents published in support of the current consultation at that stage included an Operations Update and a Ward Impact Summary (North of the River: Part 2), both of which were considered at that time. Indeed, the Applicant persisted with its assertion that Hobbs Hole qualified as "replacement land" and brief details were provided as regards the total area of the replacement land identified as a consequence of the proposed land take at TCCF (which intended to includes Hobbs Hole and an area of land to the north of TCCF, also on the western side of the M25), the proposals for access to that replacement land, and its purpose, being the provision of new woodland and biodiversity mitigation. On page 98 of the Operations Update, the rather sweeping and unsubstantiated assertion was made that the replacement land would "provide equal accessibility and would be no less advantageous to the public". That phrase repeats the criteria of section 131(12) definition of "replacement land" but assuming prior qualification of the same land as land within the meaning of section 131(1). The Ward Impact Summary shed no further light on this matter.

2.45 The brief report referred to above falls woefully short of what can be expected and simply summarises the results of a single visitor survey carried out at Thames Chase Community Forest over a period of 4 days in August 2021, as well as the alternative sites looked at in selecting the replacement land associated with the impact of the LTC project on the land at TCCF.

2.46 Leaving aside the inadequacy of this report and the timing of the exercise that was carried out since a four-day August survey i.e. during school break/holiday period will not necessarily be a true representation of the numbers of visitors over a yearly period. This August survey is informative about the proposed use of the TCCF land but not necessarily helpful and still cannot justify permanent acquisition of Mr Mee's land in this case.

2.47 The report confirms that a total of 6 sites to serve as replacement land were considered, two of which (Hobbs Hole and an area of land to the north of TCCF, also on the western side of the M25) were selected as being *suitable*. But, again, "suitability" is not a criterion under section 131(4) of the Planning Act 2008. "Suitable" appears under section 131(4A) but only in the context of land that is "open space". Table 7.4 of the Statement of Reasons of the Applicant does not rely on section 131(4A) of the Planning Act 2008.

2.48 Brief details of the Applicant's assessment of the 4 rejected sites is contained in the report. However, the outcome of the comparative analysis and 'performance against search criteria' assessment undertaken in respect of the two successful sites, one of which is Hobbs Hole, is not reported on, which is a significant omission.

2.49 The Applicant has maintained that it has consulted Thames Chase Trust and Forestry England and that both organisations have expressed a strong preference for *their* selection of land over

other potential locations in the area preferred by the Applicant. But the Applicant appears to have ignored these forestry regulators and their advice on forestry matters.

2.50 In this respect, it is noted that the Statement of Common ground between National Highways and Forestry England dated October 2022 labels matters on Hobbs Hole as a "matter not agreed". Neither Mr Mee not his advisers have been privy to those discussions so do not regard the process of selection to have been transparent or fair.

2.51 Further, it is noted that 'Site 1' of the rejected sites – a private golf course – was not considered suitable (again, a section 131(4A) test and not a section 131(4) test), at least in part, because it hosts a viable commercial business that intends to continue, and so, if the Applicant were to seek to acquire this land for the LTC project, it could result in a significant business extinguishment claim. Since section 131(4A)(c)(ii) refers to costs, it cannot be said that there is no suitable land available in the form of the golf course in exchange for the order land under Table 7.4, Row 6. Thames Chase Community Forest. This is because the golf course is necessarily laid out as open space for golfing.

2.52 The compelling case for compulsory acquisition of any special category land included within the Order Limits for the LTC project is required to be demonstrated as lawful and as qualifying within the statutory criteria (here, the Applicant relies on section 131(4) of the Planning Act 2008 in relation to Hobbs Hole and no other section.

2.53 The Mee family rejects as unlawful the asserted taking of Hobbs Hole against their will. That purported taking is ultra vires the Planning Act 2008.

2.54 We therefore maintain that the Applicant has failed to undertake a lawful or proper rational exercise to justify, on the basis of evidence, the position for the permanent compulsory acquisition of this land as this has never been provided.

3. EFFECTS ON MANOR FARM AND PROTECTIVE PROVISIONS

3.1 The following concerns of the Mees relate to the ongoing operation of their Farm during the currency of construction operations and operation of the Project (if it were to be authorised).

3.2 The Mees consider that these concerns (in the main) can be properly dealt with through Protective Provisions and will issue a draft of these for inclusion in the DCO. If they are not included, then the concerns below demonstrate a real impact on the ongoing viability of this Farm.

3.3 The construction and operation of the LTC project is going to have a severe and detrimental impact upon our client's ability to continue farming his land at Manor Farm. It will affect *years* of productive farming of the best and most versatile agricultural land.

3.4 There are several instances where permanent acquisition of Mr Mee's land is proposed in connection with the LTC project, and where such acquisition has the potential to prevent or compromise our client's ability to utilise existing agricultural field accesses. It is therefore imperative that due consideration is given in all cases and that accesses, suitable for use by farm vehicles (including a combine harvester) and agricultural machinery, is maintained at all times in the affected locations so that the ability to continue farming his land the adjoining fields is not compromised or sterilised.

3.5 Further, where the LTC proposal is for an existing agricultural access to be shared with a new Non-Motorised User (NMU) route (i.e. walking, cycling and horse-riding route), there is a lack of information as to how the access will operate and both uses are to be managed. Whilst the Applicant wishes to improve public access and connectivity, it has not considered the negative impacts of trespassing, fly tipping and hair coursing, which is already rife in this area, is a major worry. The Applicant has not provided any details of how it intends to address the potential negative impacts arising from improved public access and in particular how this would affect the future farm operations and security, nor how continued agricultural access will be accommodated/maintained in those locations where a shared access is proposed.

Farm Track off Ockendon Road

3.6 See Farm Plan, GA Plans (Annotated) D. Our Client is concerned about the Applicant's proposal to permanently acquire the existing farm track located off Ockendon Road which is

used daily, all year round (with farm vehicles and agricultural machinery), to access the fields on either side of the track and to maintain the telecoms masts which are located at its north section. Sheet 43 of the General Arrangement Plans identifies the track (the ownership of which is unclear) as an NMU route leading to and over the proposed LTC carriageway. This land should not be permanently acquired, the Applicant has not provided its case for doing so and any joint arrangements for shared use can be accommodated without the need for permanent acquisition. It is quite simply an excessive application of compulsory powers.

3.7 It is also fundamental that that the usage of this track is not compromised in any way during the construction of the LTC project and when the project is operational. Further, in this particular location particularly, public safety is a genuine concern. At its southern end, the proposed NMU route will enter onto Ockendon Road, a busy road with a blind bend to the west. Our client is not satisfied that the Applicant has undertaken a proper analysis of the relevant junction, nor an evaluation of the safety risk posed to the public.

Severance of Irrigation System

3.8 See Farm Plan 3. Delivery of the LTC project will sever the existing irrigation system which is in operation at Manor Farm and absolutely critical to the farming of that land. A suitable replacement irrigation system must be provided as part of the LTC project to serve the lifetime of the farming use. This has been made clear in all representations to date and during discussions between the parties on this matter. No design solution has been provided to date.

Utility Diversions and Corridors

3.9 See Farm Plan, GA Plans (Annotated) C. The Land, Works and General Arrangement Plans (in each case Sheet 42), show an area of land in respect of which temporary possession and the permanent acquisition of rights is required for 'multi-utility alignment' and associated works. However, this alignment is said to be 'indicative'. Therefore, it isn't clear what the proposed utilities are, their precise location and for how long temporary possession of the relevant land may be required in order to install them, nor how the utilities will be maintained.

3.10 In the circumstances, Mr Mee is simply unable to make an accurate assessment of the likely impact of this aspect of the LTC project on his land holdings. Further clarity from the Applicant is required in relation to the utilities to be installed, the timetable for their installation and the maintenance regime to be adopted in the long-term.

Ecological and Environmental Mitigation

3.11 See Farm Plan GA (Annotated) Plans C. Land at Manor Farm which is adjacent to the Upminster and Grays Branch Railway (to the west) is identified for environmental works, specifically ecological habitat creation.

3.12 Mr Mee is disappointed to see that this land continues to be identified for permanent acquisition and does not see the need for this acquisition to take place (see Land Plans: Volume C – Sheet 42). He therefore objects to the permanent acquisition as a matter of principle. By way of reluctant compromise, he could explore the possibility of a stewardship arrangement whereby he would retain ownership of the land, albeit subject to certain restrictions and safeguarding measures, under an agreement which provides for an appropriate long-term maintenance regime. If an arrangement of this nature is to be established, the Applicant must first provide our client with a detailed set of heads of terms for consideration and approval. Despite this point having been repeatedly made, the matter has not progressed.

3.13 Furthermore, the proposed design of the landscaping / environmental works is considered to be especially poor and will adversely impact the remaining field, which is already being reduced in size, making it less viable to farm.

Fishing Tenants

3.14 See Farm Plan 3 (Lakes). Manor Farm comprises a number of lakes to which fishing tenants currently have access. The lakes are stocked with valuable fish that the tenants have come to

identify, “catch and release” and are an added attraction for users of the lake. The business depends on this.

3.15 Mr Mee is concerned to ensure that this access (from which he derives a considerable income) is maintained both during and post the construction of the LTC project. Further, the potential for harm to the valuable fish stocks within the lakes must be considered and protective measures implemented where the same is identified. For example, the field irrigation issues could detrimentally affect the fishing lake located to the west of Pea Lane as the existing irrigation system provides the lake’s water supply. In addition, given the sensitivities of the fish stocks, care will need to be taken to ensure that the construction of the LTC project does not contaminate or compromise the quality of the water.

3.16 To date, Mr Mee has not been given any details of the Applicant’s mitigation strategy for addressing the potential impacts arising from the LTC project on the lakes at Manor Farm, the fish stocks they support or the tenants who fish in them. Without this it is inevitable that Mr Mee will experience some difficulty with assessing the full impacts and likely effects.

4. MANOR FARM SHOP

4.1 See Farm Plan 3. The proposal to temporarily close Ockendon Road (B1421) and to require deliveries and customers living within the local community to access Manor Farm Shop from the west will have a detrimental impact on current trading patterns.

4.2 The maintenance of a suitable access for farm vehicles, articulated lorries bringing produce to Manor Farm Shop, and for the shop’s customers during the construction of the LTC project remains of substantial concern to Mr Mee.

4.3 There have been varying periods of road closure suggested but no certainty on this at present. The DCO as drafted suggests nineteen months but the Applicant has also suggested periods of between ten and nineteen months. This lack of certainty will undoubtedly affect Mr Mee’s ability to continue to operate this business with the possibility of severe compromise and may result in the cessation of operations altogether.

4.4 Discussions between Mr Mee and the Applicant’s consultant team are ongoing with regard to construction logistics and the potential mitigation measures which could be put in place to minimise the LTC proposal’s impact upon Manor Farm Shop, including alternative access arrangements and shop specific signage on any required diversion route(s). However, given the severity of the potential consequences for our client’s business, NH is requested to provide a comprehensive and firm set of proposed commitments for Mr Mee to consider.

4.5 Until the requisite comfort is provided, Mr Mee’s objection to the LTC project, on the ground that it will adversely affect the ongoing operation of Manor Farm Shop and affect his livelihood must continue to be maintained. The matter can now be dealt with by Protective Provisions.

5. LAND AT STREET FARM SOUTH OCKENDON

5.1 See Farm Plan 2. Mr Mee is owner of land at South Ockendon – this land, together with land owned by neighbouring landowners, is under option to Bellway Homes Limited (**Bellway**). Through the emerging Local Plan, Thurrock Council have identified South Ockendon, including the land under option with Bellway (**Option Land**), as having the potential for large scale strategic growth of in the order of 10,000 homes to meet identified housing need.

5.2 Bellway have registered as an Interested Party. Mr Mee endorse points which they have made and are likely to make in their Written Representation in relation to the DCO examination.

5.3 Mr Mee’s concern in relation to this part of that other farm is to minimise the potential for the LTC project to prejudice the residential development of the Option Land and, more broadly, the delivery of much-needed housing as envisaged in the emerging Thurrock Local Plan.

5.4 Whilst the extent of land required around South Ockendon has varied through the public consultations and appears to have been reduced the extent being acquired is still significant without full justification for needing all of that land. LTC have said throughout discussions that the design is still evolving but this is a far from a satisfactory position when peoples’ land and rights are being acquired. We remain unclear about some aspects of the proposals and would appreciate further clarity from LTC.

5.5 See Farm Plan GA (Annotated) Plans A. The Applicant proposes to permanently acquire land in order to deliver a footpath connection between the LTC project and the northern edge of the existing built-up area of South Ockendon, with the route of the proposed footpath running adjacent to North Road (see Land and General Arrangement Plans: Sheet 39). This is also the intended location of the primary access which will serve housing developments proposed to be delivered to the west and east of North Road. The inevitable conflict which this will give rise to must be resolved so as to avoid the LTC project having a sterilising effect on the development potential of the land at South Ockendon and it being an obstacle to the achievement of the significant residential growth aspirations which exist for the area.

5.6 As a matter of principle, Mr Mee does not agree with the permanent acquisition of this land. There is simply no need to acquire a *freehold* of land for the creation of right *over* land in the form of footpaths. Rather, such a desire can be provided by means of a Protective Provision with a specified purpose.

Pond Relocation

5.7 See Farm Plan 3. Permanent acquisition of a parcel of Mr Mee's land is also proposed for ecological habitat creation, specifically the location of a pond. However, the requirement for a pond to be located on this land is not clear and it is understood that the Applicant is amenable to the pond being moved. Therefore, further discussions in respect of this matter are required. The matter can now be dealt with by Protective Provisions.

Heritage Asset/Listed Wall

5.8 Mr Mee is very concerned about a heritage asset/listed wall which is located on the route to a proposed LTC compound and is keen to ensure that protective measures are put in place to avoid the wall being damaged during the construction phase of the project. There should be no doubt over the potential criminal liability for the Applicant or its contractors should damage be caused to the heritage asset/listed wall by the project proposals. Further guarantees and assurances in respect of this matter are required. The matter can now be dealt with by Protective Provisions.

Field Drains:

5.9 Mr Mee's farmland where it interlinks with LTC is drained via an expansive and intricate field drainage system which is going to be severed as a consequence of the construction of the LTC project. This existing system is required to be re-engineered in order to continue functioning which presents a number of logistical and timing issues. A suitable design solution which secures separate drainage systems for the fields in this location and the proposed LTC carriageway is needed, as well as a clear plan for the management of the interface between the works to install both systems. The matter can now be dealt with by Protective Provisions.

South of the proposed LTC carriageway

Woodland Planting Proposals

5.10 See Farm Plan GA (Annotated) Plans A. Sheet 39 of the General Arrangement Plans shows a substantial area of land as verge/required for woodland planting to the south of the proposed LTC carriageway. Mr Mee is disappointed to see that this land continues to be identified for permanent acquisition (see Land Plans: Volume C – Sheet 39) having previously made clear his willingness to explore the possibility of a stewardship arrangement whereby he would retain ownership of the land, albeit subject to certain restrictions and safeguarding measures, under an agreement which provides for an appropriate long-term maintenance regime. If an arrangement of this nature is to be established, NH must first provide our client with a detailed set of heads of terms for consideration and approval. Despite this point having been repeatedly made, the matter has not progressed. The matter can now be dealt with by Protective Provisions.

Severed Land

5.11 See Farm Plan GA (Annotated) Plans A. Our client owns a parcel of land to the south of the proposed LTC carriageway, which is identified for temporary possession in connection with the project, but for which the purpose isn't clear (see Land and General Arrangement Plans: Sheet 39). We see no provision, within the plans submitted with the Application, for continued access to this land upon completion of the LTC project; in effect, the parcel will become landlocked. Should the LTC project secure development consent and be delivered, our client requires his access to this land to be maintained. Further discussions in respect of this matter are required.

5.12 Footpath adjoining Dennis Road (17): an NMU route is proposed to run along Dennis Road which will sever our client's access to the adjacent field which he currently farms. Should the LTC project secure development consent and be delivered, our client requires his access to this field to be maintained, noting that some flexibility is required so that the access is suitable – having regard to both the existing agricultural use of the field, as well as its future development potential.

5.13 As a matter of principle our client objects to the permanent acquisition of land for any new NMUs and there is no need for the Applicant to do this. The Applicant has suggested a tripartite agreement which it has said would provide comfort to adjoining owners should there be any potential for future development of adjacent land which would affect the NMUs. However, discussions with regard to this matter are at an early stage and Mr Mee does not agree with the principle and requires his freehold to be retained in all instances.

<u>North and South of the proposed LTC carriageway</u>

Maintenance of Agricultural Field Access

5.14 There are several instances where permanent acquisition of Mr Mee's land is proposed in connection with the LTC project, and where such acquisition has the potential to prevent or compromise the ability to utilise existing agricultural field accesses. Where this occurs, it is imperative that an access, suitable for use by farm vehicles (including a combine harvester) and agricultural machinery, is always maintained so our client to continue farming the adjoining fields is not compromised or sterilised. This has not been guaranteed at this stage.

6. CONCLUSIONS

6.1 Whilst there has been a level of engagement between the Applicant and Mr Mee there are matters that cannot be agreed and in respect of which fundamental objection must be maintained.

6.2 Most significantly Mr Mee continues strong and fundamental Objection on the basis that:

6.2.1 The inclusion of Hobbs Hole in Table 7.4 of the Statement of Reasons was and remains unlawful and ultra vires the Planning Act 2008.

6.2.2 The unacceptability as a matter of principle to *permanently* acquire land which is in agricultural use to give to the public for *occasional* use has not been lawful and cannot be justified as lawful also.

6.2.3 The Applicant cannot in law, and should not as a matter of principle, be seeking to acquire the freeholds of land to provide NMUs which relate to rights over and not in land. These rights can be created without acquiring freeholds of land and potentially sterilising land for the future which is not directly related or needed for the LTC project, including by means of Protective Provisions.

6.2.4 The other matters above have not been progressed sufficiently at this stage to enable the consideration of the withdrawal of any objections to the LTC project. These can be included within the terms of Protective Provisions that the Mees will draft and provide in due course for consideration by the ExA and the Secretary of State to ensure the ongoing value of the best and most versatile of agricultural land remains capitalised upon.

7. APPENDICES

7.1 Plan showing landholdings

7.2 Farm plans 1-3 and GA Plans

7.3 Previous Representations submitted to LTC

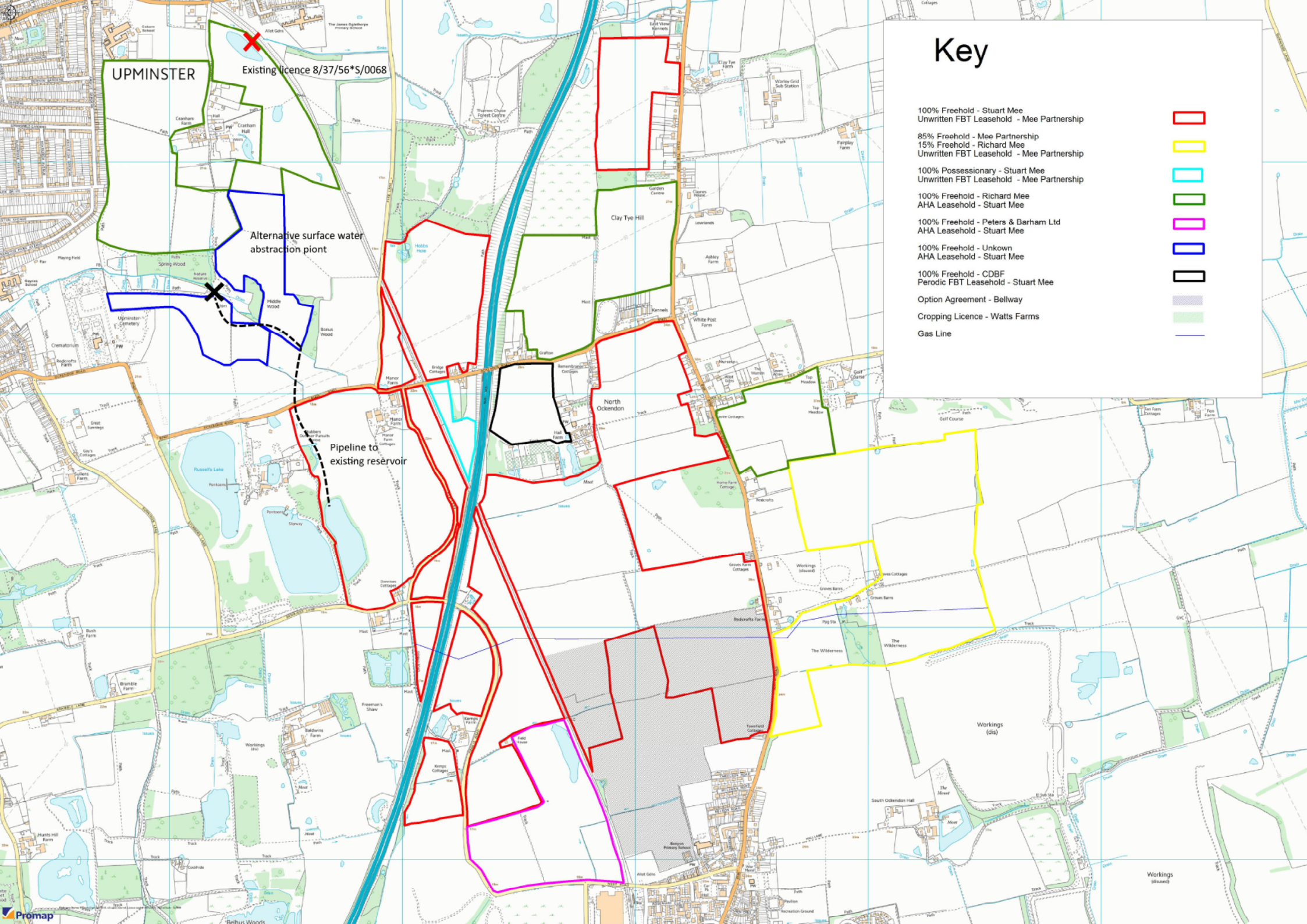
7.4 Letter from Bircham Dyson Bell dated 3 March 2021

7.5 Legal Framework and relevant case law.

Counsel Christiaan Zwart

Karen Howard, Partner

Gateley Plc


UPMINSTER
Existing licence 8/37/56*S/0068
Alternative surface water abstraction piont
Pipeline to existing reservoir
North Ockendon
Clay Tye Hill
Key
100% Freehold - Stuart Mee
Unwritten FBT Leasehold - Mee Partnership
85% Freehold - Mee Partnership
15% Freehold - Richard Mee
Unwritten FBT Leasehold - Mee Partnership
100% Possessionary - Stuart Mee
Unwritten FBT Leasehold - Mee Partnership
100% Freehold - Richard Mee
AHA Leasehold - Stuart Mee
100% Freehold - Peters & Barham Ltd
AHA Leasehold - Stuart Mee
100% Freehold - Unkown
AHA Leasehold - Stuart Mee
100% Freehold - CDBF
Perodic FBT Leasehold - Stuart Mee
Option Agreement - Bellway
Cropping Licence - Watts Farms
Gas Line

Farm Plan 1

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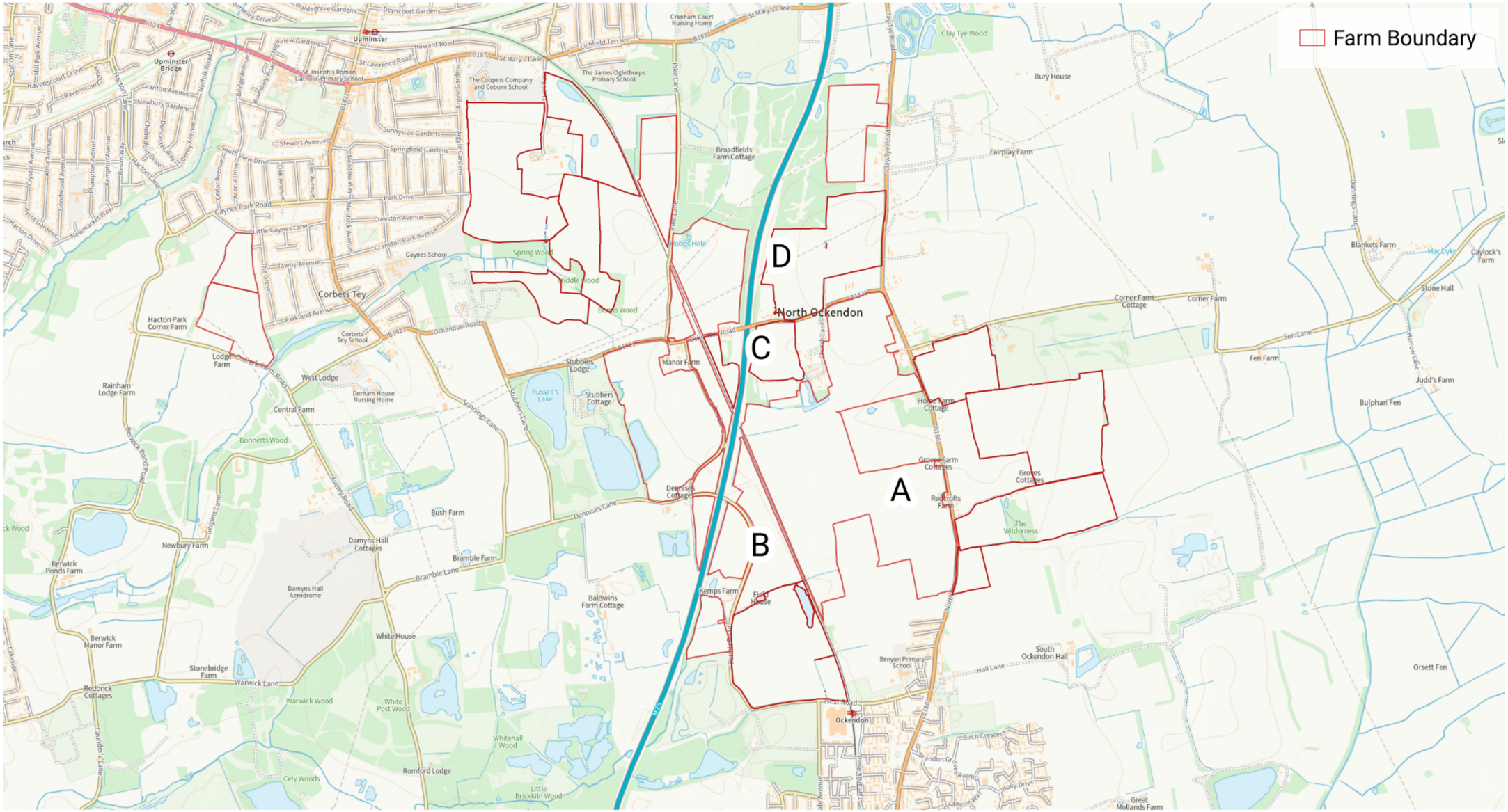
500 m
Scale 1:28724 (at A4)

N

Farm Plan 2

Land App



Produced on Jul 18, 2023.
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1000 m
Scale 1:31055 (at A4)

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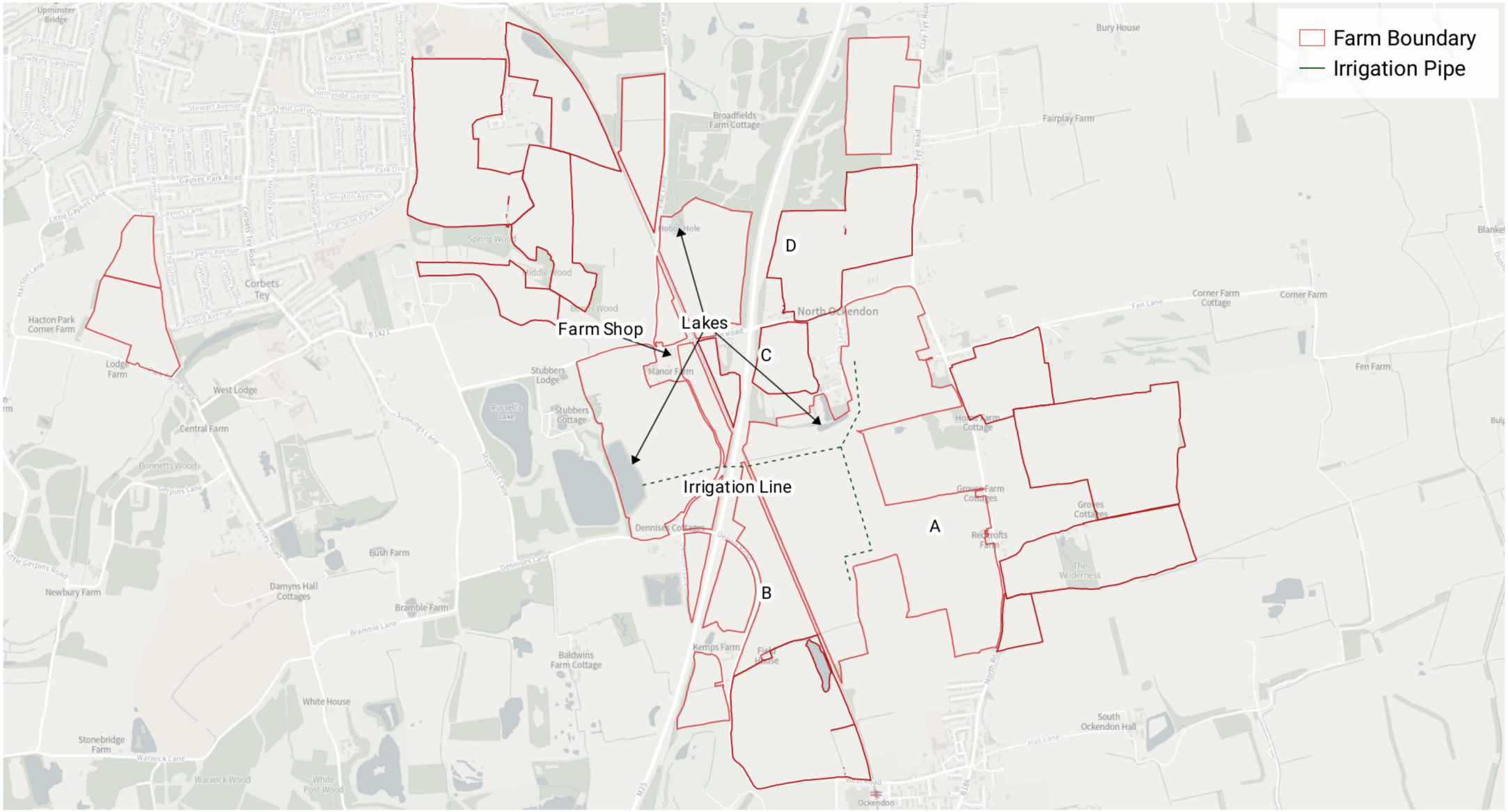
Farm Plan 3

Land App



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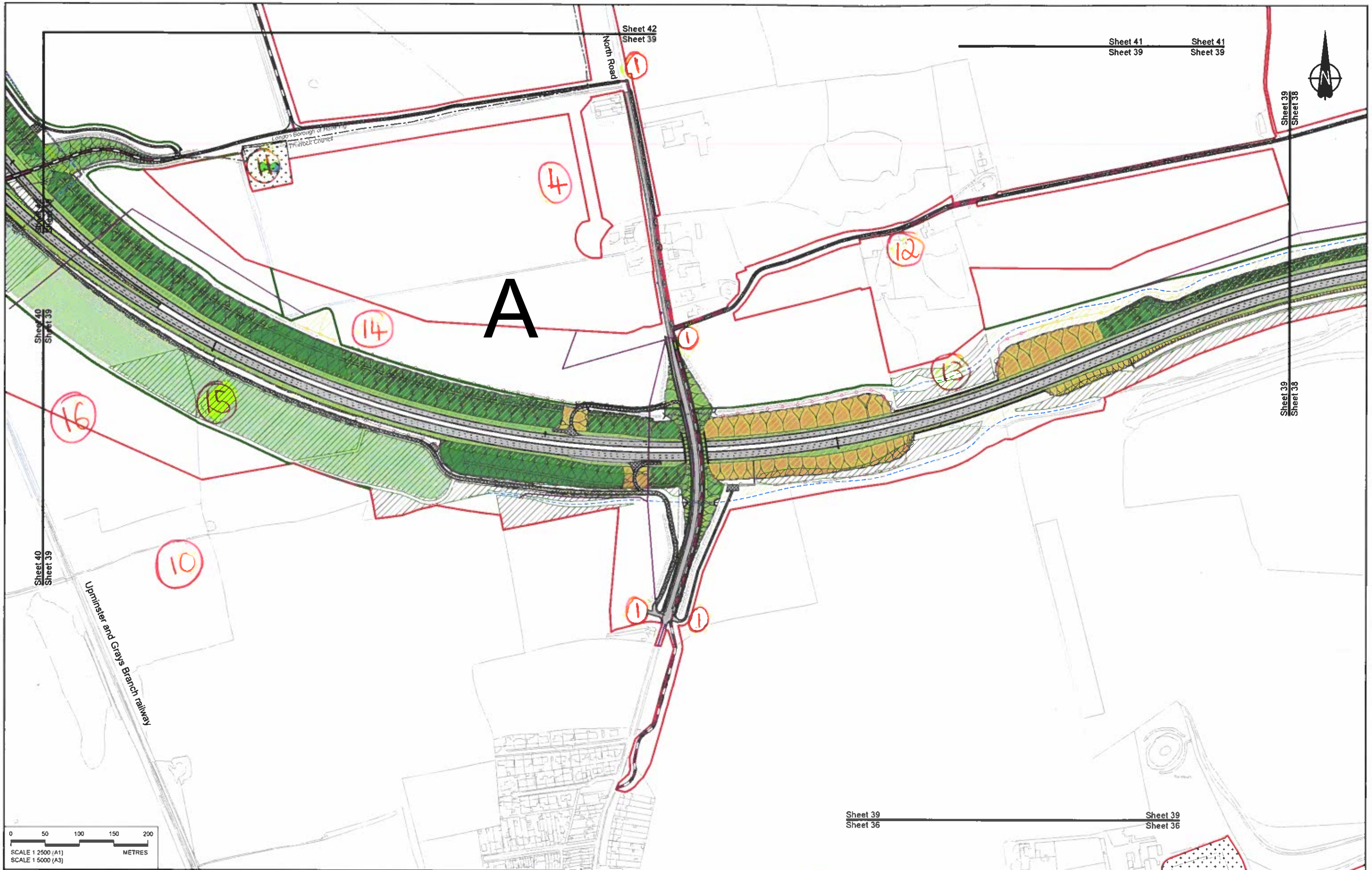

NOTES

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2. These plans should be read in conjunction with the Development Consent Order (application document reference TR010032/APP/3.1).
3. For Environmental details refer to the Environmental Masterplan (application document reference TR010032/APP/6.2 Fig 2.4) and Environmental Components Plan (application document reference TR010032/APP/6.2 Fig 2.3) and associated drawings and documents.

BOUNDARIES
- Order Limits
- Local Authority boundary
- Proposed replacement travellers site

PROPOSED ENGINEERING AND CONSTRUCTION
- New carriageway
- Overbridge
- Underpass
- Culvert
- Traffic sign
- Gantry
- Lighting
- Infiltration basin, retention basin or retention pond
- Walking, cycling and horseriding routes
- Green Roof for Tunnel Service Building
- Tunnel
- Ground protection tunnel
- Earthwork - Cutting
- Earthworks - Embankment
- Earthworks - False cutting and bunding/ponding
- Verge
- Retaining wall
- Water pipe & self-regulating valve
- Maintenance access
- Car park
- Rendezvous point

PROPOSED UTILITIES
- Underground gas diversion
- Realigned or modified overhead electricity line
- Underground multiutility alignment
- Diversion into existing network
- Utility compound or substation

PROPOSED ENVIRONMENTAL WORKS
- Woodland planting
- Grassland planting
- Ecological habitat creation and receptor site for protected species
- Temporary ecological habitat
- Bat Barn structure
- Ecological pond
- Flood Compensation Area
- Open space provision, replacement open space or replacement common land
- Hedgerow
- Watercourse diversion
- Ecological fencing (badger)
- Acoustic barrier
- Fencing

Rev	Status	Rev. Date	Purpose of revision	Drawn	Chck'd	Apprv'd
P01	S0	19/10/2022	DCO Application	GP	RD	ASB

Client: national highways

Project: LOWER THAMES CROSSING

Status	DCO Application
Original Size	A1
Revision	P01
Application Document Number	TR010032/APP/2.5
Scale	1:2500

Drawing title: GENERAL ARRANGEMENT REGULATION 5(2)(o) SHEET 39

Drawing Number: HE540039-CJV-BOP-SZZ_GN000000_-DR-CX-10036

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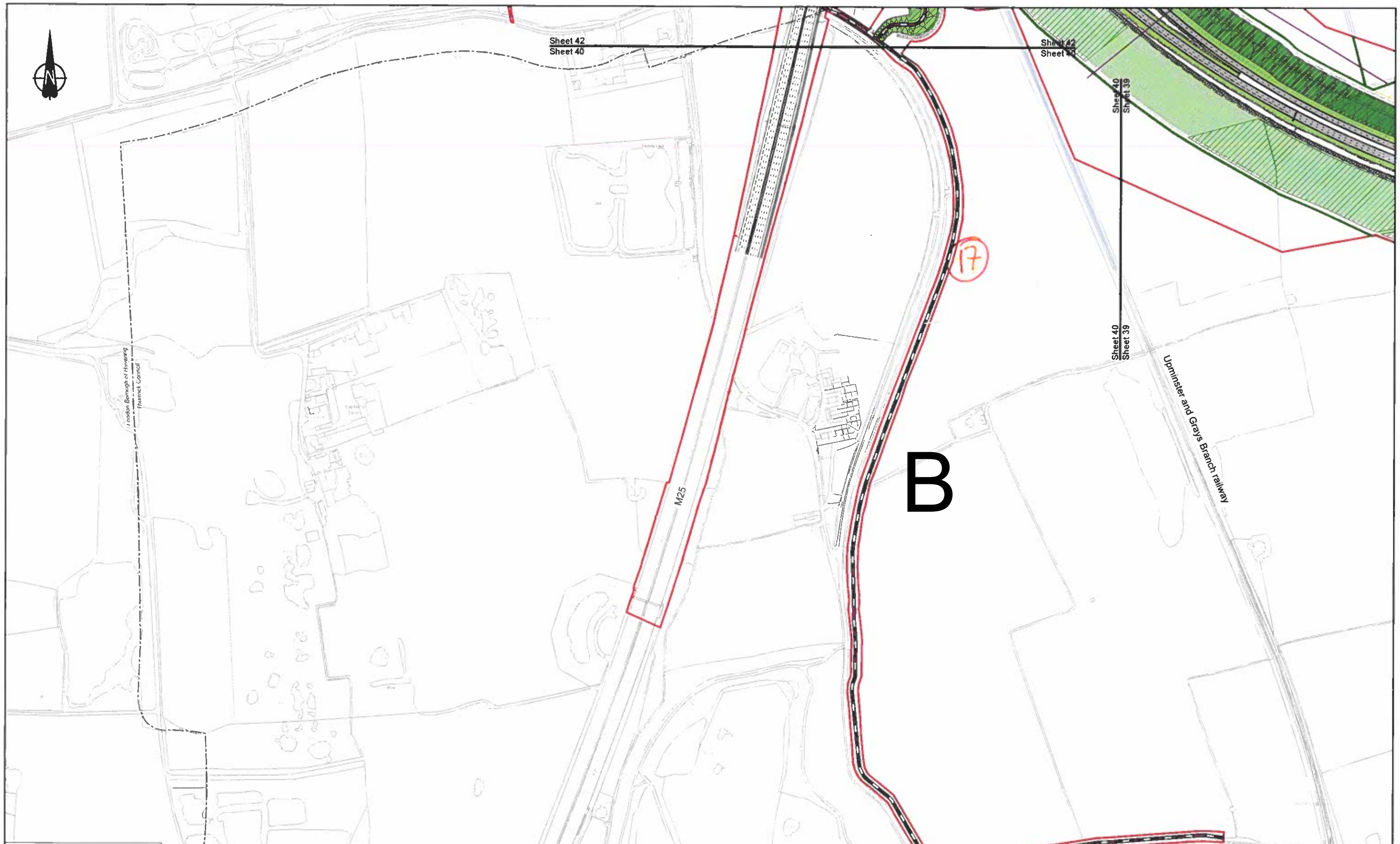

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- Ground protection tunnel
- Earthworks - Cutting
- Earthworks - Embankment
- Earthworks - False cutting and landscaping
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- Water pipe & safety/grabbing valve
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Status	DCO Application
Original Size	A1
Revision	P01
Application Document Number	TR010032/APP/2.5
Scale	1:2500

Drawing title: GENERAL ARRANGEMENT REGULATION 5(2)(o) SHEET 40

Drawing Number: HE540039-CJV-BOP-SZZ_GN000000_-DR-CX-10037

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Sheet 43
Sheet 42

Sheet 43
Sheet 42

Upminster and Grays branch railway

Pike Lane

Ockendon Road

M25

C

North Ockendon

North Ockendon

Pea Lane

M25

Sheet 42
Sheet 39

London Borough of Havering
THURROCK COUNCIL

Sheet 42
Sheet 40

Sheet 42
Sheet 39

0 50 100 150 200
METRES
SCALE 1:2500 (A1)
SCALE 1:5000 (A3)

Rev	Status	Rev. Date	Purpose of revision	Drawn	Chck'd	Apprv'd
P01	S0	19/10/2022	DCO Application	GP	RD	ASB

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Client: national highways

Project: LOWER THAMES CROSSING

Status	DCO Application
Original Size	A1
Revision	P01
Application Document Number	TR010032/APP/2.5
Scale	1:2500

Drawing title: GENERAL ARRANGEMENT REGULATION 5(2)(o) SHEET 42

Drawing Number: HE540039-CJV-BOP-SZZ_GN000000_-DR-CX-10040

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Sheet 44
Sheet 43

Sheet 44
Sheet 43

Thames Chase
Forest

North
Ockendon

Pike Lane

Clay Tye Road

Ockendon Road

D

Sheet 43
Sheet 42

Sheet 43
Sheet 42

0 50 100 150 200
SCALE 1 2500 (A1)
SCALE 1 5000 (A3)
METRES

Rev	Status	Rev. Date	Purpose of revision	Drawn	Chck'd	Approv'd
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national highways

Project
LOWER THAMES CROSSING

Status: DCO Application
Original Size: A1
Revision: P01
Application Document Number: TR010032/APP/2.5
Scale: 1:2500
Drawing title:
GENERAL ARRANGEMENT
REGULATION 5(2)(o)
SHEET 43
Drawing Number: HE540039-CJV-BOP-SZZ_GN000000_-DR-CX-10041

HE540039-CJV-BOP-SZZ_GN000000_-DR-CX-10041.dwg

Letter of 19 December 2018

Chelmsford office

Strutt & Parker
Coval Hall
Chelmsford
Essex CM1 2QF
Telephone 01245 258201

chelmsford@struttandparker.com
struttandparker.com

Highways England
Lower Thames Crossing Consultation
FREEPOST LTC CONSULTATION

[redacted]

By Email: ltc.consultation@traverse.ltd

Our ref: ASC/198521

19th December 2018

Dear Sirs

Response to Lower Thames Crossing Consultation - S Mee

1. Introduction

1.1. We act for Stuart Mee the occupier and landowner or joint landowner of the land shown on the attached plan. (the "Land") (the "Owner").

1.2. Highways England's (HE) proposed route and works for the Lower Thames Crossing (LTC) will have various severe detrimental effects on our client's land.

2. Manor Farm – Agricultural Land

2.1. Most of the land that comprises Manor Farm is classed under the Agricultural Land Classification system as Grade 1 and Grade 2. These land types are designated in Government policy as the "best and most versatile" land and afforded protection as such.

2.2. This is further enhanced by a comprehensive irrigation system.

2.3. The combination of the quality of the land and the irrigation allows a wide range of specialist high value crops to be grown upon the farm. These crops include coriander, French beans, spinach, parsley, dill, and chard as well as the more traditional cereal crops.

2.4. The proposed scheme route has a significant impact upon the areas of land predominantly used for growing these specialist crops.

2.5. Continuing growing of these crops could prove difficult both during and after the construction of the proposed scheme which will affect the farming business and may have an impact upon employment as a smaller cereal crop only farm would not require the same number of machinery operators.

2.6. Continued farming of the land will be made more difficult due to how the proposed scheme intersects the Land when considered in relation to the M25 and Railway Line which already cross the farm. We appreciate there will be a discussion about accommodation works to attempt to mitigate the impact.

RICS Regulated by RICS

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2.7. The LTC proposals have identified an area of land for permanent acquisition and as land for “Potential land required for environmental mitigation or landscape enhancement”. Using this land would remove a further area of the “best and most versatile land” and we consider converting this from high quality farmland is not justifiable.

3. Manor Farm Shop - Manor Farm, Ockendon Road, South Ockendon, Upminster RM14 2TZ

3.1. Our client owns and runs the very popular Manor Farm Shop which retails a wide range of equestrian, small holding and agricultural feeds and ancillary equipment.

3.2. There is a warehouse facility attached to this shop due to the bulky nature of some of the items sold and the need to handle them with forklift trucks.

3.3. The shop employs a range of full time and part time workers in both customer facing and stock handling roles.

3.4. We are concerned that during and after the works there could be a very significant impact upon this business. This could be an impact which results in job losses.

4. South Ockendon

4.1. Also under ownership is land at South Ockendon. This site, in the Thurrock Council area, has been promoted through the Local Plan process. The representations have been made by a developer. The area being promoted also includes adjoining land belonging to two other landowners.

4.2. This land is being promoted for residential development, as part of a wider strategy for growth surrounding South Ockendon.

4.3. The LTC proposals currently affect the land by taking land from it and thereby reducing the area that can be developed. The LTC will also have an impact on potential accesses to the South Ockendon site, thereby further sterilising its development potential for much-needed housing land.

5. Wider Impacts of the Scheme

5.1. We appreciate that HE will be undertaking an environmental impact assessment of the LTC Project proposals and that it has submitted a Scoping Report (October 2017) to the Secretary of State. This Scoping Report states that an assessment will be carried out of the potential effects of the LTC project on 'people and communities'. The people and communities section of the Scoping Report states that the assessment will consider the impact and effect of the project on the following:

"• Community and private assets – private property (including both residential and commercial property), community facilities (as a result of permanent and temporary land-take) and impacts on navigation in the event of marine infrastructure being required.

• Development land (this relates both to sites for which planning applications have been submitted and/or determined as well as to sites that have been allocated in relevant planning policy documents)

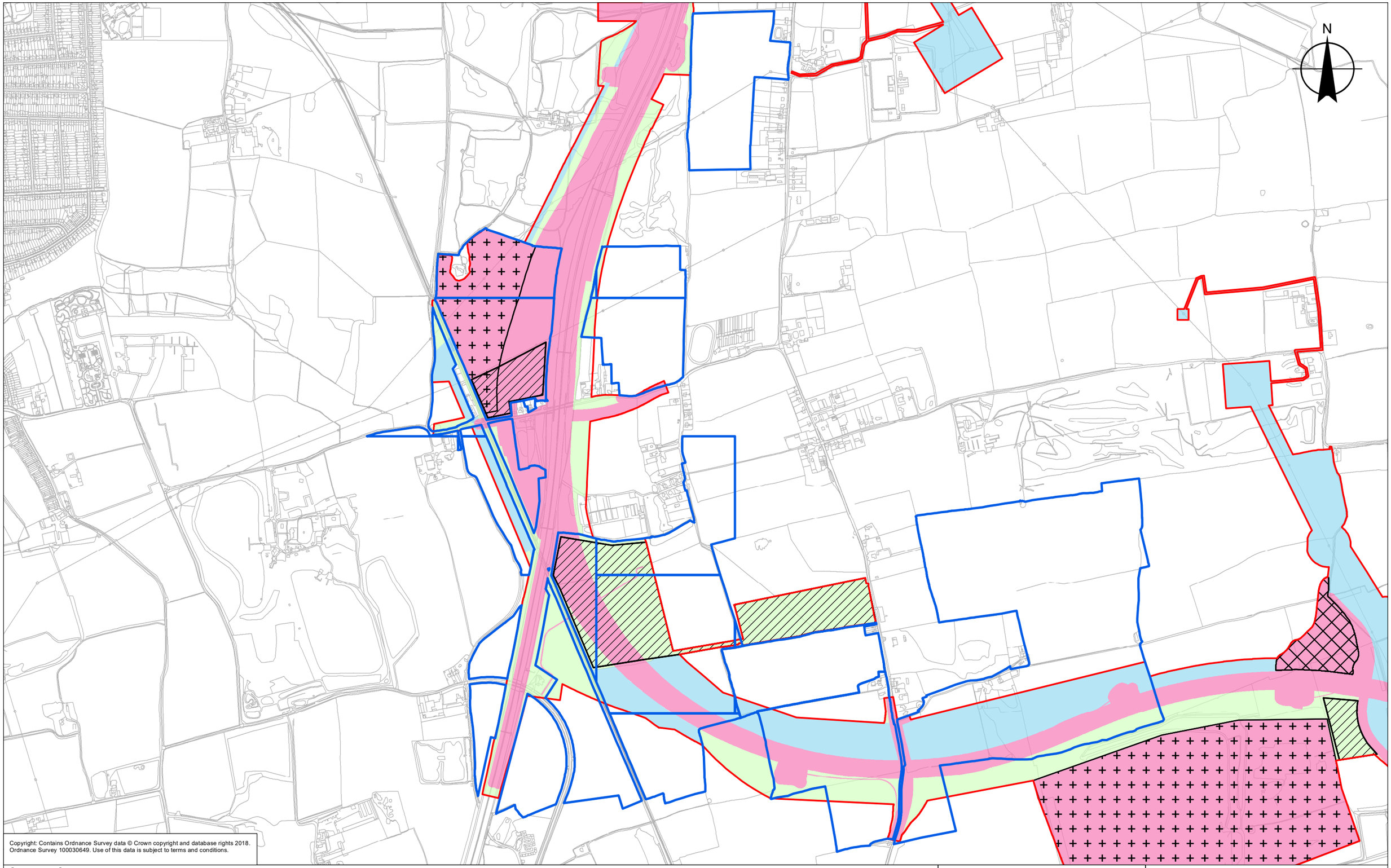
• The local and wider economy (for example employment levels)"

5.2. We consider that HE have not considered the wider impacts that their proposal will have on people and communities arising from the Owner's interests.

6. Our Client's Position

6.1. Our client's current position is that he must object to the LTC proposals as currently framed.

Alexander Creed BSc(Hons) MRICS FAAV
Director



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Legend:

- Statutory consultation development boundary (October 2018)
- Land registry titles within development boundary
- Construction compounds
- Potential land required for environmental mitigation or landscape enhancement
- Potential land required for flood compensation
- Permanent acquisition of land required
- Rights to land required for the diversion of utilities
- Temporary use of land required

0 100 200 400 Metres

SCALE - 1:12,500

Client: highways england

Project: LOWER THAMES CROSSING
STATUTORY CONSULTATION

PROPOSALS FOR CONSULTATION

Drawing Title

MEE LAND USE PLAN WITHIN THE DEVELOPMENT BOUNDARY

MXD Location: Z:\Land_and_Property\Outputs\Land_Owner_Plans\LTC_LaP_StatCon_Fisher_A3_Landscape.mxd

Do not scale

© Lower Thames Crossing

Letter of 8 September 2021

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National Highways
Lower Thames Crossing Consultation
FREE POST LTC CONSULATION

By Email: LTC.CONSULTATION@TRAVERSE.LTD

Delivered: By E-mail Only

Our Ref KH.SG.M-00952788
Date 8 September 2021

Dear Sirs

LOWER THAMES CROSSING COMMUNITY IMPACTS CONSULTATION 2021
RESPONSE ON BEHALF OF STUART MEE

We are instructed to act on behalf of Stuart Mee, the owner/joint owner and occupier of land located within the wards of Upminster and Ockendon, such land falling within the Order Limits of the Lower Thames Crossing (**LTC**) project. The purpose of our letter is to respond to the current community impacts consultation being carried out by National Highways (**NH**), formerly Highways England, which opened on 14 July in respect of the LTC project.

Representations on Mr Mee's behalf have already been submitted in response to the statutory consultation undertaken by NH between October and December 2018 following the announcement of the preferred route for the LTC project in April 2017. A copy of these representations, dated 19 December 2018 and made by Strutt & Parker, is enclosed with this letter.

This was followed by the submission of further representations dated 12 August 2020, made in response to NH's design refinement consultation carried out between July and August 2020. A copy of these further representations, again prepared by Strutt & Parker, is also enclosed with this letter.

This letter, taken together with the previous submissions made on Mr Mee's behalf, represent his current position in respect of the LTC project.

Despite Mr Mee having engaged proactively throughout the consultation process and having sought a separate dialogue with NH, this has failed to precipitate any material amendments to the LTC project proposals which would serve to allay Mr Mee's very serious concerns. Disappointingly, the current consultation offers very little by way of further comfort. As such, Mr Mee's position remains one of objection pending satisfactory resolution of the matters summarised below.

<u>Manor Farm – Agricultural Land</u>

The impact of the LTC project on Mr Mee's ability to continue farming his land at Manor Farm during and post construction of the project continues to be of critical concern, driven primarily by its high quality

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(it being, for the most part, classified as 'Best and Most Versatile Land' falling within Grade 1 and Grade 2 of the Agricultural Land Classification system) and the operational irrigation system which is in place.

Mr Mee is actively engaged in discussions with NH in respect of a number of issues which bear on his farming business, including the potential for severance of his landholding as a consequence of the construction of the LTC project, access/road junction location and design (with a view to accommodating both farm vehicles and agricultural machinery), non-motorised user routes and public rights of way, utility corridors and diversions, ground water resource and irrigation, field drainage and NH's proposals for ecological and environmental mitigation.

These issues present Mr Mee with a number of significant operational challenges, as well as a genuine concern as to whether it will be possible to continue to farm his retained land, in a post-construction LTC project scenario, and to run a viable business from it. Therefore, until the above-mentioned discussions are further progressed and a means of reducing and appropriately managing the anticipated impacts upon the land and operational farming business at Manor Farm has been secured, Mr Mee maintains his strong objection to the LTC project.

Hobbs Hole – Special Category Replacement Land

The land at Manor Farm includes an area known as Hobbs Hole. This area is identified as suitable replacement land for NH's proposed land take at Thames Chase Community Forest (**TCCF**), an area of designated open space/special category land which straddles the section of the M25 located to the north of North Ockendon.

NH is proposing permanent acquisition of part of the land at TCCF for delivery of the LTC project, specifically the construction of the M25 northbound slip road and earthworks. Permanent rights are also proposed to be acquired in order to facilitate the diversion of utilities. Accordingly, the land at Hobbs Hole is required to meet the definition of 'replacement land' contained in sections 131 and 132 of the Planning Act 2008 (**2008 Act**).

Section 131, concerning the permanent acquisition of special category land by compulsion, defines 'replacement land' as *"land which is not less in area than the order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public".* Section 132 deals with the compulsory acquisition of rights over special category land and contains a similar definition for 'replacement land' as follows: "*land which will be adequate to compensate the following persons for the disadvantages which result from the compulsory acquisition of the order right: (a) the persons in whom the order land is vested; (b) the persons, if any, entitled to rights of common or other rights over the order land; and (c) the public.*

The documents published in support of the current consultation include an Operations Update and a Ward Impact Summary (North of the River: Part 2), both of which we have had regard to. Brief details are provided as regards the total area of the replacement land identified as a consequence of the proposed land take at TCCF (which includes Hobbs Hole and an area of land to the north of TCCF, also on the western side of the M25), the proposals for access to the replacement land, and its purpose, being the provision of new woodland and biodiversity mitigation. On page 98 of the Operations Update, the rather sweeping and unsubstantiated assertion is made that the replacement land would *"provide equal accessibility and would be no less advantageous to the public"*. The Ward Impact Summary sheds no further light on the matter.

The definition of 'replacement land' in sections 131 and 132 of the 2008 Act and, in particular, the concept of such land being *"no less advantageous"* necessitates a comparative analysis of the characteristics (i.e. accessibility, topography, landscape character, quality, condition etc.) of the land at TCCF and the candidate replacement land. However, details of the criteria applied by NH in its search for suitable replacement land have not been shared with Mr Mee, nor the results of NH's assessment of

the performance of any candidate replacement land parcels, including Hobbs Hole, against those criteria.

It will have been incumbent on NH to undertake a comprehensive review of land within the area of the LTC project and any special category land identified for acquisition, and to assess its suitability to serve as replacement land. We have no knowledge of the list of sites considered by NH, their individual characteristics and the basis upon which NH has chosen to discount them. As such, we are unable to critically assess whether there are any alternative replacement land sites which merit further consideration by NH, and which may obviate the need for the land at Hobbs Hole to be acquired.

Further, the requirement for Hobbs Hole to serve as replacement land, set within the context of NH's proposals for new open space sites at Tilbury Fields and Chalk Park, as well as a new community forest at Hole Farm, has not been demonstrated.

The compelling case for compulsory acquisition of any special category land included within the Order Limits is required to be explained by NH, as well as the components of its assessment with regard to the identification of suitable replacement land. The information which has been made publicly available to date does not enable Mr Mee to properly scrutinise either matter or to reach a view on the robustness of NH's approach. It would be entirely unjust for NH not to afford our client this opportunity in circumstances where his land is being compulsorily acquired, not for delivery of the LTC project works themselves, but so that it can be transferred to a third party purely as a compensatory measure.

For the above reasons, Mr Mee remains fundamentally opposed to the acquisition of the land at Hobbs Hole to serve as replacement land in connection with the LTC project.

Manor Farm Shop

The proposal to temporarily close Ockendon Road (B1421) and to require deliveries and customers living within the local community to access Manor Farm Shop from the west will have a detrimental impact on current trading patterns.

The period of closure proposed is not known and, depending on its length, and the arrangements put in place to maintain access to Manor Farm Shop during the said period, Mr Mee's ability to continue operating this business could be severely compromised. Indeed, it may result in the cessation of operations altogether.

Accordingly, the maintenance of a suitable access for farm vehicles, articulated lorries bringing produce to Manor Farm Shop, and for the shop's customers during the construction of the LTC project remains of substantial concern to Mr Mee.

Discussions between Mr Mee and NH's consultant team are ongoing with regard to construction logistics and the potential mitigation measures which could be put in place to minimise the impact upon Manor Farm Shop, including alternative access arrangements and shop specific signage on any required diversion route(s). However, given the severity of the potential consequences for our client's business, NH is requested to provide a comprehensive and firm set of proposed commitments for Mr Mee to consider.

Until the requisite comfort is provided, Mr Mee's objection to the LTC project, on the ground that it will adversely affect the ongoing operation of Manor Farm Shop, must continue to be maintained.

Land at South Ockendon

Mr Mee is the owner of land at South Ockendon, such land, together with land owned by neighbouring landowners, being under option with a national housebuilder. Through the emerging Local Plan,

Thurrock Council have identified South Ockendon, including the land under option, as having the potential for large scale strategic growth of in the order of 10,000 homes to meet identified housing need.

The current LTC consultation continues to identify the land at South Ockendon as being required for permanent acquisition (in part), as well as temporary possession only and temporary possession plus the permanent acquisition of rights. Clearly, delivery of the LTC project is going to have a sterilising effect on the development potential of this land thereby reducing the amount of much-needed housing which the land would otherwise be able to accommodate, and severely compromising the ability to form adequate access to the land which remains and its amenity looking forward to a future scenario when the land has been developed and occupied.

Uncertainty remains regarding the requirement to divert the Barking Power Station/City of London Corporation pipeline, the potential route for which is shown on the General Arrangement Plan: Sheet 36, and if needed, the extent of the easement and nature of the associated protective measures/permanent restrictions which will need to be secured. Mr Mee has not been provided with clear information by NH as to whether diversion of the pipeline is still needed. Therefore, urgent confirmation of the precise position in respect of this issue is requested.

Further, it is considered that justification for the extent of the land identified for permanent acquisition in order to provide environmental mitigation, specifically woodland planting, is lacking, and that less land take could provide sufficient screening from a landscape and visual perspective. By way of justification, NH have commented that the woodland planting proposals in the area of South Ockendon are reflective of the existing rectangular field patterns within the surrounding context. This may be the case; however, essential mitigation cannot be underpinned by a mere desire to follow existing field patterns. NH cannot advance a robust case for permanent acquisition of the required land on this basis. To proceed in this manner would be wholly disproportionate.

Preliminary discussions have taken place with NH as regards a long-term stewardship arrangement whereby ownership of the land identified for woodland planting would be retained by our client, although subject to restrictions to ensure that it remains safeguarded for environmental mitigation and subject to an appropriate maintenance regime thereafter. Mr Mee is concerned to minimise the impact of the LTC project and, in particular, its potential to prejudice the future development of the land at South Ockendon for housing. Accordingly, a detailed articulation of the terms of any stewardship arrangement is required as this has not been provided to date, as well as the nature and extent of the consequent restrictions which any such arrangement would entail.

<u>LTC Timescales and Phasing</u>

To date, and despite requests being made by a number of respondents, including our client, only scant information has been provided by NH as regards the anticipated timescales and overall phasing of the LTC project.

Without this information, Mr Mee is unable to fully assess the likely impacts arising from the LTC project on his various landholdings and the need to manage any potential conflicts between the delivery of the project and both his existing farming operations and his future development plans. This is wholly unsatisfactory given the stage which the consultation process has reached, with re-submission of NH's application for development consent to the Planning Inspectorate being imminent, and the repeated requests which our client and others have made for this information to be provided.

Details of timing and project phasing are basic, but crucially important, details which the promoter of a scheme of the size, nature and complexity of the LTC project should be able to provide clear information about. NH's apparent inability to do this causes Mr Mee to have serious misgivings regarding the robustness of the assessment work which has been undertaken in relation to the LTC project in order

to inform the conclusions reached regarding its anticipated impacts and the mitigation strategies required to be implemented to address them.

We ask that our client's request for further clarity in respect of the programme for delivery and phasing of the LTC project is acknowledged by NH and that a detailed and comprehensive response is provided as a matter of urgency.

Should there be any queries in connection with the contents of this letter, please direct them (together with all future correspondence in respect of the LTC project) to our Karen Howard (Partner) and/or Samantha Grange (Legal Director).

Yours faithfully

SHOOSMITHS LLP

Letter of 20 June 2022

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Delivered: By E-mail Only

Our Ref KH.SG.M-00952788
Date 20 June 2022

Dear Sirs

LOWER THAMES CROSSING LOCAL REFINEMENT CONSULTATION 2022
RESPONSE ON BEHALF OF STUART MEE

We are instructed to act on behalf of Stuart Mee, the owner/joint owner and occupier of land located within the wards of Upminster and Ockendon, such land falling within the Order Limits of the Lower Thames Crossing (**LTC**) project. The purpose of our letter is to respond to the current local refinement consultation being carried out by National Highways (**NH**), which opened on 12 May 2022 in respect of the LTC project.

Representations on our client's behalf have already been submitted in response to the statutory consultation undertaken by NH between October and December 2018 following the announcement of the preferred route for the LTC project in April 2017. These representations, dated 19 December 2018, were made on Mr Mee's behalf by his appointed surveyors, Strutt & Parker.

Further representations dated 12 August 2020, again prepared by Strutt & Parker on the instruction of our client, were submitted in response to NH's design refinement consultation carried out between July and August 2020.

We were then instructed to make representations on Mr Mee's behalf to the community impacts consultation which NH carried out between July and September of last year. Our letter dated 8 September 2021 focused on four primary areas of concern with regard to the LTC project and our client's land interests, namely the impacts arising from the LTC project at (i) Manor Farm; (ii) Hobbs Hole; (iii) Manor Farm Shop; and (iv) Land at South Ockendon. We also highlighted the paucity of information available, as at the date of our letter, as regards the anticipated timescales and overall phasing of the LTC project and stressed the critical nature of these details to enable Mr Mee to fully assess, and to have an accurate and complete understanding of, the overall impact of the LTC project on his land and business interests.

Following the close of NH's community impacts consultation, our client has continued to pursue a constructive dialogue with NH. Along with Strutt & Parker, Mr Mee attended an "LTC progress meeting" with representatives of the LTC project team on 22 February 2022, during which a number of our client's concerns were discussed and, in order to make progress towards addressing them, it was agreed that

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certain steps would be actioned. In particular, the LTC project team committed to providing Mr Mee with various items of additional information. Disappointingly, the provision of this additional information is outstanding in several respects and the meeting actions, for the most part, remain to be completed. Consequently, very little, if no, substantive progress has been made in recent months to move the dialogue between Mr Mee and NH forward.

In responding to the current LTC local refinement consultation, we will revisit the principal matters of concern for our client and provide an update in respect of the same. We do not intend to repeat points which have previously been made and request that our letter is read alongside all of the submissions made in respect of the LTC project on Mr Mee's behalf to date.

The current consultation demonstrates some positive changes to the LTC project proposals in so far as they affect the land within our client's ownership at South Ockendon. These changes (to which we turn in further detail below) are welcomed. However, pending the satisfactory resolution of the totality of Mr Mee's very serious concerns, his position in respect of the LTC project remains one of fundamental objection.

Manor Farm – Agricultural Land

The impact of the LTC project on Mr Mee's ability to continue farming his land at Manor Farm during and post construction of the project continues to be of critical concern given the high quality of the land (it being, for the most part, classified as 'Best and Most Versatile Land' falling within Grade 1 and Grade 2 of the Agricultural Land Classification system) and the operational irrigation system in place, together with its associated infrastructure.

In our letter dated 8 September 2021, we raised a number of issues which bear on our client's farming business and which, if not managed properly, have the potential to cause significant disruption and to undermine the viability of the business during and post-construction of the LTC project.

In particular, we have previously highlighted the potential for severance of Mr Mee's landholding as a consequence of the LTC project's construction and the need for clarity as regards several aspects of the project including: (i) access/road junction location and design (with a view to accommodating both farm vehicles and agricultural machinery and ensuring that field access is maintained at all times); (ii) non-motorised user routes and public rights of way; (iii) utility corridors and diversions; (iv) NH's field drainage, irrigation and ground water proposals; and (v) the ecological and environmental mitigation strategy to be adopted.

All of the above matters were raised at the meeting which our client attended with LTC's project team on 22 February 2022. They remain under discussion as NH are continuing to develop their proposals. However, it is not acceptable that Mr Mee awaits a substantive update in this regard, together with details of a programme of works and overall guidance as to timings. Pending the identification of a firm set of acceptable NH proposals and a comprehensive suite of mitigation measures, our client maintains his strong objection to the LTC project on the basis of its anticipated impact upon the land and the operational farming business both in the medium and longer term at Manor Farm.

Hobbs Hole – Special Category Replacement Land

In the submissions made on Mr Mee's behalf to NH's community impacts consultation, we referred to the area of land at Manor Farm which is known as Hobbs Hole. This area has been identified as suitable replacement land for NH's proposed land take at Thames Chase Community Forest (**TCCF**), an area of designated open space/special category land which straddles the section of the M25 located to the north of North Ockendon.

Permanent acquisition of part of the land at TCCF is identified as being necessary for the delivery of the LTC project, specifically the construction of the M25 northbound slip road and earthworks. Permanent rights are also proposed to be acquired in order to facilitate the diversion of utilities. Consequently, the land at Hobbs Hole is required to meet the definition of 'replacement land' contained in sections 131 and 132 of the Planning Act 2008 (**2008 Act**), details of which are contained in our letter dated 8 September 2021.

Brief details of the total area of replacement land identified as a consequence of the proposed land take at TCCF (which includes Hobbs Hole and an area of land to the north of TCCF, also on the western side of the M25) are a matter of public knowledge, as well as the proposals for access to the replacement land, and its purpose, being the provision of new woodland and biodiversity mitigation.

However, in order to come within the definition of 'replacement land', as contained in sections 131 and 132 of the 2008 Act, the land at Hobbs Hole must be shown to meet the critical criterion of being *"no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public".* As previously submitted, this necessitates a comparative analysis of the characteristics (i.e. accessibility, topography, landscape character, quality, condition etc.) of the land at TCCF and the candidate replacement land. However, details of the criteria applied by NH in its search for suitable replacement land remain to be disclosed, as do the results of NH's assessment of the performance of any candidate replacement land parcels, including Hobbs Hole, against those criteria.

A "Guide to local refinement consultation" is amongst the documents published in support of the current consultation. At page 132, it is stated that NH has further developed its utility diversion proposals in order to refine the land needed at TCCF. In particular, it is proposed to use a greater proportion of the existing utilities infrastructure in this location to deliver the LTC project. However, as regards replacement land, the Guide reports that NH's proposals are unchanged. Reliance is once again placed upon the bare and unsubstantiated statement that the replacement land *"would provide equal accessibility and would be no less advantageous for the public"*. This falls woefully short of the detailed justification which it is incumbent on NH to provide.

When our client met with representatives of the LTC project team on 22 February 2022, reference was made to a visitor survey undertaken at TCCF in the Autumn of last year. It was also stated that NH's Land and Property Lead was continuing to look into the suitability of Hobbs Hole to serve as replacement land, as well as the justification for its permanent acquisition for this purpose and the total replacement land take requirement stemming from the LTC project's proposals in respect of TCCF. Mr Mee was informed of NH's intention to seek Counsel's advice on these matters in the coming weeks and was given an assurance that a copy of this advice would be shared with him, together with the results of the Autumn 2021 visitor survey at TCCF. Neither has been provided to date.

The compelling case for compulsory acquisition of any special category land included within the Order Limits is required to be demonstrated by NH, a key aspect of which is the assessment it has undertaken in order to calculate the amount of replacement land required and to identify the most suitable land to perform this function. Mr Mee has no visibility in this regard and the details of NH's approach are yet to be made available for scrutiny. As such, the robustness of this approach is untested which is wholly unsatisfactory given the pending severity of its impact on affected landowners including our client.

In the circumstances, Mr Mee remains firmly opposed to the acquisition of the land at Hobbs Hole to serve as replacement land in connection with the LTC project.

<u>Manor Farm Shop</u>

The proposed closure of Ockendon Road (B1421) in connection with the LTC project remains of fundamental concern to our client.

It is acknowledged by NH that the proposed road closure is a complex issue, the ramifications of which need to be carefully considered owing to the potential impact on the local community, bus and transport routes and the many operational businesses, including Manor Farm Shop, which are currently served and accessed via Ockendon Road.

The period of closure proposed is still not known, nor precisely how any such closure will operate, i.e. whether a complete closure is required or whether there is the possibility of a partial closure with the road being open during certain designated hours. Further details have been requested of NH on several occasions in order that Mr Mee may consider alternative options or ways in which it may be possible to mitigate the impact upon his business interests. In particular, details of spoil calculations and predicted LTC vehicle movements along Ockendon Road have been requested. The provision of this information was taken away as an action by the LTC project team from the meeting which our client attended on 22 February 2022. However, this information remains outstanding and the promise of a follow up meeting in early April has been reneged on.

It remains of critical importance that a suitable access for farm vehicles, articulated lorries bringing produce to Manor Farm Shop, and for the shop's customers during the construction of the LTC project continues to be maintained. Failure to do so will have a severe and detrimental impact on current trading patterns and may result in the cessation of operations altogether, with the associated loss of income from the closure of Manor Farm Shop causing the overall viability of our client's farming business at Manor Farm to be adversely affected. Mr Mee is not the only landowner and businessman in this distressing position. A number of other local businesses are set to suffer similar hardship should NH's proposal to close Ockendon Road go ahead absent a robust set of mitigation measures to minimise the impact upon them being put in place.

Given the severity of the potential consequences for our client and others, we ask that NH treats the identification of a suitable resolution to this matter as an absolute priority. Until such time as Mr Mee's grave and understandable concerns with regard to the proposed closure of Ockendon Road are allayed, his objection to the LTC project on this ground will be maintained.

Land at South Ockendon

As NH is aware, our client is the owner of land at South Ockendon, such land, together with land owned by neighbouring landowners, being under option with a national housebuilder. Through the emerging Local Plan, Thurrock Council has identified South Ockendon, including the land under option, as having the potential for large scale strategic growth of in the order of 10,000 homes to meet identified housing need.

The position as regards the Barking Power Station/City of London Corporation pipeline has now been clarified. The Order Limit reductions to the south of the LTC project (as shown on General Arrangement Plan: Sheet 36) which are possible as a consequence of this pipeline being capped off as redundant, rather than diverted, are considered positive. Further, the landscaping proposals in this location are welcomed on the assumption that they constitute a planting bund/embankment feature for the purpose of noise and/or landscape impact mitigation which is intended to minimise any adverse effects arising from the LTC project on the delivery of housing development to the south. We request confirmation from NH that our understanding of the position is correct.

However, the relevant Land Use Plan issued as part of the current consultation (Sheet 36) continues to identify land at South Ockendon which is within our client's ownership for permanent acquisition. It's unclear as to why this is considered necessary. Having regard to the purpose for which the land is required, namely the provision of ecological mitigation in the form of woodland planting, the proposal to permanently acquire this land is considered to be wholly disproportionate. Subject to a fully articulated proposal being forthcoming from NH, our client remains willing to explore the possibility of a stewardship

arrangement whereby he could retain ownership of the land, albeit subject to certain restrictions and safeguarding measures, together with an appropriate long-term maintenance regime.

Ultimately, Mr Mee's primary concern is to minimise the impact of the LTC project on his land at South Ockendon and its potential to prejudice the delivery of the much-needed housing development which is envisaged in the emerging Thurrock Local Plan. In this regard, it is also critical to ensure that land which is located outside of that being promoted through the Local Plan process, but which will provide essential infrastructure to facilitate the delivery of proposed housing developments, is safeguarded such that it can fulfil this purpose.

By way of example, our client notes NH's proposal to permanently acquire land in order to deliver a footpath connection between the LTC project and the northern edge of the existing built-up area of South Ockendon, with the route of the proposed footpath running adjacent to North Road (see Land Use Plan/General Arrangement Drawing: Sheet 36). This is also the intended location of the primary access which will serve housing developments proposed to be delivered to the west and east of North Road. The inevitable conflict which this will give rise to must be resolved so as to avoid the LTC project having a sterilising effect on the development potential of the land at South Ockendon and it being an obstacle to the achievement of the significant residential growth aspirations which exist for the area.

Whilst certain positive steps forward have been made with regard to the impact of the LTC project on our client's land at South Ockendon, and, in particular, the Order Limit reductions to which we have made reference above, our client continues to have a number of very serious misgivings which the current consultation proposals fail to alleviate. Therefore, his position remains one of overall objection.

LTC Timescales and Phasing

Information regarding the anticipated timescales and overall phasing of the LTC project both for Mr Mee and others remains scant/non-existent.

We are instructed to reiterate our client's request for clarity in this regard so that we my assist him in fully assessing the likely impacts arising from the LTC project on his existing land and business interests and his future development plans, as well as the mitigation strategies required to be put in place in order to minimise those impacts. A failure to provide information to our client and others leaves the LTC process open to further scrutiny and we wish NH to understand the possible implications which this, together with an overall lack of clarity, will have for affected landowners given the stage this project has reached.

Should there be any queries in connection with the contents of this letter, please direct them (together with all future correspondence/information in respect of the LTC project) to our Karen Howard (Partner) and/or Samantha Grange (Legal Director).

Yours faithfully

SHOOSMITHS LLP

Letter of 24 February 2023

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THE PLANNING INSPECTORATE
NATIONAL INFRASTRUCTURE PLANNING

By Email: lowerthamescrossing@planninginspectorate.gov.uk

Delivered: By E-mail Only

Our Ref KH.SG.M-00952788
Date 24 February 2023

Dear Sir / Madam,

LOWER THAMES CROSSING NSIP APPLICATION
RELEVANT REPRESENTATION ON BEHALF OF STUART MEE

We are instructed to act on behalf of Stuart Mee, the owner/joint owner and occupier (in the name of his farming business, AP Mee) of land located within the wards of Upminster and Ockendon, such land falling within the Order Limits of the Lower Thames Crossing (**LTC**) project, in respect of which an application for development consent (**Application**) has been submitted by National Highways (**NH**).

The Application was received by The Planning Inspectorate (**PINS**) on 31 October 2022 and was subsequently accepted for examination on 28 November 2022. The purpose of this letter is to register our client as an Interested Party in respect of the Application and to make a Relevant Representation on his behalf. We also take this opportunity to reserve our client's right to appear (and be represented) at the hearings scheduled as part of the examination of the Application should this be considered necessary.

Prior to the submission of the Application to PINS, NH has undertaken statutory consultation in respect of the LTC project. Representations have been made on our client's behalf at various stages of the consultation process, both by us and by our client's appointed surveyors (formerly Strutt & Parker, now Peter Cole of Ceres Property) – dated 19 December 2018; 12 August 2020; 8 September 2021; and 20 June 2022. For completeness, a copy these representations will be submitted to the examination in due course as part of any Written Representation our client may wish to make.

Mr Mee has a number of fundamental concerns regarding the impact of the LTC project on his various landholdings and commercial interests. We have sought to summarise these concerns below and to provide an outline of the principal points our client will make in relation to the Application. Pending the satisfactory resolution of Mr Mee's concerns, he is opposed to the grant of the Application and to the making of a development consent order (**DCO**) in respect of the LTC project in so far as it affects his land and interests.

To assist, we have enclosed a copy of the relevant General Arrangements Plans, submitted with the Application (Sheets 39, 40, 42 and 43), which we have annotated with numbers which correspond with

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the various points / observations which our client wishes to make in relation to the Application and to which we shall now turn (see numbers in bold and in brackets).

Manor Farm

The construction and operation of the LTC project is going to have a severe and detrimental impact upon our client's ability to continue farming his land at Manor Farm, Ockendon Rd, South Ockendon, Upminster RM14 2TZ. For the most part, the land is classified as 'Best and Most Versatile Land' falling within Grade 1 and Grade 2 of the Agricultural Land Classification system. Our client's specific concerns in respect of Manor Farm and his ability to continue operating a viable farming business from this location include the following:

1. **Maintenance of Agricultural Field Accesses (1)**: there are a number of instances where permanent acquisition of Mr Mee's land is proposed in connection with the LTC project, and where such acquisition has the potential to prevent or compromise our client's ability to utilise existing agricultural field accesses. It is imperative that an access, suitable for use by farm vehicles (including a combine harvester) and agricultural machinery, is maintained at all times in the affected locations so that the ability to continue farming the adjoining fields is not compromised or sterilised.

   Further, where the proposal is for an existing agricultural access to be shared with a new Non-Motorised User (**NMU**) route (i.e. walking, cycling and horse riding route), our client is concerned as to how the access will operate and both uses be managed. The trade-off between improving public access and connectivity, but also preventing trespassing, fly tipping and hair coursing, which is already rife in the area, is a major worry. NH has provided no details of how it intends to address the potential negative impacts arising from improved public access, nor how continued agricultural access will be accommodated in those locations where a shared access is proposed.

2. **Farm Track off Ockendon Road (2)**: our client is concerned to note NH's proposal to permanently acquire the existing farm track located off Ockendon Road which he uses on a daily basis, and all year round (with farm vehicles and agricultural machinery), to access the fields on either side of the track and to maintain the telecoms masts which are located at its north section. Sheet 43 of the General Arrangement Plans identifies the track (the ownership of which is unclear) as an NMU route leading to and over the proposed LTC carriageway. Our client requires an assurance that his use of the track has been considered by NH such that it can continue during the construction of the LTC project and when the project is operational.

   Further, in this location particularly, public safety is a genuine concern. At its southern end, the proposed NMU route will come out onto Ockendon Road, a busy road with a blind bend to the west. Our client is not satisfied that NH has undertaken a proper analysis of the relevant junction, nor an evaluation of the safety risk posed to the public.

3. **Severance of Irrigation System (3)**: delivery of the LTC project will sever the existing irrigation system which is in operation at Manor Farm. We understand that alternative irrigation system solutions are in the process of being explored and that the requisite modelling is being undertaken. However, at the time of writing, a feasible solution to what is acknowledged by NH as being a particularly difficult and complex scenario remains to be identified. There are no alternative systems.

   In order to avoid the attendant, and potentially extensive, crop losses which will occur should the fields at Manor Farm not be provided with a suitable irrigation system, it is imperative that the means of addressing this particular impact of the LTC project is clarified, demonstrably fit

for purpose, and secured as part of the project. Any new system will need to be designed, installed and capable of enduring for the lifetime of the farming tenancy.

4. **Utility Diversions and Corridors (4)**: when read together, the Land, Works and General Arrangement Plans (in each case Sheet 42), show an area of land in respect of which temporary possession and the permanent acquisition of rights is required for 'multi-utility alignment' and associated works. However, this alignment is said to be 'indicative'. Therefore, it isn't clear what the proposed utilities are, their precise location and for how long temporary possession of the relevant land may be required in order to install them, nor how the utilities will be maintained.

   In the circumstances, Mr Mee is unable to make an accurate assessment of the likely impact of this aspect of the LTC project on his land. Further clarity from NH is required in relation to the utilities to be installed, the timetable for their installation and the maintenance regime to be adopted in the long-term.

5. **Ecological and Environmental Mitigation (5)**: land at Manor Farm which is adjacent to the Upminster and Grays Branch Railway (to the west) is identified for environmental works, specifically ecological habitat creation.

   Mr Mee is disappointed to see that this land continues to be identified for permanent acquisition (see Land Plans: Volume C – Sheet 42) having previously made clear his willingness to explore the possibility of a stewardship arrangement whereby he could retain ownership of the land, albeit subject to certain restrictions and safeguarding measures, under an agreement which provides for an appropriate long-term maintenance regime. If an arrangement of this nature is to be established, NH must first provide our client with a detailed set of heads of terms for consideration and approval. Despite this point having been repeatedly made, the matter has not progressed.

   Furthermore, the proposed design of the landscaping / environmental works proposed is considered by our client to be especially poor which will adversely impact the remaining field, which is already being reduced in size, making it less viable to farm.

6. **Fishing Tenants (6)**: Manor Farm comprises a number of lakes to which fishing tenants currently have access. The lakes are stocked with valuable fish that the tenants have come to identify, "catch and release" and are an added attraction for users of the lake.

   Mr Mee is concerned to ensure that this access (from which he derives a considerable income) is maintained both during and post the construction of the LTC project. Further, the potential for harm to the valuable fish stocks within the lakes must be considered and protective measures implemented where the same is identified. For example, the field irrigation issues referred to above could detrimentally affect the fishing lake located to the west of Pea Lane as the existing irrigation system provides the lake's water supply. In addition, given the sensitivities of the fish stocks, care will need to be taken to ensure that the construction of the LTC project does not contaminate or compromise the quality of the water.

   To date, our client has been given no details of NH's mitigation strategy for addressing the potential impacts arising from the LTC project on the lakes at Manor Farm, the fish stocks they support or the tenants who fish in them.

Hobbs Hole – Special Category Replacement Land **(7)**

The area of land at Manor Farm which is known as Hobbs Hole has been identified by NH as suitable replacement land for NH's intended land take at Thames Chase Community Forest (**TCCF**), an area of designated open space / special category land which straddles the section of the M25 located to the

north of North Ockendon, and which is required in connection with the LTC project for roadbuilding (i.e. the construction of the M25 northbound slip road and earthworks) and utilities diversions. This continues to be a point of contention as to why our client's land has been specifically identified.

The land at Hobbs Hole is proposed for permanent acquisition by NH and subsequent transfer to Thames Chase Trust and/or Forestry England in order to provide an area for ecological habitat creation – specifically, we understand that new woodland and biodiversity mitigation is proposed. In performing this function, the land is required to meet the definition of 'replacement land' contained in sections 131 and 132 of the Planning Act 2008 – crucially, the land must be shown to meet the critical criterion of being *"no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public"* who are users and visitors to TCCF.

We have previously pressed NH to disclose details of its comparative analysis of the characteristics of the land being taken at TCCF (i.e. accessibility, topography, landscape character, quality, condition etc.) and the candidate replacement land, as well as NH's search criteria and the results of its assessment of the performance of any candidate replacement land parcels (including Hobbs Hole) against those criteria.

We have now been provided with a brief 8-page report entitled: *"Lower Thames Crossing: Thames Chase Forest Centre – Survey results and reasonable alternatives"* (dated September 2022) as the justification for the selection our client's land. The report falls woefully short of what can be expected and simply summarises the results of a single visitor survey carried out at TCCF over a period of 4 days in August 2021, as well as the alternatives considered in selecting the replacement land associated with the impact of the LTC project on the land at TCCF.

The report confirms that a total of 6 sites to serve as replacement land have been considered[1], two of which (Hobbs Hole and an area of land to the north of TCCF, also on the western side of the M25) have been selected as being suitable. Brief details of NH's assessment of the 4 rejected sites is contained in the report. However, the outcome of the comparative analysis and 'performance against search criteria' assessment undertaken in respect of the two successful sites, one of which is Hobbs Hole, is not reported on, which is a significant omission. We are simply told that in selecting the sites, NH has consulted Thames Chase Trust and Forestry England and that both organisations have expressed a strong preference for their selection over other potential locations in the area.

Further, we note that 'Site 1' of the rejected sites – a private golf course – was not considered suitable, at least in part, because it hosts a viable commercial business that intends to continue, and so, were NH to seek to acquire this land for the LTC project, it could result in a significant business extinguishment claim. These considerations are equally applicable to Hobbs Hole and Mr Mee's farming business at Manor Farm, which we would argue ought to be treated as a priority use, particularly given the land's 'Best and Most Versatile Land' / Grade 1 and Grade 2 status. Further, it is patently wrong to prefer one business over another on the basis of minimising the level of any potential compensation claim.

As we have previously advocated on our client's behalf, it is not enough for NH to make its case for the permanent acquisition of Hobbs Hole on the basis of bare and unsubstantiated statements which go no further than affirming that the replacement land would: *"provide equal accessibility and would be no less advantageous for the public"*. This falls woefully short of the detailed justification which it is incumbent on NH to provide. The compelling case for compulsory acquisition of any special category land included within the Order Limits for the LTC project is required to be demonstrated, a key aspect of which is the

[1] Brief mention is also made of Hole Farm and Glenroy Estate. Neither site is considered suitable to serve as replacement land for NH's proposed land take at TCCF on the basis of proximity. The report states that both sites are located over 4 miles away from TCCF, requiring transport by car or public transport. On this basis, it is said that access from TCCF to any replacement land at Hole Farm or Glenroy Estate would be *"severely restricted"*. We consider this a curious conclusion in light of the results of the visitor survey undertaken at TCCF which found that the majority of users accessed the site by motorised vehicle, and that 91% of the visitors questioned lived within a 30-minute drive time of TCCF.

assessment undertaken to calculate the amount of replacement land required and to identify the most suitable land to perform this function. It remains the case that Mr Mee has little to no visibility in this regard – the details of NH's approach are scant and its robustness is untested. This is wholly unsatisfactory given the severity of the potential impact on affected landowners including our client.

In the circumstances, Mr Mee remains firmly opposed to the permanent acquisition of the land at Hobbs Hole to serve as replacement land in connection with the LTC project.

Hobbs Hole – Agricultural Field Access **(8)**

Linked to this, we are also instructed to put on record the fact that our client currently accesses and farms agricultural fields adjacent to Pike Lane and to the north of Hobbs Hole via Hobbs Hole itself. Mr Mee's ability to continue farming these fields is dependent upon the existence (and maintenance) of a suitable access route, which can be used by farm vehicles (including a combine harvester) and agricultural machinery. In circumstances where Hobbs Hole fulfils the function of replacement land, an alternative means of access will have to be provided. In the absence of such provision, it will no longer be possible for our client to farm the aforesaid fields and they will be sterilised. To date, and to the best of our client's knowledge, the requirement for such alternative provision has not been considered by NH or included within the draft DCO submitted as part of the Application.

Manor Farm Shop **(9)**

Delivery of the LTC project will necessitate the closure of Ockendon Road (B1421) – a complex matter, the ramifications of which need to be carefully considered owing to the potential impact on the local community, bus and transport routes, and the many operational businesses, including our client's farm shop at Manor Farm (known as **Manor Farm Shop**), which are currently served and accessed via Ockendon Road. Manor Farm Shop is an integral part of Manor Farm and our client's wider farming business; it must be regarded as such by NH – damage to trade caused by lack of accessibility to the shop could compromise the wider farming business.

The overall period of closure proposed is still not known (although a worst case scenario of 18 months has been mentioned), nor precisely how any such closure (and associated diversions) will operate, i.e. whether a complete closure is required or whether there is the possibility of a partial closure with the road being open during certain designated hours. Further details have been requested of NH on several occasions in order that Mr Mee may consider alternative options or ways in which the impact may be mitigated. However, a firm set of closure proposals is still to be settled.

The revenue generated by Manor Farm Shop makes a sizeable contribution towards our client's wider farming business – in the order of 60%, with an average annual turnover over the last 3 years of £1.4m – and the shop employs 6 people (5 full time and 1 part time). Therefore, the maintenance of a suitable access during the construction of the LTC project for farm vehicles, articulated lorries carrying produce, and for the shop's customers is of critical importance. Failure to provide this will have a severe and detrimental impact on current trading patterns and may put the shop's ongoing operation at serious risk. In the event of the forced closure of Manor Farm Shop or a reduction in its annual turnover, Mr Mee is in no doubt that this will adversely impact the viability of his wider farming business.

A clear plan for the closure of Ockendon Road, the maximum period of closure and how it will be managed is desperately required. In the meantime, and until it can be demonstrated that the impacts arising can be adequately mitigated and any hardship to local businesses minimised, our client's objection to the LTC project on this ground will be maintained.

Land at South Ockendon – Residential Development Potential **(10)**

Mr Mee is the owner of land at South Ockendon – this land, together with land owned by neighbouring landowners, is under option with Bellway Homes Limited (**Bellway**). Through the emerging Local Plan, Thurrock Council has identified South Ockendon, including the land under option to Bellway (**Option Land**), as having the potential for large scale strategic growth of in the order of 10,000 homes to meet identified housing need.

Our client is aware that Bellway have registered as an Interested Party and endorses the points which they make in relation to the Application, details of which have been outlined in the Relevant Representation submitted by Strutt & Parker on Bellway's behalf.

Mr Mee's primary concern is to minimise the potential for the LTC project to prejudice the residential development of the Option Land and, more broadly, the delivery of much-needed housing as envisaged in the emerging Thurrock Local Plan. In this regard, it is also critical to ensure that land which is located outside of that being promoted through the Local Plan process, but which will provide essential infrastructure to facilitate the delivery of proposed housing developments, is safeguarded such that it can fulfil this purpose. By way of example, our client notes NH's proposal to permanently acquire land in order to deliver a footpath connection between the LTC project and the northern edge of the existing built-up area of South Ockendon, with the route of the proposed footpath running adjacent to North Road (see Land and General Arrangement Plans: Sheet 39). This is also the intended location of the primary access which will serve housing developments proposed to be delivered to the west and east of North Road. The inevitable conflict which this will give rise to must be resolved so as to avoid the LTC project having a sterilising effect on the development potential of the land at South Ockendon and it being an obstacle to the achievement of the significant residential growth aspirations which exist for the area.

Land at South Ockendon – Other Observations

Our client has a number of other observations to make in respect of the LTC project proposals in so far as they affect his land at South Ockendon. These observations can be summarised as follows:

North of the proposed LTC carriageway

1. **Pond Relocation (11)**: permanent acquisition of a parcel of Mr Mee's land is proposed for ecological habitat creation, specifically the location of a pond. However, the requirement for a pond to be located on this land is not clear and it is understood that NH are amenable to the pond being moved. Therefore, further discussions in respect of this matter are required.

2. **Heritage Asset/Listed Wall (12)**: our client is acutely concerned about a heritage asset/listed wall which is located on the route to a proposed LTC compound and is keen to ensure that protective measures are put in place to avoid the wall being damaged during the construction phase of the project. There should be no doubt over the potential criminal liability for NH or its contractors should damage be caused to the heritage asset/listed wall by the project proposals. Again, further discussions in respect of this matter are required.

3. **Landscaping Proposals (13)**: Mr Mee supports, in principle, the landscaping proposals shown on Sheet 39 of the General Arrangement Plans. This is on the assumption that they constitute a planting bund / embankment feature for the purpose of noise and/or landscape impact mitigation which is intended to minimise any adverse effects arising from the LTC project on the delivery of housing development to the south. It would assist if this could be confirmed and if the design and specification of the landscaping proposals could be supplied for our client's detailed review and consideration.

4. **Field Drains (14)**: our client's farmland where it interlinks with LTC is drained via an expansive and intricate field drainage system which is going to be severed as a consequence of the construction of the LTC project. This existing system is required to be re-engineered in order to continue functioning which presents a number of logistical and timing issues. A suitable design solution which secures separate drainage systems for the fields in this location and the proposed LTC carriageway is needed, as well as a clear plan for the management of the interface between the works to install both systems.

South of the proposed LTC carriageway

5. **Woodland Planting Proposals (15)**: Sheet 39 of the General Arrangement Plans shows a substantial area of land as verge/required for woodland planting to the south of the proposed LTC carriageway. Mr Mee is disappointed to see that this land continues to be identified for permanent acquisition (see Land Plans: Volume C – Sheet 39) having previously made clear his willingness to explore the possibility of a stewardship arrangement whereby he could retain ownership of the land, albeit subject to certain restrictions and safeguarding measures, under an agreement which provides for an appropriate long-term maintenance regime. If an arrangement of this nature is to be established, NH must first provide our client with a detailed set of heads of terms for consideration and approval. Despite this point having been repeatedly made, the matter has not progressed.

6. **Severed Land (16)**: our client owns a parcel of land to the south of the proposed LTC carriageway, which is identified for temporary possession in connection with the project, but for which the purpose isn't clear (see Land and General Arrangement Plans: Sheet 39). We see no provision, within the plans submitted with the Application, for continued access to this land upon completion of the LTC project; in effect, the parcel will become landlocked. Should the LTC project secure development consent and be delivered, our client requires his access to this land to be maintained. Further discussions in respect of this matter are required.

7. **Footpath adjoining Dennis Road (17)**: an NMU route is proposed to run along Dennis Road which will sever our client's access to the adjacent field which he currently farms. Should the LTC project secure development consent and be delivered, our client requires his access to this field to be maintained, noting that some flexibility is required so that the access is suitable – having regard to both the existing agricultural use of the field, as well as its future development potential.

North and South of the proposed LTC carriageway

8. **Maintenance of Agricultural Field Access (1)**: as with Manor Farm, there are a number of instances where permanent acquisition of Mr Mee's land is proposed in connection with the LTC project, and where such acquisition has the potential to prevent or compromise our client's ability to utilise existing agricultural field accesses. Where this occurs, it is imperative that an access, suitable for use by farm vehicles (including a combine harvester) and agricultural machinery, is maintained at all times so that the ability for our client to continue farming the adjoining fields is not compromised or sterilised.

In addressing the above-mentioned points, our client will require NH to enter into legally binding commitments which guarantee delivery of the solutions identified (whatever form they may take). A position statement / Statement of Common Ground (or equivalent document), whilst a means of documenting any agreement reached between the parties on a given point(s), will not be sufficient to enable our client to withdraw his objection to the grant of the Application in so far as it affects his land and interests (on the grounds outlined herein).

Should there be any queries in connection with the contents of this Relevant Representation, please direct them (together with all future correspondence in respect of the Application) to our Karen Howard (Partner) and/or Samantha Grange (Legal Director).

We reserve our client's right to make further and/or additional representations in relation to the LTC project proposals (as detailed in the Application).

Yours faithfully

SHOOSMITHS LLP

BDB PITMANS

For the attention of Karen Howard
Shoosmiths
6th Floor
1 St. Martin's Le Grand
London
EC1A 4AS

Our Ref
MLA/151216.0001
Date
3 March 2021

By Email

Dear Sirs

Lower Thames Crossing - replacement land for the Thames Chase Community Forest

We act for Highways England (**HE**) in the promotion of the Lower Thames Crossing (the **Project**). We understand that you act for Mr. Stuart Mee.

We have been asked to provide the legal justification for the acquisition of Mr. Mee's land in connection with the replacement of open space comprising the Thames Chase Community Forest. In particular, we understand that your client has queried:

1. whether HE could instead use its compulsory acquisition powers to create a leasehold interest over his land using powers under any granted development consent order (**DCO**); and
2. whether acquisition of the freehold is required in respect of any replacement land for the purposes of section 131 and 132 of the Planning Act 2008 (the **2008 Act**).

We set out our position on these matters below.

1 Ability to create a leasehold interest using compulsory acquisition powers under a DCO

1.1 Under section 122(1) of the 2008 Act sets out that a DCO can include "*provision authorising the compulsory acquisition of land*" where the conditions in subsection (2) of that section are met. In this case, the relevant conditions which are met are those contained in section 122(2)(c) (i.e., the land being acquired is replacement land) and section 122(3) (i.e., there is a compelling case in the public interest). For completeness, HE has complied with the relevant guidance on compulsory acquisition in determining the acquisition of your client's land is required.

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1.2 We note that in section 159 of the 2008 Act, "land" is defined for the purposes of Part 7 of the 2008 Act as including "*any interest in or right over land*".

1.3 Notwithstanding this arguably broad definition, the Secretary of State has determined that the power to acquire land under a DCO does not include the power to create a leasehold interest. In the Hinkley Nuclear Power Station decision letter dated 19 March 2013, the Secretary of State explicitly confirmed that they shared the view of the Examining Authority that a DCO could not be used to compulsorily create a new leasehold interest.[1] We note in this context that the extinguishment and acquisition of an *existing* leasehold interest is different in legal terms to the creation of a lease via compulsory acquisition.

1.4 We consider that Secretary of State's view is the correct one in these circumstances because:

1.4.1 the works proposed over your client's land are proposed to encompass the permanent, rather than time-limited, provision of replacement open space. We note in aforementioned Hinkley Nuclear Power Station project, the relevant acquisition involved *temporary* works (and the Secretary of State still concluded a time-limited right was not appropriate), whereas the acquisition in this case would involve extensive works, leading to a permanent provision of open space in the long term;

1.4.2 the approach in relation to replacement land has been replicated and approved by the Secretary of State across numerous DCO projects. We would refer you to DCO project precedents such as the A38 Derby Junctions, the M4 (Junctions 3 to 12), A14 Cambridge to Huntingdon, and the A303 Stonehenge projects;

1.4.3 that position is consistent with the operation of section 131 of the 2008 Act for the reasons discussed in section 2; and

1.4.4 it would be inappropriate to impose commercial terms which are usually determined between a prospective landlord and tenant via compulsory acquisition powers, particularly where such matters may have an impact on the public's ability to utilise any open space.

2 Operation of section 131 of the 2008 Act

2.1 As HE proposes to acquire land which currently forms part of the Thames Chase Community Forest, and that site is open space for the purposes of the 2008 Act, HE will be subject to special parliamentary procedure unless one of the exceptions in section 131 apply. In this case, HE is proposing to provide replacement land under section 131(4) of the 2008 Act.

2.2 It is important to note that section 131(4) sets out that the requirement that replacement land "*has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land*". The "prospective seller" is defined as "*means the person*

[1] See paragraph 6.4.9 of the decision letter, available here: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010001/EN010001-000017-130319_EN010001_SoS%20HPC%20Decision%20Letter.pdf

or persons in whom the order land is vested" (in this case, this would be Forestry England, and in respect of part, Essex County Council, as the owners of the Thames Chase Community Forest). This means that your client's land must vest in Forestry England and Essex County Council in order to comply with section 131(4) of the 2008 Act. We reiterate that it would not be safe to assume that a DCO can create a new leasehold interest via compulsory acquisition in this context.

2.3 We note that there is also a requirement under section 131(4) that the replacement land is "*subject to the same rights, trusts and incidents as attach to the order land*". As the Thames Chase Community Forest and, in relation to part, Essex County Council owns the freehold of the existing site, and in order to ensure that they have the same rights, trusts and incidents, freehold acquisition of the replacement land for their benefit is appropriate. We do not consider the acquisition of rights would be appropriate in this case for the same reasons provided in section 1.4 above. We expect Forestry England will agree with this position.

2.4 Under section 131 of the 2008 Act, "replacement land" is defined as:

> *"replacement land" means land which is not less in area than the order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public*

2.5 As the replacement land has to be "*no less advantageous.. to the public*", we will need to show that the public's rights are not less advantageous which they likely would be under time-limited leasehold. In this context, we refer you to the policy requirements under paragraphs 5.164, 5.174, and 5.181 of the National Networks National Policy Statement which has effect in relation to the Project. For completeness, we note that HE proposes to acquire rights over the Thames Chase Community Forest, and so section 132 of the 2008 Act is also engaged. The analysis provided above on the inability of a DCO creating a leasehold, and the requirement for freehold acquisition of replacement land, is unaffected by this.

2.6 Notwithstanding that the Project DCO application proposes to include the powers to permanently acquire your client's land for the purposes of replacement land, HE will continue to engage with your client on the voluntary acquisition of his interest in land.

We trust the above is helpful, and clarifies the position the Project has taken.

Yours faithfully

[redacted]

[redacted]

LTC DCO LEGAL FRAMEWORK

1. The Legal Framework is as follows.

PLANNING ACT 2008

2. Section 120 of the Planning Act 2008 provides: (Emphasis added)

1) An order granting development consent may impose requirements in connection with the development for which consent is granted.

2) The requirements may in particular include —

(a) requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation, or the giving of any notice, which (but for section 33(1)) would have been required for the development;

(b) requirements to obtain the approval of the Secretary of State or any other person, so far as not within paragraph (a).

3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.

4) The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5.

5) An order granting development consent may—

(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;

(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of a provision of the order or in connection with the order;

(c) include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any other provision of the order;

(d) include incidental, consequential, supplementary, transitional or transitory provisions and savings.

6) In subsection (5) "statutory provision" means a provision of an Act or of an instrument made under an Act.

7) Subsections (3) to (6) are subject to subsection (8) and the following provisions of this Chapter.

3. Section 122 provides:

1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.

2) The condition is that the land—

(a) is required for the development to which the development consent relates,

(b) is required to facilitate or is incidental to that development, or

(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.

3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

Case Law

4. In *Prest v Secretary of State for Wales* [183] 1 WLUK 416, the Court of Appeal held:

> *It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, there. fore, where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508 . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):*
>
> > *"It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."*

5. The important legal principles of that judgment include as follows:

   a) *If there is any reasonable doubt on the matter, the balance <u>must</u> be resolved in favour of the citizen."* A reasonable doubt means an evidenced (ie rational) doubt and not a subjective doubt;

   b) The indented part of the judgment is an *example* of the principle in (a). Thus, the evidence of the existence of the alternative site (in that case) itself established a reasonable (ie rational basis for) doubt;

   c) In the circumstances of (b), the law *requires* the Secretary of State to not confirm use of CPO powers. Hence: "*no reasonable Secretary of State <u>faced with that fact could</u> come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose";*

   d) There is no requirement for a precise match in respect of the existence of a fact (there, an alternative). Rather, it is sufficient for legal purposes that the "purpose" is the relevant <u>gauge</u>. Hence: " *If, in fact, the acquiring authority is itself in possession of other suitable land <u>other land that is wholly suitable for that purpose</u>…"*. Thus, in seeking to displace the fact, the promoter must show that the fact could not serve the purpose of the situation for which land was sought to be taken.

6. In *Tesco Stores Limited v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P&CR 427, Sullivan J. held:

> *It is perfectly true that the burden in a Compulsory Purchase Order inquiry lies on the acquiring authority to demonstrate a compelling case in the public interest …*

7. In *R (oao Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437, the Supreme Court affirmed *Prest* and held that the correct approach to the interpretation of statutory provisions in the sphere of compulsory purchase remains as follows:

> *10. In Prest v Secretary of State for Wales (1982) 81 LGR 193 , 198 Lord Denning MR said:*
>
> > *"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands …"*
>
> *and Watkins LJ said, at pp 211–212:*
>
> > *"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."*
>
> *11. Recently, in the High Court of Australia, French CJ said in R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12 , paras 40, 42, 43:*
>
> > *"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."*
> > *"42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …*
> > *"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."*

8. The National Policy Statement National Networks ("NPSNN") is silent in respect of alternatives in the sphere of compulsory acquisition. See paragraph 4.26:

> *4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives.*

9. Instead, as the *Stonehenge* case [2021] EWHC 2161 made clear, the common law on alternatives to CPO cannot be excluded by the NPSNN Guidance. Paragraph 4.26 does not close the door on the requirement in Prest to exclude the actual potential for alternatives to compulsory acquisition:

276. … Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no…

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent depends upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN)…

284. … the additional effect of that legal error is that the planning balance was not struck lawfully …

285… it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly beneficial (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286… there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in Langley Park (see [246] above), the second principle in Trusthouse Forte applies with equal, if not greater force.

287. … it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017 . Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. … it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration.

CHRISTIAAN ZWART

39, Essex Chambers,
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18th July 2023

James Stanley Prest and Michael Ian Bowstead Straker (Trustees of the Felin Isaf Trust and Miskin Village Trust) and Sir Brandon Meredith RHYS Williams and Brinley Edmunds v The Secretary of State for Wales v The Welsh Water Authority

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
1 January 1983

In the Supreme Court of Judicature

Court of Appeal

On Appeal from the High Court of Justice

Queen’s Bench Division

1983 WL 215478

The Master of the Rolls (Lord Denning) Lord Justice Watkins Lord Justice Fox

Friday, 24th September, 1982

Representation

LORD HOOSON Q.C. and MR. J. HOWELL (instructed by Messrs. Roche Hardcastle) appeared on behalf of the Appellants.
MR. SIMON BROWN (instructed by The Treasury Solicitor) appeared on behalf of the Secretary of State.
MR. M. T. PILL Q.C. and KISS A. J. BOOTH (instructed by the Area Solicitor, Welsh Water Authority) appeared on behalf of the Welsh Water Authority.

JUDGMENT

THE MASTER OF THE ROLLS:

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Sir Brandon Rhys Williams is a doughty fighter. He is under attack in his own homeland. It is in the Vale of Glamorgan. You pass by it if you go by the main line from Cardiff to Bridgend. Also if you go by car along the new M4 motorway near the Miskin interchange. He and his forebears have been in those parts for over 300 years. They have a considerable estate there which they let out to tenant farmers. Yet now they are under threat. The Welsh Water Authority are about to seize 30 or so acres of their land. It is agricultural land on a site next the railway line. The Welsh Water Authority have made a compulsory purchase order on it: and it has been confirmed by the Minister. It is now under appeal to this court.

The reason for this imminent seizure is to make a new sewage works for the neighbouring towns and villages. It is urgent. The existing sewage works are grossly over-loaded. It is anticipated – and hoped – that the district may be developed for industrial use. So that more facilities are needed for the disposal of sewage.

Sir Brandon and his children's trustees all recognise the need for a *new* sewage works and the urgency of it. They are just as keen as the Welsh Water Authority. But they do not agree to the site seized •0 or about to be seized by that Authority. They offer an alternative site: or rather one of two alternative sites. Each of them is about 30 or 40 acres. Each of them is close by in the same area. One is 60 yards away from the railway line. The other is 160 yards away. Each is very convenient for the new sewage works.

The contest in the case is this: Which of the sites should be used for the new sewage works? Should it be the site proposed by the Authority? or one of the two alternative sites offered by Sir Brandon?

In November and December 1977 there was a long public inquiry as to the comparative merits of the sites. It took twelve days. The long and short of it is that there is nothing to choose *between* the sites – save as to cost. Everything was considered at the inquiry. Such as the means of access, the *interference* with agriculture, the effect on the amenities, the impact of floodtag, and so forth. In no material respect was any one site to be preferred to the others – save as to cost.

Now the cost was the rub. At the inquiry there was much evidence as to the cost of constructing the plant for treating the sewage. The total cost, as at 1976 prices, would be £7,616,900 on the site proposed by the Authority. But as to the alternative sites, *Nos. 1* and 2, offered by Sir Brandon

> "the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2."

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Those were of course, only estimates at that time. Like all estimates they are often falsified in execution. They are certainly out of date by this time. Even so, the saving of £230,000 or even £300,000 would seem to be marginal in relation to a figure of nearly £8,000,000.

Yet that saving seems to have *been* the determining factor with the Inspector. *He made his report* on 20th April 1978. It *covered* sixty-four closely-typed pages. He said in it:

> "The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar … the applications (by Sir Brandon for sites Nos. 1 and 2) should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds."

In recent letters the Welsh Water Authority have made it clear that the determining factor has been one of cost. On 23rd April 1982 they said that the proposals of Sir Brandon "impose an unacceptable cost-penalty on its proposed sewage disposal scheme" : and on 14th May 1982 that the alternative site "has been considered and rejected because of the additional cost involved" .

The offer by Sir Brandon

Now I come to the crucial point in the appeal. Both at the inquiry and ever since, Sir Brandon and his children's trustees have offered to convey either of the alternative sites offered by them at "existing use value" . That is, at its value as agricultural land. But if the Welsh Water Authority insist on the site proposed by the Authority itself, then Sir Brandon and his children's trustees will require the Authority to pay its full compensation allowed by law. That is its value, not as agricultural land, but as land with a potential for development for industrial purposes. This will be much higher than the agricultural value. It would far more than outweigh the saving of £230,000 to £300,000 on construction costs.

The point that was omitted

Here is the strangething. The Inspector did not take any account of that offer. He recorded it among his findings in paragraph 264(9), but he did not take it into account in assessing the cost of the whole project. He only took into account the cost of constructing the sewage treatment works. He did not take into account the cost of acquiring the land itself. That is a most significant omission. Both sides agree that it was omitted. Neither side adduced any evidence before the Inspector about it. So *he did* not take it into account.

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The letter of 20th October 1978

Whilst the Inspector's report was with the Minister – and before he gave his decision – the trustees and Sir Brandon wrote a letter of 20th October 1978. They asked for the inquiry to be re-opened. They pointed out that the site proposed by the Authority had much potential for industrial purposes: so the cost of acquiring it would be much greater than that of the site offered by Sir Brandon which was being offered at agricultural value. This was clear enough in the somewhat clumsy language of the letter:

> "This obvious potential of the CPO site (the site proposed by the Authority) for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry."

The planning applications

Whilst all these things were going on, the trustees and Sir Brandon were making planning applications for the development of much of their land in the area for industrial purposes. These were called in by the Minister so that he could determine them himself. They had not been determined at the date of the decision letter in November 1978. A local inquiry was held into them by a different Inspector. He recommended that the applications should be allowed. But, on 7th August, 1980, the Minister turned them down at that stage. He said:

> "While not disputing the Inspector's view that there is a need for industrial land in the general area, the Secretary of State notes that other industrial sites are available and he is not convinced that the industrial need would justify a major intrusion into this attractive part of the Vale of Glamorgan."

Nevertheless, the trustees and Sir Brandon made another application. It was called in by the Minister again for his determination. Another Inspector, Miss Ellis, held another local inquiry. It is believed that she reported in favour of industrial development. In a letter of 12th March 1982 the Minister indicated his willingness to permit industrial development, subject to certain conditions.

It is quite clear, therefore, that by this time it is very probable that (if it were not acquired

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compulsorily) the site proposed by the Authority would be developed for industrial purposes and would command a very high price. The cost of the whole project would be far greater than it would be if the Authority accepted the alternative site offered by Sir Brandon.

These findings give rise to several points of law.

The use of compulsory powers

The first is fundamental. To what extent is the Secretary of State entitled to *use* compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, there. fore, where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see *Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508* . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

> "It seems to me that there is a very long and respectable tradition for the view that an authority that *seeks* to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."

The facts to be considered

The second point is this: When a case reaches the courts, is it to be decided on the facts as they appeared to the Minister at the date of his decision? or, can the courts look at subsequent facts? In this very case the Inspector took the view that, at the time of his inquiry, it was a matter for "speculation" whether or not there would be an industrial use of the site proposed by the Authority. But, by the time that the case reached the courts, or at any rate reached this court, it was no longer speculative. It was highly probable that the landowner would get permission for development for industrial purposes. If these had been proceedings in a court of law, this

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subsequent evidence would have been regarded as so material that it would have been admitted in the Court of Appeal, *see* Murphy v. Stone-Wallwork (1969) 1 W.L.R. 1025 ; *Mulholland v. Mitchell (1971) A.C. 666* . So here it seems to me that, when the decision of the Minister was under challenge in the courts, it was not final. It was sub judice. So far as I am aware, the acquiring authority does not act on it until the court proceedings are finally disposed of. Rarely indeed would fresh facts be admitted to counteract the decision: but I think that in a proper case they should be. Take this very case. The Welsh Water Authority are not bound to take up the compulsory purchase order. If they exercise it, the price will not *be assessed* at the date of the order. It will *be assessed* at the time when they actually take the land, see *West Midland Baptist (Trust) Association (Inc) v. Birmingham Corporation (1970) A.C. 874* . That would be much higher than at the date of the Inspector's inquiry. If the Authority can wait till after the Court of Appeal order – to see what prices are, it is only fair that the landowner should be able to have his case – against compulsory purchase – also determined at that date.

Test it this way: Take a case where the Minister has confirmed the compulsory purchase order. But after the confirmation the acquiring authority alters its proposals radically, or abandons them, or decides to use the land far a different purpose from that which it originally intended. In that case the cm. pulsory purchase order would no longer be available to it. The court would restrain the acquiring authority from going on with the purchase. That *is* shown by Grice & anr. v. Dudley Corporation (1958) 1 Ch. 329 , where Mr. Justice Upjohn said (at page 344);

> "… what are the corporation doing? They seem to me to be endeavouring to acquire the plaintiffs' property for some purpose other than that for which they were authorised to exercise compulsory powers by the compulsory purchase order … they are going entirely outside the order and, if that be so, then they must be restrained from doing so."

If that can be done by the court – after the order has been confirmed – surely it can be done where there is an application to the court to set aside the order under the statutory powers available. I am aware that this would need fresh evidence over and above that which was before the Inspector and the Minister. But there is power to receive it. Not usually. Only rarely. As I said in *Ashbridge Investments Ltd. v. Minister of Housing & Local Government (1965) 1 W.L.R. 1320* at page 1327:

> "Fresh evidence should not be admitted save in exceptional circumstances."

Those exceptional circumstances need not be closely defined. I would suggest that fresh evidence can and should be admitted on similar grounds to that in the courts of law – in those cases where it has arisen since and would in all probability have an important influence on the

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result.

The matters to be taken into account

The third principle asks this question: What matters is the Secretary of State to take into account? Is he limited to those canvassed before the Inspector? or should he go beyond them and consider other matters, if they are relevant?

This was one of the principal points made by the Minister and by the Water Authority. They said that the trustees and Sir Brandon never raised the point about the cost of acquisition of the land, nor did they give any evidence upon it. So they should be shut out from canvassing it now.

To my mind this is a mistake. It treats a public inquiry – and the Minister's decision – as if it were a lis inter partes . That it certainly is not. It is a public inquiry at which the acquiring authority and the objectors are present and put forward their cases – but there is an unseen party who is vitally interested and is not represented. It is the public at large. It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to pay too much for the land – especially where there is an alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account, cf. *Hanks & ors. v. Minister of Housing & Local Government (1963) 1 Q.B. 999* . The principle was implicit in the decision of the House of Lords in *Board of Education v. Rice (1911) A.C. 179* . It was expressed by Lord Greene, M.R., in a single sentence in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229:

> "He must call his own attention to the matters which he is bound to consider."

This was put a little more fully by Lord Diplock in *Education Secretary v. Tameside (1977) A.C. 1014* at page 1065:

> "Or, put more compendiously, 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 to enable him to answer it correctly?"

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The power of the court

The fourth principle is the power of the court to intervene. Often we are referred to the classic judgment of Lord *Greene*, M.R., in the Wednesbury case (1948) 1 K.B. 223, but I ventured to restate it in my own words in *Ashbridge Investments v. Minister of Housing (1965) 1 W.L.R. 1320* at page 1326, which has been repeatedly applied. This was in relation to the very statutory words applicable here:

> "Seeing that that decision is entrusted to the Minister, we have to consider the power of the court to interfere with his decision. It is given in Schedule 4, para. 2 (of the Housing Act 1957). The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law."

I went on to say that in some cases fresh evidence might be admitted:

> "We have to apply this to the *modern* procedure whereby the inspector makes his report and the Minister gives his letter of decision, and they are made available to the parties. It seems to me that the court should look at the material which the Inspector and the Minister had before them, just as it looks at the material before an inferior court, and see whether on that material the Minister has gone wrong in law … Fresh evidence should not be admitted save in exceptional circumstances."

Conclusion

It remains to apply these principles.

In the first place, we have fresh evidence which shows that the present proposals of the acquiring authority are radically different from those which were considered by the Inspector at the inquiry. The main differences are these:

(i) Modern methods of treating sewage have reduced the whole scale of the project so that the area required for the actual works has been halved in size.

(ii) It is very probable that planning permission be given for the development of the order land for industrial purposes (that is the CPO site): so that it would command a very

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considerable "hope" value far in excess of agricultural land, cf. *Camrose (Viscount) & anr. v. Basingstoke Corporation (1966) 1 W.L.R. 1100* .
(iii) The trustees and Sir Brandon have made it clear that they will make the alternative site available at existing use value, that is, its agricultural value.

In view of the fresh evidence it would be quite unreasonable for the acquiring authority to proceed with the compulsory purchase order. Yet on 18th May 1981, they gave notice to treat and have only held their hand pending these proceedings.

In the second place, even if the fresh evidence be disregarded, when the Minister wrote the decision letter confirming the compulsory purchase order, he failed to take into account the cost of acquiring the site proposed by the Authority (the CPO site) as against the cost of acquiring the alternative site offered by Sir Brandon. This was a most relevant consideration. It would probably have made a crucial difference because, even at that date in 1978, there was a potential of development for industrial use which would have given a considerable "hope" value to the order land (the CPO site). The Minister ought to have had regard to this point – in the public interest ≤ even though it was not canvassed by the parties at the inquiry. In any event he ought to have considered it – after receiving the letter of 20th October 1978 – and asked for evidence of values before coming to his decisions. If he had considered its the only reasonable conclusion would be that the compulsory purchase order would not have been confirmed.

I would, therefore, allow the appeal and set aside the compulsory purchase order. Everyone must regret the long delay in making the new sewage works. But I think that the responsibility must rest primarily with the Welsh Water Authority. All could have *been* avoided if they had not insisted on their own site, but had accepted the offer made by Sir Brandon and his children's trustees long ago. If they had done so, the sewage works could have been completed by this time – at much less cost than they will be now. It is, I understand, still open to them to accept the offer. They should do so and get on with the work at once. I would allow the appeal accordingly.

LORD JUSTICE WATKINS:

The attempted acquisition of land by compulsory purchase is when strongly resisted by the owners of it, likely to give rise to a protracted and sometimes bitter contest fought in the forum of public inquiry and thereafter in the courts. Seldom, however, can there have been such a long drawn out struggle to preserve for himself and his family a part of their land at Miskin in the heart of Glamorgan as that waged by Sir Brandon Rhys Williams and the Trustees of the family Trusts.

Sir Brandon's family have lived in Miskin Manor for a century. They have been associated with the lands thereabouts for three centuries or more. He has set ideas of his own as to how his land should be developed in the interests of good and profitable estate management. He has not for

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many years been averse to selling some part of his land, at agricultural value, initially to the Local Authority and later on to the Welsh Water Authority when this was created in 1944 so that a sewage disposal plant could be constructed upon it and a suitable access road provided to that.

But he insists upon making available for this purpose a site which in extent and in every other way is, in his estimation, suitable for this purpose and he will not, in any circumstance, treat with the Welsh Water Authority in respect of another part of his land, which is their considered choice for the construction of a plant which is to be provided for the benefit of the inhabitants of Miskin, Llantrisant and other villages nearby.

But the construction of this is, after a decade of strife concerning its location, still not imminent. Indeed, local inhabitants could be excused for thinking that it never will be, seeing that the Welsh Water Authority is, it could be said, inexcusably obdurate in pursuing its objective and Sir Brandon is at least equally determined and resourceful in thwarting them.

There have been from time to time substantial changes in the schemes or proposals put before the Secretary of State for Wales by both sides. The Welsh Water Authority has made fundamental changes in its conception of the kind of plant designed to be constructed, which has meant, among other things, that the amount of land sought to be acquired has diminished in size and Sir Brandon has changed the location of the alternative site he is willing voluntarily to sell at agricultural value to accommodate the plant.

A sensible and reasonably expeditious resolution to this dispute has also been affected by other factors outside the control of both the Welsh Water Authority and Sir Brandon. Notable among these has been the planning and construction of the M4 motorway, which passes through the Miskin Estate, and various proposals, some of which have been the subject of planning applications, for industrial development of this part of Glamorgan which lies immediately to the south of the Rhondda Valley, wherein coal mining has been for years a declining industry – just as in other valleys in Glamorgan and Gwent has the manufacture of steel. These two heavy industries were the economic bedrock of South Wales.

For many years now, since the end of the second world war especially, the local industrial scene has gradually moved from the valleys to the agricultural coastal plain where lie the ports and through which run the railway line and now the motorway. New industries hitherto alien to this part of Wales have been placed near or not very far away from these essential facilities for transporting people and material.

Some of the land around Llantrisant has already been used for this purpose. During the last 15 years a much more extensive industrial development there has been envisaged by planners, including Professor Buchanan, in a specially commissioned report. These proposals have included, among other things, the creation of a new town. Today the approach to development there is much less grandiose, but the determination to bring some new industry to the area

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appears to be in some quarters as firm as ever.

Accordingly, it can with justification, so it is argued, be said that the area has a potential for industrial use. The Welsh Land Authority, which is answerable to the Secretary of State, has been and seemingly remains very conscious of this. Various provisions of the Community Land Act 1975 remain available to this Authority. Armed with these it seeks to acquire land for industrial use near Llantrisant, including a part of the Miskin Estate. It has not yet succeeded in obtaining the requisite consents with which to implement its proposals for land acquisition, but there is no sign that its resolve to acquire a reserve of land in this neighbourhood is weakening.

Furthermore, the Local and County Authorities, which themselves have under. gone convulsive changes in recent times, have advanced proposals for development so as to bring in new industry.

So the long endured pressures imposed upon the Secretary of State for Wales and his predecessors to grant planning permissions and approve the purchase of land by compulsory acquisition have been many and various.

It would not be in the least surprising, therefore, if the Secretary of State and those who advise him, in a mood of desperation if not exasperation, resolved to put an end to the battle over the siting of the sewage plant by as he has done, giving the Welsh Water Authority the powers of land acquisition it seeks accompanied by planning permission to construct the plant which he stipulated was to begin by 30th November 1983.

In the decisive decision letter of 14th November 1978, after describing out. standing applications for planning permission for industrial use by Sir Brandon and the Welsh Land Authority, it was stated:

> "Whilst it would not be for the Secretary of State to prejudge the issue regarding the siting of industry south east of the Miskin Interchange, he is satisfied on the evidence that the construction of a sewage disposal works on the site proposed by the Authority or on either of the two sites advanced by Sir Brandon Rhys Williams would not jeopardise the development of an industrial estate in the area. Accordingly, he considers he would not be justified in with.≥ holding his decisions in relation to the sewage disposal works".

It was contended on behalf of the appellants that in this passage the Secretary of State revealed that he had reached a decision in advance of detailed appraisals of the planning applications which, if successful, would inevitably have seriously affected the cost of compulsory acquisition of the Welsh Water Authority site. The decision to confirm the order was swayed against Sir Brandon solely by the costs factor, a full and proper appreciation of which could not be gained

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without regard to the user present or prospective of adjoining parts of his lands.

As subsequent events have shown, so it is argued, this cost factor viewed in that way will involve the Welsh Water Authority in a sum for the acquisition of the site which is the subject of the compulsory purchase order, which will not be based on agricultural value but upon a valuation which takes account of at least the hope of planning permission being granted for use for industrial purposes of the site and of adjoining lands as a composite whole or for adjoining lands excluding the site. In this context, it is of interest to learn of the Secretary of State's recent indication that he is quite likely to regard favourably a recommendation made by an inspector in 1981 that conditional planning permission be granted to Sir Brandon and the trustees upon their applications therefor for the use for industrial purposes of a very considerable area of land which includes the compulsory purchase order site.

In her report following the enquiry into the applications, the inspector somewhat significantly concluded, upon the need for land for industrial use, that, if it was necessary urgently to attract large prestige firms with exacting require.+ ments which can serve the Rhondda, then Miskin was the only site she was shown which meets the criteria of accessibility, availability and attractiveness.

In March 1982 the Secretary of State informed Sir Brandon and the Trustees that the existence of an acceptable agreement with the local planning authority under the provisions of section 52 of the Town and Country Planning Act 1971 – apparently such an agreement is in being – would be an important factor in his con.. sideration of the applications. And he enquired whether, in view of the areas of land covered by the agreement, account could be taken of any possible requirements which might arise for alternative sites for a sewage disposal works.

What is one to make of all that, save, it seems inevitable, that a large part of the Miskin lands, the CPO site included, will soon be the subject of plan. ning permission for industrial *use.* And the cost of acquisition of the CPO site, if the order is to remain confirmed, will not be based on agricultural land value but upon the much higher value attributed to land used for industrial purposes.

This is obviously in the public interest a very important consideration, especially when it is borne *in* mind that, in the present case, land can still be acquired by the Welsh Water Authority without the use of compulsory powers at agricultural value which is, so it is submitted by Lord Hooson, as suitable as the compulsory purchase order site for the construction of a sewage plant.

Looking at the whole situation as it appears now, that is, I think, a valid and powerful argument. Despite attempts made on behalf of the Secretary of State and the Welsh Water Authority to demonstrate that his decision to confirm the compulsory purchase order was not exclusively founded on the difference between the cost of construction of the CPO site and the alternative site, I am persuaded, for reasons which I shall later explain and which arise out of the contents

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of the several reports and decision letters which are summarised in the decision letter of 14th November 1978, that this was the sole factor which caused the Secretary of State to prefer the CPO site.

Accordingly, seeing nothing has happened to change the character of either of the two sites during the last three-and-a-half years, if it were permissible to regard the situation as it appears now for the purpose of fairly disposing of the appeal, I would unhesitatingly allow the appeal. The cost factor is altogether different now. Land values are a powerful, if not overwhelming, ingredient of it, whereas it *was* absent from the Secretary of State's consideration in the autumn of 1978.

But is it lawful and otherwise proper to look at the Secretary of State's decision taking account of subsequent events so as with hindsight, to adjudge it right or wrong? It is very tempting to do so, especially when what is at stake is the right of a man to retain his land or to dispose of it when and how and to whom he chooses. There are instances in recent times when this court has, notably in claims for personal injury, looked at an event or events subsequent to judgment in order to decide whether a plaintiff or a defendant has been justly treated, but I regard them as an exception to the general rule, which is that a decision appealed against can only be regarded within the circumstances from which it was derived. Generally to conduct the appellate process otherwise would *be* to introduce into it an undesirable combination of re-hearing and fresh evidence which would put at peril the imperative need for judgments or orders or decisions to be final unless they are wrong in law or because, for example, the principles explained in the well-known Wednesbury case have not been followed.

I did not understand Lord Hooson to invite us to resolve this appeal other-wise than in the conventional way. This I propose to do, firmly believing it to be wrong to proceed differently. The most he asks of us with regard to the post decision history is to pay regard to it as an unfolding of events, the main effect of which the Secretary of State could reasonably have anticipated as likely to occur sometime soon in the future when he made his decision in November 1978. In other words, it demonstrates what it was the Secretary of State might have anticipated if he had given thought to it, namely that there was hope value in the CPO site and adjoining lands which inevitably would markedly affect the cost of acquisition under the CPO and, therefore, the cost factor which he acted upon.

So regarded, reception of evidence of that kind is, I think, unobjectionable but otherwise it must be ignored. Even when acted upon in that context it may prove to be of little or no value. This is especially so in long drawn out planning disputes during which time all manner of conditions and needs may change so as radically to alter a pre-existing situation.

In the present appeal I do not find the subsequent events helpful, having regard to the vast bulk of the past history, every detail of which must have been known to the Welsh office and, therefore, to the Secretary of State if he had wished to acquaint himself of it. His role in making

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planning decisions and confirming or otherwise compulsory purchase orders is, if not inquisitorial, which Mr. Simon Brown submits that it is not, surely investigatory, especially when he is given notice of a relevant matter which might affect his decision by a person likely to be affected by it. He must acquaint himself,from the formidable amount of assistance available to him in his department and from public inquiry, with all the information which is indispensable to the making of a just and equitable decision in the making of which he *is* entrusted with a broad discretionary power. The proper use of a discretionary power is in peril if less than the information essential for its exercise is available to him. If proper use involves him *in* "routing around" – *see* *Rhodes v. Minister of Housing and Local Government (1963) 1 W.L.R. 208* at 213 – relied upon by Mr. Pill – he must either cause that to be done or resolve the issue in favour of the land owner.

So long as all those persons who are going to be affected by his decision are aware of the information he expects to take account of, so that they are given full opportunity to make representations to him about it at public inquiry or through correspondence either before or after public inquiry, he is not restricted in his sources of gathering relevant information. A public inquiry is the best known, most used and most useful means at his disposal to ensure that he is fully equipped to decide the matter in hand.

There are times, however, when a vital point, as it *seems* to him later has either been insufficiently ventilated or not touched upon at all at an inquiry. In either of these circumstances, if he is going to allow the point to affect him, he must cause enquiries to be made into it even to the extent of re-opening the public inquiry. Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229 said:

> "He must call his own attention to the matters which he is bound to consider."

What he may not do is to proceed to exercise his discretion and allow it to be swayed by a factor which is inadequately presented to him. It matters not, so it seems to me, that he could reasonably have expected an objector or a supporter of his ultimate decision to have fully exposed for him that factor in all its facets at public inquiry or in some other way. He conducts a process of administrative decision which is quite unlike that conducted by courts and some, if not all, tribunals. Nevertheless, it is a process which is governed by disciplines vital to the public interest.

In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council (1977) A.C. 1014* at page 1065 Lord Diplock said:

> "Or, put more compendiously, 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

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> information to enable him to answer it correctly?"

It could be said that the Secretary of State did ask himself the right question, although Lord Hooson submits to the contrary in the circumstances, namely whether the financial implications alone could allow him to confirm the compulsory purchase order. But whether, as on any view he should have done, he acquainted himself with all the relevant information or, I would add, all the relevant considerations indispensable to correctly *answer* the question, has not to my mind been established by anything we have read or heard in this court.

In this regard he cannot, contrary to a submission made to us, in my opinion, invoke, nor can anyone else who seeks to support his decision here invoke, the doctrine of estoppel against an appellant who challenges that decision, no matter that that person could have a thought of doing so, ventilated at public inquiry what may turn out to be a crucial facet of the factor upon which the decision is hinged. To allow a legal principle or doctrine of that kind to intrude into an administrative process such as this would, in my opinion, be both inappropriate and unjust. Moreover, in the circumstances under review here, even if the issue of estoppel was validly to be raised, it should not, in my opinion, be determined in favour of either the Secretary of State or the *Welsh* Water Authority. It is clear, I think, that he gave his consent to the compulsory acquisition of Sir Brandon's land solely because of the financial implications arising out of the use of that land. If, as in my view he did, he considered those implications, leaving out of account a fact vital to a proper appraisal of them, Sir Brandon cannot possibly be estopped from inviting this court to examine the effect of that omission.

The inspector whose conclusions and recommendations he accepted made it abundantly plain, as I read his report, that he was in favour of recommending the CPO site upon a financial implication only having, so it would seem, recognised that, upon all other relevant considerations, there was nothing of consequence to cause him to prefer the CPO site to Sir Brandon's alternative. In other words, there was nothing to choose between them. In order to substantiate this appreciation of his views, it is necessary, I regret in the interests of brevity, to record in detail the contents of the following paragraphs of his report:

> "(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site.

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"(xx) As to Sir Brandon's applications, nothing in the evidence concerning appearance, agriculture, flooding, the Nant Coslech or possible future industry suggests to me that planning permissions for Sites 1 and 2 need be withheld. The evidence concerning the Ancient Monument and the Site of Special Scientific Interest shows that Sites 1 and 2 have 'negative' advantages (in the sense that damage elsewhere would be avoided or reduced), although in my view these are marginal and are far outweighed by the prospect of heavy operational traffic being thrown on to the local road network.

"(xxi) The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar, in the *sense* that the sole object of Sir Brandon submitting his applications has been to force thorough and proper consideration of the alternative sites. There is no question of Sir Brandon ever implementing a permission(s) for the con.struction of a sewage treatment works, and there can be no doubt that the WNWDA (i.e. the public) would foot the bill.

"(xxii) The machinery of physical planning control does not, and should not, operate in a financial vacuum, divorced from the harsh realities of everyday economics. Rather, I believe that wisely used it should seek to channel public investment into the right places at the right time. Thus, having concluded that the development of Sites 1 and 2 is likely to incur substantial and unnecessary penalties in the shape of scarce public resources, it would be wholly illogical for me to recommend that permission be granted in respect of those sites, unless it had been demonstrated that they possess other overriding advantages compared with the Authority's preferred scheme. I am convinced that they possess no such advantages, and conclude that the applications should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds."

If the inspector had thought there were other grounds including, for example, agricultural, environmental, access and highway considerations, he would have undoubtedly, in my view, expressly so stated. Thus, although these considerations are mentioned in paragraph (v) of the decision letter, it cannot be supposed, having regard to the inspector's detailed assessment of them, that they influenced the Secretary of State into confirming the CPO.

Paragraph (v) reads as follows: "Apart from the specific issues referred to in paragraphs 11(i) – (iv) above the Secretary of State has also carefully con.. sidered and accepts his inspector's general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the inspector's assessment of the financial implications, contained in the conclusions to the report of the second re-opened inquiry, concerning the Water Authority's proposed redevelopment and the cost comparisons with the sites advanced by Sir Brandon Rhys Williams" .

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In the following paragraph – (vi) – the Secretary of State said he had also considered written representations submitted to him by Sir Brandon. These were contained in his solicitor's letter of 20th October 1978 wherein this paragraph appears:

> "This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the enquiry".

Regardless of the main purpose of the letter this paragraph clearly alerted, or should have done I think, the Secretary of State to the likelihood that a decision based upon financial implications without consideration of relative land costs would be ill founded and, therefore, unjust to Sir Brandon. The raising of the matter of land costs is nowhere, as I understand the decision letter, answered by it directly or, by implication, within it. The assumption must be, therefore, that the Secretary of State, in refusing to re-open the inquiry or to delay his decision, regarded the financial implication from the standpoint of construction costs and no other.

It was submitted to us that the foregoing paragraph of the solicitor's letter could not possibly have indicated to the Secretary of State that Sir Brandon was suggesting that hope value inter alia was being referred to by the words "material questions of relative land costs" . As already indicated, I do not agree. The Secretary of State has the benefit of advice from senior civil servants well versed in such matters as compulsory purchase and planning. I am not persuaded that they,knowing, of course, that there were material unresolved planning applications before them, did not appreciate that it was being suggested that hope value should be taken account of.

In any event, I do not think it required this paragraph to introduce this financial factor into the mind of the Secretary of State. He was so concerned about the financial implications as to found his decision upon them. That being so, how could he neglect to consider something so fundamental as the cost of the acquisition of land upon which the sewage plant was to be constructed? If this kind of decision were being taken in the commercial world I venture to think that the cost of land would have been very high on the agenda. If the Secretary of State did have it on his agenda – he has failed to prove that – he may have come to the same decision as that which is being challenged, but there is no evidence whatsoever that he gave it so much as a passing thought.

Paragraph (vii) of the decision letter is noteworthy in this connection. He therein contended that all submissions made to him after the close of the enquiries was sufficiently covered by evidence already before him. The plain fact undoubtedly is that no evidence of comparative land

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costs was before him. This I take to be a clear indication of his neglect to take account of them.

Does the Secretary of State's failure to enquire into and to consider the full implications of the cost of land acquisition invalidate his decision, bearing in mind the planning and all other relevant considerations? Lord Hooson submits his failure to do so is fatal to the decision – cost of land acquisition was overwhelmingly the main factor to be considered if financial considerations governed the decision. He goes further, and asserts that it was wrong in principle in the exclusive context of finance to prefer the CPO site unless there were overwhelming reasons for this, e.g., a gross disparity in costs which the difference involved in the construction of the plant could not properly be said to amount to.

For the Secretary of State and the Welsh Water Authority it is submitted that he was not called upon to enquire into the cost of the acquisition of land, and that it was reasonable for him and therefore a proper exercise of his discretion to determine the matter as he did.

Mr. Simon Brown conceded, however, that,if there was a glaring lacuna in the evidence and the considerations required to properly found a decision which is capable of being clarified without delaying the decision, the Secretary of State may be "Wednesbury" unreasonable if he does not make enquiries. In other words, he must be shown to have acted perversely.

In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority ands if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

I have come to the conclusion that his decision should not be upheld. A vital consideration was not enquired into, in my view. It was, therefore, left out of account in the exercise of the Secretary of State's discretion. The hope value of parts of the Miskin lands should not have been disregarded as it was, especially seeing that there was evidence of its possible existence. An enquiry into it would not, it seems to me, have delayed the decision by much time, if any. To fail to make that enquiry was a glaring omission going to a fundamental consideration.

For these reasons I, too, would allow this appeal.

LORD JUSTICE FOX:

I approach this case on the basis that the propriety of the Secretary of State's decision must be

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determined by reference to the facts as they existed at the date when he gave the decision. No argument to the contrary was addressed to us. Indeed, Lord Hooson, as I understood him, accepted that basis as correct. That concession was, in my view, rightly made. I see no ground upon which the propriety of the Secretary of State's decision in November 1978 can be determined by reference to an event occurring over three years later (i.e., the Secretary of State's letter of 12th March 1982 indicating that he was prepared to permit industrial development subject to conditions).

The principal matter raised by the appeal is what attitude the Secretary of State should have taken to the question of comparative acquisition costs. The matter was not considered at all at the public inquiry where the investigation of comparative costs was directed to the costs of construction. The Inspector records, however, in paragraph 263(a) of his Report: "All these lands are in the ownership of Sir Brandon or his children's Trustees. Gwern-y-Gedrych is no longer being actively farmed and such land as the Authority might require is "on offer" at existing use value." Gwern-y-Gedrych is the alternative site offered by Sir Brandon. Are the appellants now estopped from raising the point? At the date when the Secretary of State gave his decision there had already been three public inquiries. The opponents of the Order were not lacking in professional advice or, I think, in determination in their resistance to the confirmation of the Order. They had every opportunity and incentive to raise the matter. In my view, how. ever, there is no question of estoppel here. The Secretary of State's duty was to review the position in the light of all relevant considerations. He had a duty to direct his mind to the material questions and to take reasonable steps to inform himself. If the Secretary of State fails to discharge that duty I do not think that the landowner is precluded from complaining merely because he failed to see the point at an earlier stage. The Inquiry is not litigation, it is merely an aid to the ascertainment of the material facts and issues. It may well be that, in determining whether the Secretary of State has directed his mind to the right questions and has taken reasonable steps to inform himself, the court should have regard to what was, at the time the Secretary of State made his decision, common ground or unquestioned between the parties. Thus, where if at the Inquiry (a) the question of cost was in issue, (b) Gwern-y-Gedrych was on offer at existing use value, (c) it was then speculative whether the possibility of industrial development would materially increase land values and (d) the cm,. plainants put forward no case that the land values were materially increased by that possibility, it might be said that the Secretary of State could reasonably refer, without further inquiry, that the mere possibility of industrial development being permitted consequent upon the planning applications had no material effect upon land values. But, if that proposition is correct (and, as I mention later, I feel doubt as to what the impact of the applications on value might be), it is not, in fact, the situation which faced the Secretary of State when he made his decision. By that time he had received the letter from Sir Brandon's solicitors dated 20th October 1978. There are a number of passages in that letter to which I should refer. Thus, the letter in its opening paragraph states:

> "We understand that the report of the Inspector following the public inquiry which closed in December 1977 has been submitted to you and the purpose of this letter is to request that

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> this inquiry be re-opened before a decision is taken to enable certain matters which arose since the inquiry closed or were not placed before the inquiry to be fully and openly investigated". The matters thus referred to are set out in ten numbered paragraphs.
>
> In paragraph 1, after a reference to the applications for planning permission for industrial development, it is stated: "Your decision on the CPO should not, therefore, we submit with respect, be made until these two applications have been considered."

Paragraph 4 is in the following terms: "This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduced material questions of the relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry."

Finally, in paragraph 10, the letter states: "Our client considers that for these and other reasons the conclusions of the Secretary of State following the public hearing into the applications to develop the red and the green land should be available before the crucially relevant question of the choice of site for the sewage works can be determined. … It would, we submit be contrary to natural justice to announce a precipitate decision in favour of the CPO site before the industrial site hearings have taken their proper course and decisions have been taken."

There is no doubt that the main object of this letter was to ask that the Secretary of State re-open the inquiry or defer a decision upon the Compulsory Purchase Order until the planning applications had been determined. The Secretary of State considered that request and he rejected it. He was perfectly entitled to do so.

Whilst I think that the main object of the letter was as I have indicated, the provisions of paragraph 4 are, I think, of wider effect and are important. The paragraph asserts that the potential of the CPO site for industrial purposes introduced material questions of comparative land costs which had not previously been considered. It is true that the paragraph also states that "these issues cannot be resolved until the nature of the industrial development of the area has been decided" , but it also states that those issues "are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed" . In my view, paragraph 4 must be read as bringing to the attention of the Secretary of State the contention that the possibility of industrial use now introduced material factors of comparative land costs which should be taken into consideration before the Order was confirmed. That condition replaced the attitude adopted by Sir Brandon at the Inquiry.

The Secretary of State, in confirming the Order, accepted, in general, the conclusions and

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recommendations of the Inspector. In paragraph 11(v), the Secretary of State says:

> "Apart from the specific issues referred to in paragraphs 11 (i)–(iv) above the Secretary of State has also carefully considered and accepts his Inspector's general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the Inspector's assessment of the financial implications contained in the conclusions to the Report of the second reopened Inquiry concerning the Water Authority's proposed development and the cost comparison with the sites advanced by Sir Brandon Rhys Williams."

The Inspector had reported (see paragraph (xviii) of the Decision Letter:

> "(xviii) Mr. Shiell's assessment of the engineering *evidence* accompanies this report and is wholly accepted by me. It is to be expected that however hard promoters of different schemes may attempt to take a disinterested view they will tend s perhaps subconsciously, to maximise the difficulties of the rival site and minimise the problems of the one they favour. The truth often lies somewhere between. The manner in which Mr. Shiell has picked a scrupulous path through the various elements of the alternative schemes strikes me as being fair, rational and comprehensive. The result of that impartial *analysis* suggests that, compared with the CPO site, the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2.
>
> "(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site."

It appears, therefore, that the Inspector regarded construction cost as the determining factor and that the Secretary of State accepted that. But, if the increased cost of construction on the alternative site was a determining factor on the figures available to the Inspector, that was a circumstance which could be altered if in fact the cost of acquisition of the alternative site was much lower by reason of the beneficial offer made by Sir Brandon to sell the alternative site at existing use value coupled with the possibility of a large increase in value of the Compulsory Purchase Order site consequent upon the likelihood of industrial development.

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So the position is this. The Secretary of State decided in favour of the Compulsory Purchase Order on the basis of the increased construction costs if the alternative site were used. The letter of 20th October 1978, however, asserted that a new factor was introduced into the equation, namely comparative acquisition costs. The Secretary of State was bound to consider that. In paragraph 11(viii) of the Decision letter he states:

> "All representations received after the close of the Inquiries have been carefully considered. It has been concluded, however, that there is nothing contained therein which is not sufficiently covered by evidence already before the Secretary of State."

That statement does not *answer* the present problem. We have no reason to suppose that the Secretary of State ever had any evidence of comparative land costs in front of him. He does not appear to have received any at the Inquiries and there is nothing to suggest that he obtained any from any other source. I do not think it is sufficient to say that nobody suggested at the Inquiry that the difference in value was significant and that the making of the planning application in 1978 left the position as to industrial user as speculative as it was before the planning applications were made. So far as the Inquiry is concerned, the portance of the letter of 20th October 1978 is that it raised a new contention which, as the letter itself stated, was not considered at all during the Inquiry. That being so, I do not think that the fact that no point was taken at the Inquiry can be a reliable guide to the question of value at the time of the Inquiry. If it was not, then the fact that the planning position remained uncertain still does not give a reliable guide to value. I am not, in any event, satisfied on any evidence before us whether the making of the applications might not have affected value. Dealers in land might be influenced by applications made by major local landowners and the Land Authority for Wales.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

THE MASTER OF THE ROLLS:

The judgment is the appeal is allowed; the order is quashed accordingly.

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MR. HOWELL: May I respectfully invite your Lordships to allow the respondents their costs here and below and that the costs of Mr. Prest and Mr. Straker be taxed on a trustee basis?

THE MASTER OF THE ROLLS: You are asking for the costs against both the Welsh Water Authority and the Secretary of State?

MR. HOWELL: My Lord, yes.

LORD JUSTICE FOX:

Should they get their costs on a trustee basis? No doubt they can get any costs they do not recover out of the fund, but I think, so far as any other costs are concerned, it is just ordinary litigation.

THE MASTER OF THE ROLLS:

It is just ordinary litigation; it should not be anything special. When a case is ordinary litigation they get ordinary costs, do they not?

LORD JUSTICE FOX:

They can only indemnify themselves out of the fund

MR. HOWELL: It is certainly not a case about administration of the trust.

LORD JUSTICE FOX: As trustees, if they engage in proper activities to preserve the trust property, any expenses in respect of that can be recovered from the trust fund.

MR. HOWELL: My Lord, certainly.

THE MASTER OF THE ROLLS:

Let us hope you will get all your costs without bothering the fund about it. If they are properly taxed it seems to me that all the expenditure which you have incurred, if it is proper and reasonable – therefore, you ought to get your costs from the other side. Mr. Brown, is there any question about that?

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MR. BROWN: My Lord, none at all, provided, of course, the court does not make any special order as to costs to reflect the status as trustees of certain of the applicants. I gather the court is not minded to make such special order, so as to that I say nothing.

THE MASTER OF THE ROLLS: Have you anything to say about that, Miss Booth?

MISS BOOTH: My Lord, no. We chose to be separately represented on the last occasion and I cannot resist that application.

MR. BROWN: My Lord, I am instructed to make application to your Lordships to grant leave to appeal to the House of Lords.

THE MASTER OF THE ROLLS: More and more delay: it is about time these sewage works were constructed.

MR. BROWN: My Lord, certainly. It is obviously an important decision in many respects and, indeed, no doubt the Secretary of State for Wales and other depart. ments of the Crown wish to consider certain matters. I am particularly concerned with some aspects of the judgments of this court which are of a wider and more general application than merely to the instant appeal. My Lords, the two particular matters are the nature and extent of the Secretary of State's investigatory function – I use, I hope, the language of my Lord, Lord Justice Watkins – and, secondly, the correct approach to the question whether or not to confirm a compulsory purchase order, to what extent the balance must fall down decisively in favour of acquisition. There is the other question as to fresh evidence but, as I understand the judgments of this court, your Lordship is in a minority on that and perhaps, even in your Lordship's judgment, it is an obiter dictum expression of view. That is the application I am instructed to make.

THE MASTER OF THE ROLLS: What do you say about it, Mr. Howell?

MR. HOWELL: My Lord, obviously the question of the duty of the Secretary of State to make investigations is a point of general application. All that I would say is that all three of your Lordships' judgments

THE MASTER OF THE ROLLS: What seems to me at the moment is the urgency of the work being got on with. If this case goes to the House of Lords, goodness knows how long it will take. Nothing will be done and there it is.

MR. HOWELL: My Lord, it certainly will not be in the public interest that the construction of the sewage works be further delayed.

THE MASTER OF THE ROLLS: We refuse leave. So the appeal will be allowed with costs here and below.

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I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

Order: Appeal allowed with costs here and below. Leave to appeal to the House of Lords refused.

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Constabulary or to the general public interest. I am therefore of the opinion that they must be made available in this litigation.

Their Lordships accordingly voted that the order of the District Registrar be restored,

> " that the defendant do produce for inspection at his solicitor's office to the plaintiff and his advisers on reasonable notice the five documents. . . ."

Solicitors: *Field, Roscoe & Co. for Berkson & Berkson, Birkenhead; Markbys for Wayman-Hayles, Chester; Treasury Solicitor.*

F. C.

[HOUSE OF LORDS]

PADFIELD AND OTHERS . . . . . APPELLANTS

AND

MINISTER OF AGRICULTURE, FISHERIES AND FOOD AND OTHERS . . RESPONDENTS

Agriculture—Agricultural marketing—Milk marketing scheme—Complaint to Minister—Duty of Minister—Reference to committee of investigation—Agricultural Marketing Act, 1958 (6 & 7 *Eliz.* 2, *c.* 47), *s.* 19 (3).

Crown—Minister, determination by—Whether subject to review by courts—Marketing scheme—Complaint—Reference to committee of investigation—Discretion of Minister—Limitation—Public interest—Agricultural Marketing Act, 1958, *s.* 19.

The Agricultural Marketing Act, 1958, contained (inter alia) provisions relating to the milk marketing scheme. By section 19:

> "(3) A committee of investigation shall— . . . (*b*) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any . . . complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee. . . . (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated products, or is contrary to the interests of any persons affected by the scheme and is not in the public

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* *Present*: LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD PEARCE AND LORD UPJOHN.

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interest, the Minister, if he thinks fit to do so after considering the report—(*a*) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (*b*) may by order revoke the scheme; (*c*) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order. . . ."

Under the scheme, producers had to sell their milk to the Milk Marketing Board, which fixed the different prices paid for it in each of the eleven regions into which England and Wales were divided. The differentials reflected the varying costs of transporting the milk from the producers to the consumers, but they had been fixed several years ago, since when transport costs had altered. The South-Eastern Region producers contended that the differential between it and the Far-Western Region should be altered in a way which would incidentally have affected other regions. Since the constitution of the board, which consisted largely of members elected by the individual regions, made it impossible for the South-Eastern producers to obtain a majority for their proposals, they asked the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation and when he refused applied to the court for an order of mandamus.

Held, (Lord Morris of Borth-y-Gest dissenting) that the order should be made, directing the Minister to consider the complaint according to law.

Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act; this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere.

Julius v. *Bishop of Oxford* (1880) 5 App.Cas. 214, H.L.(E.) considered.

Decision of the Court of Appeal, post, p. 1003E; [1968] 2 W.L.R. 924, C.A. reversed.

APPEAL from the Court of Appeal (Diplock and Russell L.JJ., Lord Denning M.R. dissenting).

The Minister of Agriculture, Fisheries and Food and the Milk Marketing Board (the present respondents) appealed from an order of the Divisional Court of the Queen's Bench Division dated February 3, 1966, whereby the court made an order of mandamus ordering the Minister to consider an application to him by George Padfield, Geoffrey Loveys Brock and Henry Steven (the present appellants), to refer a complaint by them to the committee of

investigation under the Agricultural Marketing Act, 1958, "according to law and upon relevant considerations to the exclusion of irrelevant considerations." The Court of Appeal having allowed the appeal,[1] the present appellants appealed to the House of Lords.

Since 1933 the Milk Marketing Scheme (Approval) Order, 1933 (S.R. & O. 1933, No. 789), as amended by the Milk Marketing Scheme (Amendment) Orders, 1936, 1937, 1939, 1950 and 1955, had been in operation in England and Wales. Thereunder producers were bound to sell their milk to the Milk Marketing Board, which periodically fixed the prices to be paid to the producers. England and Wales was divided into eleven regions. All the producers in each region received the same price but the price varied from region to region. One reason for this was that the cost to the board of transporting milk from the producers' farms to the centres of consumption was greater in some regions than in others. The lowest price was paid to producers in the Far-Western Region the highest to those in the South-Eastern Region. In the other nine regions the prices varied between the two. The present differentials were fixed several years ago when transport costs were much lower. For about ten years the South-Eastern producers had been unsuccessfully urging the board to increase the differentials. The differential between the South-East and the Far-West was 1·19d. per gallon. South-Eastern producers contended that it should be 3½d. per gallon. Since the total sum available to the board to pay for milk bought in all regions was fixed each year, giving effect to the contention of the South-Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far-West and several other regions would get less.

The board is composed of 12 members from the regions (two from the North-Western Region and one from each of the others), three members elected by all the producers and three appointed by the Minister. The board acts by a majority of its members. The experience of the past 10 years was said to show that the South-Eastern producers could not hope to get a majority on the board for their proposals. With a view to getting the Minister of Agriculture, Fisheries and Food to take action under section 19 of the Agricultural Marketing Act, 1958, the present appellants, who were office bearers of the South-Eastern regional committee, met officials of the Ministry on April 30, 1967.

On May 1, 1964, John Henry Kirk, an Under Secretary at the Ministry, wrote to the appellant Padfield the following letter:

[1] Post, p. 1003E; [1968] 2 W.L.R. 924.

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"My colleague Mr. Jones-Parry and I had the opportunity of discussing with you a day or two ago a matter which you first raised with the Ministry at the end of January, namely, what means the Ministry could suggest for investigating and remedying the grievance felt by your committee concerning the regional price of milk in the south-east.

"2. We explained that, as it seemed to us, the only procedure available would be for a group of producers in the south-east to formulate a complaint within the terms of section 19 of the Agricultural Marketing Act 1958, and request the Minister to refer this to the committee of investigation. We made it clear, however, that the Minister is not bound so to refer any complaint and has discretion to decide whether to do so.

"3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable.

"4. The reasons which led us to this conclusion were explained to you as follows: (*a*) The guarantee given to milk producers under the Agriculture Acts is a guarantee given to the board on behalf of all producers. The Minister owes no duty to producers in any particular region, and this is a principle that would be seriously called into question by the making of an Order concerned with a regional price; (*b*) Such action would also bring into question the status of the Milk Marketing Scheme as an instrument for the self-government of the industry and such doubt would also, by extension, affect the other Marketing Schemes as well; and (*c*) It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales.

"5. I wish to point out that the statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

On June 18, 1964, the solicitors of the Milk Marketing Board wrote to the solicitors of the present appellants the following letter:

"While your clients contend that they ought to have a bigger proportion of the available money, there are other producers elsewhere who contend that your clients ought to

have a smaller proportion. The proportions actually determined by the board are the result of collective decisions of the board and do not necessarily represent the view of any one producer or of the producers in any one county or region. . . . The board have the duty of determining prices and they have done so to the best of their ability. They consider that as they have acted within their powers and in good faith, an arbitrator appointed under paragraph 93 of the scheme has no power to substitute his view (if it differs from the board's) of what those prices should be. . . . Your clients cannot receive more unless some others receive less, and what is really involved is the whole determination of prices throughout the country. Paragraph 93 of the scheme is not intended to transfer the board's duty of determining prices to an arbitrator at the instance of a particular group of producers."

A letter dated January 4, 1965, from the solicitors of the present appellants to the Minister of Agriculture, Fisheries and Food said:

"3. The complaint is of certain acts and/or omissions in prescribing (under paragraph 64 of the Scheme) the terms on which and the price at which milk shall be sold to the board, in that the board should, but do not, take fully into account variations as between producers in the costs of bringing their milk to a liquid market whether such costs are incurred or not.

"4. These acts and/or omissions of the board (*a*) are contrary to the proper and reasonable interests of the producers in the South-Eastern region and of other producers near large liquid markets, all of whom are persons affected by the scheme, and (*b*) are not in the public interest.

"5. At present producers' net prices show a range of 1·19d. per gallon between regions while the true marketing costs in 1961/2 had a range of 3·37d. per gallon between regions, the South-Eastern region having the lowest costs. Under the present arrangements the range of net prices is fixed and does not vary from year to year, whereas the trend is for the marketing costs to widen: the complainants calculate that the 1963/4 range was 3·66d. per gallon, the costs of the South-Eastern region still being the lowest. As between individual producers the range of true marketing costs is even greater.

"6. *As to* (*a*) *in paragraph* 4 *above.*

"It is contrary to the reasonable and proper interests of the producers referred to in paragraph 4 above that (in addition to the other contributions they properly make under the Scheme) they should make a contribution to the marketing costs of reaching the liquid markets from the more distant parts of the country which are properly attributable to producers in those more distant parts and which should be borne by such producers.

"7. *As to* (*b*) *in paragraph* 4 *above.*

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"(i) The cross-subsidy set out above has caused or contributed to and will cause or contribute to an unreasonable alteration in the balance of production, reducing growth in the nearer areas and increasing it in the more distant. This has tended and will tend to increase the total marketing costs to the public detriment. (ii) It is not in the public interest to continue a system of pricing which unduly favours one set of producers as against others."

In reply the private secretary to the Minister wrote on March 23, 1965, the following letter:

"The Minister has asked me to reply to your letter of January 4 in which you made a complaint on behalf of Messrs. G. Padfield, G. L. Brock and H. Steven, against the Milk Marketing Board, and requested that the complaint should be referred to the committee of investigation. The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

In reply to a further letter the following letter from the Ministry dated May 3, 1965, and signed by A. L. Irving stated:

"I am directed to reply to your letter of April 9 addressed to the Minister's private secretary. You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the Milk Marketing Scheme, in which all registered producers participate and which governs the operations of the board."

On June 18, 1965, the present appellants applied by motion for the leave of a Divisional Court of the Queen's Bench Division to apply for an order of mandamus commanding the Minister (1) to refer the complaint to the committee of investigation or (2) to deal effectively with the complaint on relevant considerations only to

the exclusion of irrelevant considerations. In an affirmation dated January 19, 1966, the Minister stated as follows:

> "3. In considering the applicants' application I read among other papers the letter signed by Mr. J. H. Kirk and dated May 1, 1964, . . .
>
> "4. Before reaching my decision not to refer the applicants' complaint to the committee of investigation I considered all the matters put before me on behalf of the applicants in support of their application.
>
> "5. I came to my decision for the reasons indicated in the letters dated March 23, 1965, and May 3, 1965, . . . namely, that I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

The Minister and the board appealed from the order of the Divisional Court of February 3, 1966.

Sir Dingle Foot, Q.C., S.-G. and *Peter Langdon-Davies* for the Minister of Agriculture, Fisheries and Food.

David Kemp for the Milk Marketing Board.

D. A. Grant Q.C. and *Alistair Dawson* for the applicants, George Padfield, Geoffrey Loweys Brock and Henry Steven.

July 27, 1966. The following judgments were read.

LORD DENNING M.R. We are here concerned with the marketing of milk. It is regulated by the Milk Marketing Scheme and administered by the Milk Marketing Board. The dairy farmers of England and Wales sell their milk to the Milk Marketing Board. The lorries of the board pick up the churns of milk at the farm gate and carry it to depots. The price is fixed by the board for milk delivered at the farm gate. In order to fix the price, England and Wales are divided into eleven regions. The price varies from region to region. But all the farmers in any one region are paid the same price per gallon at the farm gate.

The dairy farmers in the South-Eastern region are paid a higher price for their milk than the dairy farmers in the Far-Western region. The reason is because they are much nearer to the great population of London. If they were free of control, they would be selling their milk to London at a price delivered in London, and would have to bear their own costs of transport. The costs of the Sussex farmers in transporting their milk to the London market would be much less than the costs of the Cornish farmers,

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and their net receipts would be correspondingly higher. The board recognise this by paying a "differential" to the South-Eastern farmers to compensate them.

The South-Eastern farmers, nearly 5,000 of them, complain that the existing "differential" is too low. It was fixed long ago by the Minister during the war under the regulations then in force. It was then fixed at 1·19d. per gallon, and has remained the same ever since. The value of money has altered and costs have increased. The actual difference in costs is 3½d. per gallon. The South-Eastern farmers claim that the differential should be increased to recognise this increase. They pray in aid the report of two committees. First, the Cutforth Committee, which was set up by the Minister, and reported in 1936:

> "It seems to us essential as a governing principle that transport charges should be allocated among producers in such a way as to secure differentials in net returns which are related to actual proximity to liquid milk consuming centres."

Second, the Davis Committee, which was set up by the board itself and reported in 1963: "We recommend that under present conditions the total range of prices at the farm gate should be 2·4d. per gallon as against 1·19d. as at present." The Davis Committee divided the country into five zones, stepping up the differentials in five stages by 0·6d. per gallon. For instance, Cornwall and Devon should get the basic price; Somerset 0·6d. more; Wiltshire and Dorset 1·2d. more; Hampshire and Berkshire 1·8d. more; Kent and Sussex and the Home Counties 2·4d. more per gallon than the basic price.

In view of these favourable reports, the South-Eastern dairy farmers have pressed the Milk Marketing Board to increase the prices payable to them. But the Milk Marketing Board have refused. All the moneys received for milk go into one pool. If the South-Eastern farmers got more, the Far-Western farmers would get less. An increase in differential would benefit the South-Eastern farmers and some of the nearby regions, but would harm the Far-Western and other remote regions. Under the Milk Marketing Scheme, the board consists of 17 or 18 members, 12 being regional members, three being special members elected by all producers, and two or three appointed by the Minister. It looks as if those pressing for an increase in differential can always be out-voted by those who desire no change.

Seeing that they could not persuade the board to make a change in the differential, the South-Eastern farmers complained to the

Minister under section 19 (3) of the Agricultural Marketing Act, 1958. Under that section the Minister has power to direct that a complaint be considered by the committee of investigation. The committee of investigation is a standing statutory committee under a legal chairman, which is set up especially to consider complaints affecting the milk industry. The Minister refused to refer the complaint to the committee. The South-Eastern farmers now come to the court complaining of the conduct of the Minister. They say that in refusing he took extraneous matters into consideration which he ought not to have done.

The key words of section 19 (3) are that

> "A committee of investigation shall . . . be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any complaint made to the Minister as to the operation of any scheme."

If the Minister does refer a matter to the committee, its task is shown by section 19 (6). It has to consider whether any provision of the Milk Marketing Scheme, or any act or omission of the Milk Marketing Board, is "contrary to the interests of any persons affected by the scheme and is not in the public interest." The rest of the section and the regulations under it show that once a matter is referred to a committee of investigation, it is to be investigated in a fair and impartial manner. The committee can hear witnesses. It can call for accounts and information from the board. It can hear other witnesses not called by the party. It must hear not only the complaint but also the board. The committee has then to make its report: and its conclusions have to be published. If the committee report that the board ought to take steps to remedy the matters of complaint, the board can themselves take those steps: and if they do not do so, the Minister can order them to rectify the matter.

Applying these provisions to the present case, the South-Eastern dairy farmers are clearly "persons affected by the scheme." They have made a complaint to the Minister "as to the operation of the scheme." The Minister therefore has power to refer it to a committee of investigation. Suppose he did so and that the committee reported that the present price differential is contrary to the interests of the South-Eastern dairy farmers, and is not in the public interest. The report would no doubt be considered by the board. If the board did not take steps to remedy the position, the Minister could step in and order them to rectify it.

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It is plain to me that by these provisions Parliament has provided machinery by which complaints of farmers can be investigated by a committee which is independent of the board and by which those complaints, if justified, can be remedied. No other machinery is provided. This case raises the important question: How far can the Minister reject the complaint out of hand? Is the Minister at liberty in his unfettered discretion to withhold the matter from the committee of investigation and thus refuse the farmers a hearing by the committee? And by refusing a hearing, refuse a remedy? Mr. Kemp, who appeared for the Milk Marketing Board, contended that the Minister need not consider the complaint at all. He could throw it into the waste paper-basket without looking at it. The Solicitor-General did not support this argument. It is clearly untenable. The Minister is under a duty to consider every complaint so as to see whether it should be referred to the committee of investigation. I can well see that he may quite properly reject some of the complaints without more ado. They may be frivolous or wrong-headed: or they may be repetitive of old complaints already disposed of. But there are others which he cannot properly reject. In my opinion every genuine complaint which is worthy of investigation by the committee of investigation should be referred to that committee. The Minister is not at liberty to refuse it on grounds which are arbitrary or capricious. Nor because he has a personal antipathy to the complainant or does not like his political views. Nor on any other irrelevant ground.

It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason.

But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives bad reasons? I do not agree. This is the only remedy available to a person aggrieved. Save, of course, for questions in the House which Parliament itself did not consider suitable. Else why did it set up a committee of investigation? If the Minister is to deny the com-

plainant a hearing—and a remedy—he should at least have good reasons for his refusal: and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that the Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him—or, conversely, has failed, or must have failed, to take into account considerations which ought to have influenced him—the court has power to interfere. It can issue a mandamus to compel him to consider the complaint properly. That was laid down by two of my predecessors in this place: Lord Esher M.R. in *Reg.* v. *Vestry of St. Pancras*,[1] said of a body who were entrusted with a discretion:

> "... they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

Lord Greene M.R., in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[2] said[3]:

> " . . . a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

That passage has been repeatedly cited with approval in the House of Lords: see *Smith* v. *East Elloe Rural District Council*,[4] by Lord Reid[5]; *Fawcett Properties Ltd.* v. *Buckingham County Council*.[6]

Applying these principles to this case, the Lord Chief Justice held that this was a case where the courts should interfere. He said that the complaint by the South-Eastern farmers was

> " a bona fide complaint and one which would be likely in the light of past history to be found to be justified and further that the conduct of the board in this regard would be likely to be held to be one which is not in the public interest."

The Solicitor-General criticised that passage as not being

[1] (1890) 24 Q.B.D. 371, 375–376; 6 T.L.R. 175, C.A.
[2] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.
[3] [1948] 1 K.B. 223, 229.
[4] [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.).
[5] [1956] A.C. 736, 762.
[6] [1961] A.C. 636, 660; [1960] 3 W.L.R. 831; [1960] 3 All E.R. 503, H.L.(E.).

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warranted by the evidence. It may be that the Lord Chief Justice put it a little too high in using the word "likely." But the evidence at least discloses this. It shows that this complaint by the South-Eastern farmers was a genuine complaint which was worthy of investigation by the committee of investigation. It has the support of a committee set up by the board itself. And yet the Minister has not referred it to the statutory committee. Why not? The reason was disclosed at a meeting which the South-Eastern farmers had with the officials of the Ministry on April 28, 1964. The officials said that, if a complaint was made, the Minister would refuse to refer it to the committee of investigation. They set out their reasons in a letter of May 1, 1964, which had been carefully prepared in advance:

> "In considering how to exercise his discretion, the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred, and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration . . . that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable. . . . The statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

The one reason disclosed by that letter is that, if the committee were to uphold the complaint, the Minister would be expected to give effect to the committee's recommendations, and that he was unwilling to do. By whom would he be expected? I presume he means by Parliament or, at any rate, by public opinion. See what this comes to! The Minister does not want an inquiry lest Parliament, or the public, would expect him to act on the report. It means this: Even though the complaint was justified on the merits, and even though the committee recommended that it be rectified, the Minister was not prepared to rectify it.

I do not think that was a proper approach to the complaint. The Minister ought not to make up his mind in advance. He could not tell what evidence the committee might have before them, or what reasons might lead to their recommendations. He ought at least to be prepared to consider their report with an open mind. He ought not to shut down an investigation simply because he might be expected to act on the recommendations.

Following on that letter, the South-Eastern farmers on January 4, 1965, made an official complaint to the Minister. On March 23, 1965, the Minister refused to refer it to the committee of investigation. He said:

> "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is, of course, one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event, the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself."

Following on that reply, the complainants' solicitor pressed the Minister further. In particular, by a letter of November 4, 1965, he asked the Minister if he had excluded from his mind the considerations set out in the 1964 letter. The Minister never gave a direct answer to that question. He never said he had excluded those considerations from his mind. All he did was to make an affidavit on January 19, 1966, in which he said: "I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

In view of the Minister's failure to reply to the specific question asked by the complainant's solicitor, I am prepared to infer, and do infer, that he was influenced by the considerations set out in the letter of May 1, 1964, as well as those in his later letter and affidavit.

Taking the reasons which the Minister has given for his refusal, I take first the consideration in the letter of May 1, 1964, that if the complaint were upheld, he would be expected to make a statutory order. That was a bad reason which ought not to have influenced him. Second, I take the consideration that the complaint raised wide issues as a ground for refusing an investigation. That was a bad reason. The width of the issue would be a ground for holding an investigation, not for refusing it. The committee could hear the views of the producers in other regions. Third, I take the Minister's statement that it was a matter for the decision of the Milk Marketing Board, and not for him. I think he was thereby mistaking his powers. He has the ultimate word on prices. If the board regulates prices in a way which is contrary

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to the public interest, the Minister can of his own motion intervene and make an order to rectify the position; see section 20 (2). Likewise, when a committee of investigation reports that the board is fixing prices in a way which is contrary to the interests of farmers, and not in the public interest, the Minister has power to make an order to rectify this position: see section 19 (6) (*c*).

In my opinion, therefore, the Minister has been influenced by reasons which ought not to have weighed with him. He has, therefore, not properly exercised his discretion. An order of mandamus should go to direct him to exercise it properly. I agree with the Lord Chief Justice and would dismiss this appeal.

DIPLOCK L.J. (read by Russell L.J.): The Solicitor-General concedes that the words in section 19 (3) of the Act: "if the Minister in any case so directs" impose upon the Minister a duty to consider any complaint made to him as to the operation of any scheme, but contends that it leaves him with complete discretion to decide whether he will refer the complaint to a committee of investigation for consideration and report.

The concession as to the Minister's duty to consider a complaint was, in my view, rightly made. Counsel for the Milk Marketing Board, however, whose locus standi in the matter has not been made clear to me, argues that the Minister is entitled to put any complaint into his wastepaper basket unread for he is under no duty to consider it. Consequently the High Court has no jurisdiction to order him by mandamus to do so. The imposition of a duty by a statute does not require any particular form of words. It is perhaps unusual for a duty to be imposed in respect of an act mentioned in a mere protatic phrase such as that under consideration in the present statute. But even such a phrase can do so if the subject matter with which it deals compels the conclusion that Parliament must have intended to impose a duty in respect of the doing of that act. Here the subject matter is a complaint as to the operation of a scheme for which subsection (3) and the subsequent subsections are intended to provide a remedy. The obtaining of a direction by the Minister is a condition precedent to the complainant's access to that remedy. In my view it is a necessary implication that the Minister is under a duty to make up his mind "in any case" whether the complaint is such that the complainant ought to have access to that remedy and is consequently under a duty to consider the complaint for that purpose.

A But it is important to bear in mind first that the sole purpose of his consideration is to decide whether the complaint is one which he thinks ought to be dealt with by the procedure of a committee of investigation under the section, and secondly that it is to his discretion and not that of anyone else that Parliament has entrusted the decision whether or not any particular complaint B should be so dealt with. His decision is administrative, not judicial, and in reaching it he may lawfully take into consideration its possible effects on general policy and other people. He need not confine himself to the merits of the particular case made by the complainant. Indeed, save in so far as may be necessary to satisfy himself that there is something in the case to be investigated, he C is not at this stage concerned with the merits of the case at all. Those will be for the committee of investigation to consider if he decides to refer the case to them.

The Minister need give no reasons for his refusal to refer a complaint for consideration by a committee of investigation. One would expect him as a matter of courtesy to give some reason for D his decision whenever, as in the present case, a bona fide complaint came from a responsible source. But, since he need give none, he need not give all—a matter to be borne steadfastly in mind if his decision is attacked in the High Court for failing to have regard to some relevant matter. For the High Court would only discourage such courtesy and so would stultify its own function as guardian of the rule of law in the administrative field if it E were to treat the reasons given by the Minister for his decision as if they were the written award of an arbitrator to be meticulously examined for some mistake or omission which might lend colour to a suggestion that he had erred in law. Again, since the decision is administrative, the language used for communicating the F Minister's reason for it is not lawyer's jargon but Civil Servicese. And we must so read it, asking ourselves what would ordinary laymen, in this case dairy farmers, understand to be the reasons why their request had been turned down.

And so it is in this spirit that I turn to the reasons which were G given by the Minister in the present case. The grounds upon which the High Court is justified in interfering by prerogative order or by declaration in an administrative decision are now well settled. I do not find it necessary to refer to any other authority than that of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[7] which has already been cited by the Master of the

[7] [1948] 1 K.B. 223, 228.

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Rolls. I agree too with the Master of the Rolls that, having regard to the terms of the Minister's own affidavit and what had gone before it, the proper inference is that the Minister was influenced by the considerations referred to in Mr. Kirk's earlier letter of May 1, 1964, as well as those stated in the formal letters of March 23 and May 3, 1965. All three letters make it clear that the Minister was directing his mind to the "suitability" of the complaint for being dealt with by the procedure of reference to a committee of investigation under section 19 of the Act. And this was right—for that was all that he had to decide at that stage. Unlike the Board of Education in *Rex* v. *Board of Education*[8] he asked himself the right question.

The reasons which he gave for regarding the complaint as unsuitable for this procedure have been subjected to close analysis both in the Divisional Court and in the argument before us. For reasons I have stated, I do not think that this is the right approach. Having regard to the past history of the dispute between the South-Eastern region and the Marketing Board, all of which was well known to the Ministry as well as to the complainants, the complainants would have understood the letters as saying:

> "Your complaint raises the whole question of what (if any) differential prices should be paid by the Milk Marketing Board to producers in the various regions. This is a question which the Minister considers should be decided by the board which is composed for the most part of representatives elected by the producers in the various regions throughout the country. It is a question in which he thinks he should not interfere. If the complaint were referred to a committee of investigation for consideration and report, it would involve the risk that the committee might uphold the complaint and the Minister would be expected to make a statutory Order overruling the board's decision. This, for a number of reasons indicated in Mr. Kirk's letter of May 1, 1964, he would not be prepared to do. He therefore thinks it better not to refer the complaint to a committee of investigation either."

This seems to me to be a policy decision. Subject to his accountability to Parliament, it is for him and no one else to decide to what extent he should exercise his limited powers of control over the exercise by marketing boards of their powers under marketing schemes; and it is for him and no one else to decide whether he will permit a complainant to set in motion the statutory machinery which may result in a report adverse to the

[8] [1910] 2 K.B. 165, C.A.

board, undermine its authority and put the Minister himself under pressure to exercise control over a matter which he thinks is best left to the board.

In his leading judgment in the Divisional Court, the Lord Chief Justice has dissected the reasons given in the letters into three. In the reverse order to that in which they are dealt with in his judgment, they are: (a) that the question of regional price structure raised by the complaint was one to be dealt with by the marketing board itself; (b) that the complaint raised wide issues going beyond the immediate concern of the complainants, and (c) that the Minister himself would not take action on the report of the committee of investigation if it were adverse to the board.

As regards (a), a stress is laid by the Lord Chief Justice and by Sachs J. on the fact that the South-Eastern region, whom the complainants represent, have only a minority representation on the board. Like any other region, they can be outvoted upon matters where their interests conflict with those of the majority. That is how "normal democratic machinery" works. Whether it is good machinery or not, it is one which Parliament has approved as suitable for the nation as well as for marketing boards, and, with great respect, I cannot accept that the Minister, by referring to the operations of the board as being governed by the normal democratic machinery, was overlooking the fact that the complainants had only a minority representation on the board and minorities can be outvoted.

As regards (b), the Divisional Court have inferred, from the Minister's reference to the complaint as raising wide issues which affect the interests of other regions and the regional price structure as a whole, that he had misconstrued the Act in that he must have thought that the Act prohibited the reference to a committee of investigation of complaints which raised wide issues and affected other persons, and likewise prohibited him from making statutory orders about the regional price structure. Again, and with respect, I can see no good ground for these inferences. It is one thing to think that you have no power to refer a complaint because it raises wide issues and affects other persons; it is another thing to regard that as one reason why it may be impolitic to refer a particular complaint. It is one thing to think that you have no power to make statutory orders about regional prices; it is another to think it impolitic to do so. The former are mistakes of law; the latter are decisions of policy. The letter of May 1, 1964, makes it clear that the Minister, as one would expect, knew quite well

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that he had the necessary powers but that as a matter of policy he did not intend to exercise them in respect of the particular complaint of the South-Eastern region. And policy is for him, not for the court.

It is reason (c) that has given me most pause. The Divisional Court pointed out that where a complaint is made about an act or omission of the board, section 19 confers upon the Minister two discretions, first, a discretion whether or not to refer the complaint to a committee of investigation and, secondly, but only if the committee report that the act or omission is contrary to the interests of any persons affected by the scheme and not in the public interest, a discretion to order the board to take such steps to rectify the matter as may be specified in the order. As the letter of May 1, 1964, shows, the Minister, in deciding how to exercise his first discretion whether to refer the complaint to a committee of investigation, took into account the fact that he would be unwilling to exercise his second discretion by making an order on the board if the occasion for the exercise of that discretion should arise as a result of the committee's report. In so doing the Divisional Court held that he erred in law because: "The exercise of the first discretion . . . is . . . wholly independent of what view the Minister may take if and when he comes to exercise the second discretion." This seems to me to be applying judicial concepts to administrative decisions. Such decisions must take account of consequences remote as well as immediate, of risks as well as certainties. The Minister is certainly entitled and, as I think, ought, to ask himself: "If I refer this complaint to a committee of investigation, what may that lead to?" One possibility is that it will lead to a report upholding the complaint and critical of the board's action in a sphere in which the Minister thinks it should be left to make its own decisions with which he should not interfere. And if he does not intend in any event to interfere, that is, to exercise his second discretion by making an order on the board, this is, in my view, a relevant consideration for him to take into account when deciding whether or not to refer the complaint to a committee of investigation at all.

What has given me most concern is the phrase in the letter of May 1, 1964: ". . . if a complaint were so referred and the committee were to uphold it, he [the Minister] in turn would be expected to make a statutory order to give effect to the committee's recommendations." If this really meant expected by Parliament, I think

it would disclose a basic mistake of constitutional law, for it would avow an attempt to elude Parliamentary control of policy. But the phrase does not identify the contemplated holders of the expectations. It may have been intended to refer to the complainants, the opposition in Parliament or the press, and it would not be right to put the worst construction on it.

It follows that I do not think that any of the reasons which have been advanced would justify this court in ordering the Minister to reconsider the complaint. It has not, in my view, been shown either that he did not exercise his discretion, or that in doing so he misconstrued his powers or duties under the Act, or that he took into his consideration any irrelevant matters or omitted to consider any relevant matters. It seems to me that the unexpressed major premise of the Divisional Court's judgment is that the Act confers upon persons affected by a marketing scheme a right to have any bona fide complaint as to the operation of the scheme considered by a committee of investigation. But this the Act does not do. The only right is to have referred to the committee such complaints as the Minister in his discretion thinks should be so referred. He did not think that this one should, and, since it has not been shown that in so thinking he erred in law, there is an end of the matter.

For my part I would allow this appeal.

RUSSELL L.J. I had prepared in outline a judgment arriving at the same conclusion as that of Diplock L.J. and for the same reasons. Ordinarily, since we differ from the Master of the Rolls and the Divisional Court, I would deliver a separate judgment; but I do not think I would express my opinions on this case better or more cogently than has Diplock L.J., and therefore content myself with agreeing that the appeal should be allowed.

Appeal allowed with costs in the Court of Appeal and in the Divisional Court.
Leave to appeal.

Solicitors: *Solicitor, Ministry of Agriculture, Fisheries and Food; Ellis & Fairbairn; Biddle, Thorne, Welsford & Barnes.*

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The applicants appealed.

The hearing of the appeal before the Appellate Committee proceeded on July 18, 19 and 20, 1967. On the last day it was adjourned to a date to be fixed to enable the appellants to raise in addition to the questions set out in their printed case the following question for decision in this appeal:

> "Whether on the true construction of section 19 of the Agricultural Marketing Act, 1958, the first respondent [the Minister] was under a duty to refer the appellants' complaint dated January 4, 1965, to the committee of investigation appointed by the Minister under that section."

Supplemental cases were filed on behalf of the appellants and the respondent Minister and the hearing of the appeal proceeded on December 18, 19 and 20, 1967.

T. M. Eastham Q.C. and *Alistair Dawson* for the appellants. Three questions arise here: (1) Was the Minister bound to refer the complaint to the committee of investigation under section 19 (3) of the Agricultural Marketing Act, 1958? (2) Can the court intervene to control the exercise by the Minister of the power conferred on him by the statute? (3) Should the court intervene in the present case?

The appellants say here that the acts or omissions of the board were contrary to the interests of persons affected by the Milk Marketing Scheme within section 19 (6) of the Act.

The words "if the Minister in any case so directs" in section 19 (3) (*b*) in relation to the reference of a complaint to the committee of investigation are admittedly permissive only and, if section 19 is to be construed as imposing a duty on the Minister, that duty must be derived aliunde. In some cases a duty exists to exercise a power, as distinguished from a complete discretion. Here a duty can be spelt out of the Act.

In *Julius* v. *Bishop of Oxford*[1] Lord Selborne said in relation to the words "it shall be lawful" that their meaning is the same whether or not there is a duty to use the power and that they never in themselves confer an obligation. Lord Cairns L.C.[2] laid down the tests to determine whether discretionary words imposed such a duty, so that the enabling words are compulsory: (1) The power has to be deposited with a public officer, (2) to be used for the benefit of persons (3) who are specifically pointed out and

[1] (1880) 5 App.Cas. 214, 235, H.L.(E.). [2] Ibid. 225.

(4) with regard to whom a definition is given of the circumstances in which its exercise can be called for.

In the present case the Minister is a public officer, on whom a duty of supervision has been placed. The power is not conferred for his own benefit. The persons pointed out are the persons affected by the Scheme. The power is to be exercised when a complaint is made which could not be considered by a consumers' committee (see section 19 (3) (*b*)). The present case fulfils all these conditions and a duty is imposed on the Minister to refer such a complaint. See also in the *Julius* case [3] Lord Cairns, Lord Penzance and Lord Selborne. Reliance is placed (1) on the compulsory nature of the Scheme; (2) that section 19 is designed for the redress of grievances and (3) that it is the sole means of obtaining redress: see what Lord Denning M.R. said in the Court of Appeal.[4] It is plain from section 30 that the Minister has considerable responsibilities under the Act. There is a duty on the Minister to refer every genuine and substantial complaint, (i.e., one which is not trivial, frivolous or repetitive). The appellants have a right to have it referred.

In the case of *Julius* [5] only some words of Lord Blackburn create some difficulty, but the cases on which he was relying show that he was using the word "right" in an unusual way, e.g., *Alderman Backwell's Case*.[6] The right in the present case is that of a private individual whose rights are affected.

Rex v. *Steward of Havering Atte Bower* [7] is slightly analogous to the present case. The only two fairly recent cases are *Rex* v. *Mitchell* [8] and *In re Shuter*.[9]

Section 20 of the Act is wholly different from section 19, which envisages a complaint by someone whose rights are being adversely affected by the Scheme. He must go before the committee of investigation to establish that he is so affected and that it is not in the public interest that the Scheme should continue in its present form. The only provision in the Act under which the appellants can have their complaints investigated is section 19. Under section 20 they have no right at all to make the Minister move. In the circumstances the Minister cannot say that he will not consider the merits or allow anyone else to do so. Mandamus should issue.

[3] 5 App.Cas. 214, 222–223, 227, 229–230, 235.
[4] Ante, p. 1006A.
[5] 5 App.Cas. 214, 241, 244.
[6] (1683) 1 Vern. 152.
[7] (1822) 5 B. & Ald. 691.
[8] [1913] 1 K.B. 561, 567–568; 29 T.L.R. 157, D.C.
[9] [1960] 1 K.B. 142; [1959] 3 W.L.R. 652; [1959] 3 All E.R. 481, D.C.

If the House of Lords holds that this is not a case of a discretion coupled with a duty, the question arises in what circumstances can the court intervene to control the exercise of a pure discretion. Reliance is placed on what Lord Denning M.R. said in the Court of Appeal [10]; see also Diplock L.J.[11] The court can intervene if the Minister has been influenced by extraneous considerations or has failed to take into account considerations which should have influenced him. On this question there is no real difference between the parties.

As to the third question, the Minister has misdirected himself as to the true construction of section 19, which must include complaints made by producers. On the documents it is clear that the Minister took into account irrelevant considerations. In the circumstances there is no hope of the complaint being dealt with by the board under the normal democratic procedure, which here produced a situation not only unfair to the appellants but contrary to the public interest.

The Minister failed to exercise his discretion according to law because his refusal to refer the complaint was caused or influenced by his having misdirected himself in law and taken into account erroneous and irrelevant considerations.

Paragraph 3 of the letter of May 1, 1964, sets out irrelevant matters to which, it is said, the Minister would address his mind. In the letter of March 23, 1965, an objection to referring the complaint is said to be that it "raises wide issues." That is not a proper consideration. It is also stated that the issue is of a kind "which properly falls to be resolved through the arrangements . . . within the framework of the Scheme itself." But this approach ignores the Minister's powers under section 19 (6) (*c*) and section 20 (2).

Alistair Dawson following. In references to "the public interest" there is a difference of phrasing between section 19 (6) and section 20 (2). In the latter case what must be considered is whether the matter is harmful to the public interest; in the former case what is being considered is something which is not actively required by the public interest. As to "public benefit," see *In re Coats' Trusts*,[12] affirmed in the House of Lords (*Gilmour* v. *Coats* [13]). The difference indicates that the complainant will succeed if he shows that his interests are detrimentally affected.

[10] Ante, p. 1007A.
[11] Ante, p. 1011G.
[12] [1948] Ch. 340, 344–345; 64 T.L.R. 193; [1948] 1 All E.R. 221, C.A.
[13] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848, H.L.(E.).

The Milk Marketing Board are always parties to such proceedings as this. If a general direction were given to them they would be able to work out the proper payments on the new principles.

Section 30 of the Act gives the Minister a general power of supervision. He cannot say that in respect of one class of operations he will not interfere with the board on pricing, no matter how unjust the situation may be. That would deprive producers of the protection which the Act gives them.

Sir Dingle Foot Q.C. and *Peter Langdon-Davies* for the respondents. The first question is whether on the true construction of section 19 the Minister was under a duty to refer this complaint to a committee of investigation.

The submissions for the appellants represent a complete misconception of the Minister's duties in relation to the board.

The statutory regulation of agricultural marketing starts with the Agricultural Marketing Acts, 1931 and 1933. These Acts give a considerable degree of self government to the producers who elect the marketing boards. The boards are given extensive powers to regulate sales and determine prices to farmers and even to impose penalties. The Minister has very limited powers of intervention: see section 1 (1) of the Act of 1958. The first move must come from the producers themselves; see also section 2 (2), (3) and (7), section 4, section 6 and section 8 (1) (*b*), which gives an aggrieved producer the remedy of arbitration.

It is common ground that arbitration would not have been appropriate in the present case. Even under section 20 of the Act, where the Minister is given certain powers of intervention, those powers are limited (see subsection (2)). It is only when one goes back to section 19, where there has been a reference to a committee of investigation, that the Minister himself is the final judge of what is in the public interest. Under section 19 he cannot act to give directions to the board until the committee has reported. Under that section also his powers are very limited; see also section 24. Section 30 does not give the Minister a power of general supervision; he is under no form of parliamentary accountability for the actions of the board; see also sections 34 and 36.

The Milk Marketing Board is an elected body given very wide powers and, among other things, it is clearly intended by Parliament that it should determine the price of milk and how it is to be sold. All decisions must be taken by the board itself. Only residual powers are left to the Minister, who cannot take any action of his own motion. This falls far short of any general

power of supervision. He is only given certain limited powers of intervention and has no general responsibility to Parliament for the decisions of the board. Decisions as to price differentials and the like should be decisions of the board. The Minister must not try to supersede the board, because he would then be defeating the intentions of Parliament.

There is no duty on the Minister to order a hearing by the committee of investigation. His only duty is to consider a complaint fairly, and with regard to every complaint he has an unfettered discretion whether or not to refer it to the committee. In the *Julius* case [14] there is no contradiction between the speeches of Lord Cairns L.C. and Lord Blackburn.

Here the Minister is given certain functions as the guardian of the public interest. The Act is designed to safeguard consumers, dairymen and distributors, who have no vote on the board and it is to that that the Minister must direct his mind. But no one in the class of persons affected by the Act is given by section 19 (2) any enforceable right under section 19 (3). That is not the effect of section 19 (6), the wording of which is different.

In all the cases cited in the *Julius* case [15] there was something in the nature of a legal right. In the present case one is dealing, not with persons with specific legal rights, but with something much wider. Every member of the public is affected by a marketing scheme and has an interest in its operation, and so have the distributors, but it cannot be maintained that everyone with a grievance is entitled to have it investigated.

The Minister does not occupy a position analogous to that of a judge. His function is entirely different. He is there in the last resort to consider questions of public interest, not the grievances of particular individuals. He has a duty to apply his mind to the complaint which is made and to decide whether or not it should go to the committee of investigation. He could not disregard a complaint and throw it unread into the waste paper basket nor make a decision never to send any cases to the committee on the ground that the investigation of complaints would have a disruptive effect on the Scheme and on balance cause more trouble than it was worth. But, on the other hand, he is not bound to exercise his discretion in favour of a complainant and order an investigation.

The appellants are seeking to read into the Act words which are not there. The legislature has given the Minister a completely unfettered discretion. He must apply his mind to the particular

[14] 5 App.Cas 214, 222, 243–244. [15] 5 App.Cas. 214.

grievance, to which he must have regard at all stages. Admittedly he has a discretion to refuse to refer unsubstantial complaints and he must also have an unfettered discretion to refuse to refer a substantial complaint if the public interest is involved. He can refuse to act on a complaint without giving any reasons and in such a case the complainant would have no remedy and his decision cannot be questioned. Accordingly the reasons which he has given in the present case should not be examined too closely.

The Minister has two decisions to make: (1) whether to refer a complaint to the committee of investigation and (2) if he does so, whether to give effect to its report.

On the first question he may say that he does not think there is a suitable case for investigation because the complaint strikes at the very root of the Scheme. He must consider at all stages what it is in the national interest for him to do.

The *Julius* case[15] was referred to in *In re Baker*,[16] *Rex* v. *Mitchell*,[17] *Sheffield Corporation* v. *Luxford*[18] and *de Keyser* v. *British Railway Traffic & Electric Co. Ltd.*[19] From these it appears that unless the duty is coupled with a legal right its exercise is discretionary. The appellants can derive no help from the *Julius* case,[20] which is entirely in favour of the respondents.

As to the question whether the court can intervene to control the exercise by the Minister of the discretion conferred on him by statute, it is salutary that, when Ministers have misconceived their powers, they should be subject to judicial correction. But it is equally important that the courts should not substitute their own views for those of the Minister or trespass on the field of policy. The authorities show how far the courts have gone in this form of judicial control: see Halsbury's Laws of England, 3rd ed., Vol. 11 (1955), pp. 103–104, para. 192; *Reg.* v. *St. Pancras Vestry*[21]; *Rex* v. *Board of Education*[22]; *Rex* v. *Port of London Authority*[23] and *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation.*[24]

The authorities amount to this: (1) Where there is, as here, an unfettered discretion, the only right of the applicant is to have his application considered. (2) The courts will only intervene if the

[15] 5 App.Cas. 214.
[16] (1890) 44 Ch.D. 262, 273; 6 T.L.R. 273, C.A.
[17] [1913] 1 K.B. 561, 566, 569.
[18] [1929] 2 K.B. 180, 183; 45 T.L.R. 491, D.C.
[19] [1936] 1 K.B. 224, 229; 52 T.L.R. 73, D.C.
[20] 5 App.Cas. 214.
[21] (1890) 24 Q.B.D. 371, 375, 377; 6 T.L.R. 175, C.A.
[22] [1910] 2 K.B. 165, 174, 175, 178, 180; 26 T.L.R. 422, C.A.
[23] [1919] 1 K.B. 176, 183, 184, 186–187; 35 T.L.R. 143, C.A.
[24] [1948] 1 K.B. 223, 228, 229; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

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Minister or the authority is acting unlawfully. (3) The Minister or the authority acts unlawfully if he or it refuses to consider the application. There may be (a) an outright refusal or (b) a misdirection on a point of law, or (c) an irrelevant or extraneous consideration taken into account.

When the courts are considering the exercise of an administrative discretion they will be reluctant to hold that the Minister or the authority has considered something wholly outside the ambit of that discretion.

As to the question whether the court should intervene in the present case, the court cannot proceed on the view that the reasons of the Minister are contained in the letter of May 1, 1964. It is the letters of March 23, 1965, and May 3, 1965, which show his reasons. These express his final refusal to refer the complaint. These are the authoritative documents, and one should not attach too much weight to the earlier letter.

It cannot be maintained that the Minister has exercised his discretion on a wrong view of the law or taken into account any irrelevant or extraneous considerations.

At the end of the day one is entitled to say that this was a case to be dealt with by the board and not by the committee of investigation.

Peter Langdon-Davies following. On the facts it is not true that the other regions were benefiting to the detriment of the South-Eastern region, the producers in which are not an oppressed minority. The interests of the different regions may vary. Though some may have a vested interest in favour of the present prices, others are neutral. It cannot be maintained that every hand is against the South-Eastern region.

The question whether the present case fulfils the test laid down in the *Julius* case [25] is purely one of construction. In some parts of the Act the mandatory word "shall" is used, e.g., in sections 2 (3), 19 (2) and 20 (3), but in section 19 (3) the expression "if the Minister in any case so directs" confers an unfettered discretion. When a power is given by mere empowering words, it would be strange if it was one which there was no obligation to exercise: see *In re Neath & Brecon Railway Co.*[26] In this Act the legislature used the word "shall" when it thought good and proper to do so and there is no reason to think that when it did not do so that was not deliberate too. The Minister's only duty under this

[25] 5 App.Cas. 214.

[26] (1874) 9 Ch.App. 263, 264, C.A.

section is to consider whether the complaint is suitable for investigation by the committee and in that his discretion is unfettered.

The court can only interfere if the Minister acted unlawfully: see the case of *Associated Provincial Picture Houses*.[27] The Minister is subject to two controls, (1) Parliament and (2) the courts, whose function is only to keep him within the law and to see that he goes no further. If he wrongly refused to refer a case, he could be brought to book by Parliament. The court may think he is wrong, stubborn or acting unfairly, but it should not interfere unless he is acting unlawfully. It is not always easy to draw the line. It is agreed that Lord Denning M.R. was right when he said in the court below[28] that the Minister must not brush aside the machinery provided for remedying grievances. He must not refuse without good reason to have a complaint investigated but he is the judge of the question whether or not to refer a complaint and in so deciding he is subject to the control of Parliament. Lord Denning M.R.[28] was introducing a new concept into the law in requiring that the Minister must give a good reason for refusing to exercise his discretionary power, thereby making the court the judge. The Minister is under no duty to explain why he exercises his discretion. This whole passage of Lord Denning's judgment proceeds from a misconception of the relative control functions of the court and of Parliament. The majority judgment[29] sets out the law as it is.

If a court decides to interfere with the exercise of a discretionary power it will have to make an order. When it is so interfering the normal form of order is a direction " to determine the matter according to law " and it is always made clear what the error of law is: see the *St. Pancras* case,[30] *Rex* v. *Board of Education*[31] and *Rex* v. *London County Council*.[32]

The Minister should not be required to disregard the suitability of the complaint for investigation by the committee because that is really a matter for him. The Minister is entitled to have a policy and to make it known and to consider any application to him in the light of that policy (see *Rex* v. *London County Council*[32]) though he would not be allowed to have a policy that in no case would he exercise his power: see also *Rex* v. *Torquay*

[27] [1948] 1 K.B. 223, 234.
[28] Ante, p. 1006F.
[29] Ibid. 1006G.
[30] 24 Q.B.D. 371, 380.
[31] [1910] 2 K.B. 165.
[32] [1918] 1 K.B. 68; 34 T.L.R. 21, D.C.

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Licensing Justices.[33] If licensing justices are entitled to have a policy so, a fortiori, is the Minister.

Eastham Q.C. in reply. By their notice of motion the present appellants asked for a *Julius*[34] order or alternatively for an order in the terms which the court subsequently made. If they are successful in the House of Lords, they are content with an order that the Minister should consider the complaint "according to law."

It is common ground that the cases since *Julius*[34] do not help much in the solution of the first question. On its true analysis that case points to the first question here being answered in the appellants' favour: see Lord Cairns L.C.[35] and Lord Penzance.[36]

If the report of the consumers' committee is against a complainant, section 19 (3) enables the Minister to cut the matter short. But if the report is in favour of the complainant, the subsection gives him the right to go before the investigating committee. In the case of a "busybody" frivolous complaint the Minister has a discretion not to send it to the investigating committee. What is conferred on him is a discretion coupled with a duty. But, even if it be held that subsection (3) confers on him an unfettered discretion so far as consumers are concerned, it does not follow that that is so in the case of persons affected by the Scheme.

The respondents relied on the provision for arbitration in section 8 (1) (*b*) of the Act, but that is not an appropriate remedy or an alternative to a reference to the committee of investigation.

The Minister is a watchdog to ensure that the board shall act in the public interest, whereas here he is trying to pursue a policy of refusing to control the board at all on the ground that it should be self-governing. But that is not a policy which he is entitled to follow in deciding whether or not to refer a complaint to the investigating committee. The board's action in fixing prices as they have is injurious to the South-Eastern farmers, who are persons affected, and is contrary to the public interest.

It is the wrong approach to treat the Act as if it were designed for the protection of dairymen and distributors who have no vote on the board and so does not visualise the settlement of disputes between the board and a body of producers. Although distributors have no vote on the board, they are not without protection: see paragraph 66 of the Milk Marketing Scheme, 1933, as amended.

[33] [1951] 2 K.B. 784; [1951] 2 T.L.R. 652; [1951] 2 All E.R. 656, D.C.

[34] 5 App.Cas. 214.

[35] Ibid. 225.

[36] Ibid. 229–230.

The proper test is that of Lord Blackburn in the *Julius* case [37] and reliance is placed on *Rex* v. *Mitchell*,[38] where the word "may" in the Act under consideration was held to be an enabling word and that the court of summary jurisdiction was bound to give effect to the right of the accused.

Under section 19 (2) (*b*) of the Act consumers have a legal right to have their complaints heard by a consumers' committee. Under section 19 (3) the Minister has power to refer to a committee of investigation any report by a consumers' committee and any complaint as to the operation of any scheme. That is a power clearly within the decision in *Rex* v. *Mitchell*.[38] Unless there is a reference to the committee of investigation the consumers' rights under section 19 (2) (*b*) are wholly ineffectual. There is a duty on the Minister to exercise his power. If that be so in relation to consumers, it is so in relation to persons affected by the Scheme.

As to the question whether the court can intervene to control the exercise by the Minister of the powers conferred on him, it is accepted that the court can only interfere if the Minister acts unlawfully. But the qualifications put on that by the respondents are irrelevant.

As to the third question, in order to see what was in the Minister's mind, the court can look at the letter of May 1, 1964. In paragraph 3 of his affirmation dated January 19, 1966, the Minister referred to that letter as a paper which he had read. The proper inference is that he was influenced by the considerations set out in the letter: see what was said in the Court of Appeal.[39]

Paragraph 3 of the letter is a plain misdirection, saying in effect that, if the Minister referred the complaint, he might be placed in an embarrassing situation. In paragraph 4 reason (a) is erroneous in law in its statement of the Minister's duty; reason (b) wrongfully asserts a policy not to take action under section 19 on the ground that the self-government of the industry is paramount, and reason (c) is erroneous, since the Minister can fix the differential, and under sections 19 and 20 the Minister has a responsibility for the matters which affect the interests of the appellants.

As to the letters of March 23 and May 3, 1965, altering prices is not an overriding of the Scheme but only an adjustment.

If the appellants are successful in this appeal, a special provision as to costs may have to be made in respect of the Supplemental Cases filed in this appeal. Perhaps a day may have been added to the hearing.

[37] 5 App.Cas. 214, 241.
[38] [1913] 1 K.B. 561.
[39] Ante, pp. 1009C–D, 1012A.

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Sir Dingle Foot Q.C. If the appellants succeed on either of the grounds they have relied on, there should be a special order as to costs. It is for the House to decide how much the hearing has been lengthened. In any event, the appellants should pay the costs of the Supplemental Cases. The respondents should be given two-thirds of the costs of the adjourned hearing.

Their Lordships took time for consideration.

Feb. 14, 1968. LORD REID. My Lords, since 1933 there has been in operation a Milk Marketing Scheme for England and Wales made under statutory provisions now contained in the consolidating Agricultural Marketing Act, 1958. Under that scheme producers are bound to sell their milk to the Milk Marketing Board and that board periodically fixes the prices to be paid to the producers. England and Wales is divided into eleven regions. In each region producers receive the same price but there is a different price for each region. One reason for this is that the cost to the board of transporting milk from the producers' farms to centres of consumption is considerably greater for some regions than for others. The lowest price is paid to producers in the Far-Western Region and the highest is paid to producers in the South-Eastern Region: prices paid in the other nine regions vary but fall between these two extremes. The present differentials between the regions were fixed many years ago when costs of transport were much lower. For the last ten years or so South-Eastern producers have been urging the board to increase these differentials but without success. It appears that the present differential between the South-East and the Far-West is 1·19 pence per gallon: South-Eastern producers contend that the figure should be in the region of $3\frac{1}{2}$ pence per gallon. As the total sum available to the board to pay for the milk they buy in all the regions is fixed each year, giving effect to the contention of the South-Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far-West and several other regions would get less.

This matter has been considered by two independent committees and their recommendations would, at least to some extent, favour the contention of the South-Eastern producers. I only mention this fact because it shows that their contention cannot be dismissed as wholly unreasonable or inconsistent with the general scheme.

A The Milk Marketing Board is composed of twelve members from the regions, three elected by all producers in the country and three appointed by the Minister. The board, of course, acts by a majority of its members. It is said that members each have in mind, quite properly, the interests of their constituents, that the adoption of the proposals of the South-Eastern producers would B be against the financial interests of the constituents of most of the members, and that the experience of the last ten years shows that the South-Eastern producers cannot hope to get a majority on the board for their proposals.

The Act of 1958 provides two methods by which persons aggrieved by the board's actions can seek a remedy. The first is C arbitration. The South-Eastern producers attempted to invoke that remedy but it is now common ground that arbitration would be inappropriate. To give effect to their contention would require a readjustment of the price structure all over the country and this could not be achieved by arbitration.

The other possible remedy is that provided by section 19 of D the Act of 1958 which is in these terms:

> "(1) The Minister shall appoint two committees (hereafter in this Act referred to as a 'consumers' committee' and a 'committee of investigation') for Great Britain, for England and Wales and for Scotland respectively. (2) A consumers' committee shall—(*a*) consist of a chairman and of not less E than six other members, who shall be such persons as appear to the Minister, after consultation as to one member with the Co-operative Union, to represent the interests of the consumers of all the products the marketing of which is for the time being regulated by schemes approved by the Minister; and (*b*) be charged with the duty of considering and reporting to the Minister on—(i) the effect of any scheme approved by the Minister, which is for the time being in force, on con- F sumers of the regulated product; and (ii) any complaints made to the committee as to the effect of any such scheme on consumers of the regulated product. (3) A committee of investigation shall—(*a*) consist of a chairman and either four or five other members; and (*b*) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a con- G sumers' committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee under the last foregoing subsection. (4) On receiving the report of a committee of investigation under this section the Minister shall forthwith publish the conclusions of the committee in such manner as he thinks fit. (5) For the purpose of enabling any committee appointed under this section to

consider any matter which it is their duty under this section to consider, the board administering the scheme to which the matter relates shall furnish the committee with such accounts and other information relating to the affairs of the board as the committee may reasonably require, and shall be entitled to make representations to the committee with respect to the matter in such manner as may be prescribed by regulations made by the Minister under this Part of this Act with respect to the procedure of the committee. (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated product, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit so to do after considering the report—(*a*) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (*b*) may by order revoke the scheme; (*c*) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order, and thereupon it shall be the duty of the board forthwith to comply with the order. Before taking any action under this subsection the Minister shall give the board notice of the action which he proposes to take and shall consider any representations made by the board within fourteen days after the date of the notice. . . . (8) Any order made under paragraph (*a*) of subsection (6) of this section, under paragraph (*c*) of that subsection or under the last foregoing subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament, and any order made under paragraph (*b*) of the said subsection (6) shall not take effect unless it has been approved by a resolution of each House of Parliament."

With a view to getting the Minister to take action under this section the present appellants, who are office bearers of the South-Eastern regional committee of the board, approached the Minister and met officials of the Ministry on April 30, 1964. The outcome of that meeting was unsatisfactory to them and on January 4, 1965, their solicitors wrote to the Minister making a formal complaint and asking that the complaint be referred to the committee of investigation. The nature of the complaint was stated thus:

> "4. These acts and/or omissions of the board (*a*) are contrary to the proper and reasonable interests of producers in the South-Eastern region and of other producers near large liquid markets, all of whom are persons affected by the scheme, and (*b*) are not in the public interest. . . .
>
> "6. *As to* (*a*) *in para.* 4 *above*

A "It is contrary to the reasonable and proper interests of the producers referred to in para. 4 above that (in addition to the other contributions they properly make under the scheme) they should make a contribution to the marketing costs of reaching the liquid markets from the more distant parts of the country which are properly attributable to producers in those more distant parts and which should be borne by such producers.

B "7. *As to (b) in para. 4 above*

"(i) the cross-subsidy set out above has caused or contributed to and will cause or contribute to an unreasonable alteration in the balance of production, reducing growth in the nearer areas and increasing it in the more distant. This has tended and will tend to increase the total marketing costs to the public detriment. (ii) it is not in the public interest to

C continue a system of pricing which unduly favours one set of producers as against others."

To this letter the Minister's private secretary replied on March 23, 1965: [His Lordship read the letter and continued]:

And in reply to a further letter an official of the Minister replied

D on May 3, 1965: [His Lordship read the letter and continued]:

Thereafter the appellants applied to the court for an order of mandamus commanding the Minister to refer this complaint to the committee of investigation.

On February 3, 1966, a Divisional Court (Lord Parker C.J., and Sachs and Nield JJ.) made an order against the Minister but

E on July 27, 1966 this order was set aside by the Court of Appeal by a majority (Diplock and Russell L.JJ., Lord Denning M.R. dissenting).

The question at issue in this appeal is the nature and extent of the Minister's duty under section 19 (3) (*b*) of the Act of 1958 in deciding whether to refer to the committee of investigation

F a complaint as to the operation of any scheme made by persons adversely affected by the scheme. The respondent contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The appellants contend that it is his duty to refer every genuine and

G substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant considerations.

In my view, the appellants' first contention goes too far. There are a number of reasons which would justify the Minister in

refusing to refer a complaint. For example, he might consider it more suitable for arbitration, or he might consider that in an earlier case the committee of investigation had already rejected a substantially similar complaint, or he might think the complaint to be frivolous or vexatious. So he must have at least some measure of discretion. But is it unfettered?

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

When these provisions were first enacted in 1931 it was unusual for Parliament to compel people to sell their commodities in a way to which they objected and it was easily foreseeable that any such scheme would cause loss to some producers. Moreover, if the operation of the scheme was put in the hands of the majority of the producers, it was obvious that they might use their power to the detriment of consumers, distributors or a minority of the producers. So it is not surprising that Parliament enacted safeguards.

The approval of Parliament shows that this scheme was thought to be in the public interest, and in so far as it necessarily involved detriment to some persons, it must have been thought to be in the public interest that they should suffer it. But in sections 19 and 20 Parliament drew a line. They provide machinery for investigating and determining whether the scheme is operating or the board is acting in a manner contrary to the public interest.

The effect of these sections is that if, but only if, the Minister and the committee of investigation concur in the view that something is being done contrary to the public interest the Minister can step in. Section 20 enables the Minister to take the initiative. Section 19 deals with complaints by individuals who are aggrieved.

I need not deal with the provisions which apply to consumers. We are concerned with other persons who may be distributors or producers. If the Minister directs that a complaint by any of them shall be referred to the committee of investigation, that committee will make a report which must be published. If they report that any provision of this scheme or any act or omission of the board is contrary to the interests of the complainers *and* is not in the public interest, then the Minister is empowered to take action, but not otherwise. He may disagree with the view of the committee as to public interest, and, if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable in Parliament but the court cannot interfere.

I must now examine the Minister's reasons for refusing to refer the appellants' complaint to the committee. I have already set out the letters of March 23 and May 3, 1965. I think it is right also to refer to a letter sent from the Ministry on May 1, 1964, because in his affidavit the Minister says he has read this letter and there is no indication that he disagrees with any part of it. It is as follows: [His Lordship read the letter and continued]:

The first reason which the Minister gave in his letter of March 23, 1965, was that this complaint was unsuitable for investigation because it raised wide issues. Here it appears to me that the Minister has clearly misdirected himself. Section 19 (6) contemplates the raising of issues so wide that it may be necessary for the Minister to amend a scheme or even to revoke it. Narrower issues may be suitable for arbitration but section 19 affords the only method of investigating wide issues. In my view it is plainly the intention of the Act that even the widest issues should be investigated if the complaint is genuine and substantial, as this complaint certainly is.

Then it is said that this issue should be "resolved through the arrangements available to producers and the board within the framework of the scheme itself." This re-states in a condensed form the reasons given in paragraph 4 of the letter of May 1, 1964, where it is said "the Minister owes no duty to producers in any particular region," and reference is made to the "status of the Milk Marketing Scheme as an instrument for the self-government of the industry," and to the Minister "assuming an inappropriate degree of responsibility." But, as I have already pointed out, the

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Act imposes on the Minister a responsibility whenever there is a relevant and substantial complaint that the board are acting in a manner inconsistent with the public interest, and that has been relevantly alleged in this case. I can find nothing in the Act to limit this responsibility or to justify the statement that the Minister owes no duty to producers in a particular region. The Minister is, I think, correct in saying that the board is an instrument for the self-government of the industry. So long as it does not act contrary to the public interest the Minister cannot interfere. But if it does act contrary to what both the committee of investigation and the Minister hold to be the public interest the Minister has a duty to act. And if a complaint relevantly alleges that the board has so acted, as this complaint does, then it appears to me that the Act does impose a duty on the Minister to have it investigated. If he does not do that he is rendering nugatory a safeguard provided by the Act and depriving complainers of a remedy which I am satisfied that Parliament intended them to have.

Paragraph 3 of the letter of May 1, 1964, refers to the possibility that, if the complaint were referred and the committee were to uphold it, the Minister "would be expected to make a statutory Order to give effect to the committee's recommendations." If this means that he is entitled to refuse to refer a complaint because, if he did so, he might later find himself in an embarrassing situation, that would plainly be a bad reason. I can see an argument to the effect that if, on receipt of a complaint, the Minister can satisfy himself from information in his possession as to the merits of the complaint, and he then chooses to say that, whatever the committee might recommend, he would hold it to be contrary to the public interest to take any action, it would be a waste of time and money to refer the complaint to the committee. I do not intend to express any opinion about that because that is not this case. In the first place it appears that the Minister has come to no decision as to the merits of the appellants' case and, secondly, the Minister has carefully avoided saying what he would do if the committee were to uphold the complaint.

It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not

to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.

A number of authorities were cited in the course of the argument but none appears to me to be at all close to the present case. I must, however, notice *Julius* v. *Bishop of Oxford*[1] because it was largely relied on. There the statute enacted that with regard to certain charges against any Clerk in Holy Orders it "shall be lawful" for the Bishop of the diocese "on the application of any party complaining thereof" to issue a commission for inquiry. It was held that the words "it shall be lawful" merely conferred a power.

> "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person on whom the power is reposed, to exercise that power when called upon to do so" (*per* Lord Cairns L.C.[2]).

Lord Penzance said that the true question was whether regard being had to the person enabled, to the subject-matter, to be general objects of the statute and to the person or class of persons for whose benefit the power was intended to be conferred, the words do or do not create a duty,[3] and Lord Selborne said that the question was whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty.[4] So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended.

In *Julius'* case[5] no question was raised whether there could be a discretion, but a discretion so limited that it must not be used to frustrate the object of the Act which conferred it; and I have found no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. Here the words "if the Minister in any case so directs" are sufficient to show that he has some discretion but they give no guide as to its nature or extent. That must be inferred from a construction of the Act read as a whole, and for

[1] (1880) 5 App.Cas. 214, H.L.(E.).
[2] Ibid. 222–223.
[3] Ibid. 229–230.
[4] Ibid. 235.
[5] 5 App.Cas. 214.

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the reasons I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it.

As the Minister's discretion has never been properly exercised according to law, I would allow this appeal. It appears to me that the case should now be remitted to the Queen's Bench Division with a direction to require the Minister to consider the complaint of the appellants according to law. The order for costs in the Divisional Court should stand. The appellants should have their costs in the Court of Appeal but, as extra expense was caused in this House by an adjournment of the hearing at their motion, they should only have two-thirds of their costs in this House.

LORD MORRIS OF BORTH-Y-GEST. My Lords, pursuant to decisions of policy which have been the basis of Agricultural Marketing Acts since 1931 there have been various marketing schemes. The producers of an agricultural product are themselves entitled to submit a scheme to the Minister of Agriculture for the regulation and marketing of a product. There may be a board to administer the scheme. Subject to compliance with certain conditions, the Minister may approve such a scheme. A scheme is to be one for regulating the marketing of a product " by the producers thereof." The present case concerns one such scheme, namely, the Milk Marketing Scheme. There has been a scheme in operation since 1933. It was then approved by the Minister and has since from time to time been amended. It is manifest that a scheme will be more acceptable to some producers of milk than to others. The advantage of having a buyer for all the milk which a producer produces will appeal to those who otherwise would have produced more than they could sell. There will be no such advantage for those so placed that they could have a sure and ready market for all that they could produce. If prices are fixed regionally, and are fixed having regard to the average of transport and marketing costs within the region, there will be some within the region who could assert that their costs if they had been left to themselves would have been less than those of others. If in fixing prices regionally it is not deemed advisable fully to reflect the variations as between regions of transport and marketing costs, then it follows that encouragement to production is being given to certain regions at the expense of others. Within the regions, therefore, as well as

within the industry, the interests of some producers are being advantaged at the expense of other producers. The less fortunate are being helped by the more fortunate.

The latter may not welcome the policy which brings about such a result. They may see no reason why they should not have more and others less. They may object to a system under which they are in substance contributing to a subsidy to others. Yet all this may be one of the results of having a scheme.

The Milk Marketing Scheme is administered by a board. It has twelve regional representatives (one for each of ten regions and two for the eleventh region). Those regional members of the board are elected by the registered producers (paragraph 16 of the scheme). In addition there are three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister. The scheme provides (by paragraph 24) that questions arising at any meeting of the board are to be decided by a majority of the votes of members present. There are regional committees whose duty it is to report to or to make representations to the board on the operation of the scheme in relation to the producers in the region (paragraph 31). On the coming into force of the scheme, a poll of registered producers had to be taken on the question whether the scheme was to remain in force (paragraph 44). Under the statutory provisions (section 1 (8) of the Act of 1931, now section 2 (7) of the Act of 1958) the scheme had to be laid before Parliament. The board has wide powers to regulate marketing (paragraph 60). If the board requires registered producers to sell any milk only to the board then

> "the board shall from time to time prescribe the terms on which and the price at which such milk shall be sold to the board and may also prescribe the form in which contracts for the sale of such milk to the board shall be made" (paragraph 64).

The board may prescribe different terms, prices and forms of contract for different classes of producers or classes of sale or descriptions of milk.

Two things are apparent. One is that the scheme provides for government of the industry by the industry. The second is that no machinery is provided whereby the work of the board could be over-ruled by some reviewing body in regard to such matters as terms of sale and price fixation.

The appellants are three producers in one region (the South-Eastern Region). They have the support of most, or nearly all, of the other producers in that region. In substance they say that the price being paid to them should be higher. They complain of the operation of the scheme. They asked (by a letter of January 4, 1965) that their complaint should be referred to the committee of investigation which has been appointed under the Act. It is important to note their complaint. It was

> "of certain acts and/or omissions in prescribing (under paragraph 64 of the scheme) the terms on which and the price at which milk shall be sold to the board, in that the board should, but do not, take fully into account variations as between producers in the costs of bringing their milk to a liquid market whether such costs are incurred or not."

They set out figures showing that the range of variation (between regions) of producers' net prices is 1·19 pence per gallon, whereas the range of variation (between regions) of true marketing costs is considerably higher (3·37 pence per gallon in 1961–62 and probably 3·66 pence per gallon in 1963–64). The costs in the South-Eastern Region are the lowest.

The cost of transporting milk is naturally at its lowest in regions where the producers are near to centres of population and the Milk Marketing Board pay a higher price at the farm gate to producers in those regions than to producers in other regions. This is known as a differential. Producers in the South-Eastern Region receive a higher regional differential than do producers in any of the other regions.

The complaint as formulated would imply that there should be varying differentials as between all producers, but the case proceeded on the basis that there should be no variation in the differential as between the producers in a particular region.

It would seem probable that the essential facts and figures relating to the complaint are either well known or are readily ascertainable. It is quite clear that in the fixing of prices it must have been decided by the board that they would not take regional variations of transport costs "fully" into account. That decision, if taken in good faith, must have been a policy decision. It must also be the case that the members of the board who fixed the prices must have been fully aware of the contentions of the appellants. Every member of the board must have heard the competing contentions for and against the board's policy advanced and recited over and over again. They have been canvassed over the

years. It has been for the board to decide as a matter of policy whether regional prices should or should not "take fully into account variations as between producers in the costs of bringing their milk to a liquid market." Wider issues of policy are, in turn, involved. The appellants in their letter to the Minister have suggested that the price fixations of the board will have the result of "reducing growth in the nearer areas and increasing it in the more distant" and they suggest that this will tend to increase the total marketing costs to the public detriment. It may or it may not be a good thing to increase production in the more distant areas. It may or it may not be in the public interest to encourage such production. It is no part of our province to attempt to assess the weight of the competing public interests which are involved or to consider whether the policy decisions of the board will or will not in the long run enure to the public advantage. The board may or may not have reached the wisest decision. It is, however, manifest that the board's decisions have been deliberate. There is no suggestion that the board have not acted in entire good faith. Nor is it said that they have exceeded their powers under the scheme as approved. When in 1964 the appellants made a suggestion to the board that there should be an arbitration the board, through their solicitors in a letter (dated June 18, 1964) to the appellants' solicitors, stated: [His Lordship read the letter and continued:]

The appellants do not now suggest that arbitration would be appropriate but in asking that their complaint should be referred to the committee of investigation appointed under the Act they are in effect asking for an arbitration in another form. They are asking that the determination of prices should be made by the committee. The committee could only recommend that the appellants should receive a higher price on the basis that other producers should receive a lower price. The position of all those others would be affected. The committee would be acting as an appellate body from the decision of the board. It may have to be decided as a matter of policy and judgment whether the committee of investigation (which could be concerned with any one of the marketing schemes coming into existence under the Act and was not appointed to be concerned with any particular scheme such as the Milk Marketing Scheme) would be the appropriate body to perform the function. The committee of investigation is, however, in existence and it certainly would be open to the

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Minister if he deemed it desirable to refer a complaint of the present kind to the committee. A

Before your Lordships it was in the first place submitted that the appellants had a right to have their complaint referred to the committee and that accordingly an order of mandamus should be directed to the respondent positively commanding him to refer the complaint. This contention was rejected by the Divisional Court and was not even advanced in the Court of Appeal. I, also, would reject it. In my view, the respondent is endowed with a discretion. It is for him to decide whether to ask the committee to report on any complaint made as to the operation of any scheme made under the Act. A duty will only devolve upon the committee " if the Minister in any case so directs." B C

These words are in sharp contrast to those which are employed in the Act when a positive duty is imposed upon the Minister. Thus in section 2 (3) are the words " shall direct a public enquiry to be held." In section 19 (4) are the words " the Minister shall forthwith publish." In section 20 (3) are the words " the Minister shall refer." If Parliament had intended to impose a duty on the Minister to refer any and every complaint, or even any and every complaint of a particular nature, it would have been so easy to impose such a duty in plain terms. I cannot read the words in section 19 (3) as imposing a positive duty on the Minister to refer every complaint as to the operation of every scheme. Such was the appellant's contention though they modified it by suggesting that the duty would not exist in the case of trivial or frivolous or repetitive complaints. In support of their revived contention the appellants submitted that in some circumstances a duty exists to exercise a power. So in the present case it was argued that a power was deposited in the Minister, that the power was given for the benefit of particular persons, that in the Act they were specifically designated (for example, persons complaining as to the operation of a scheme) and that in the Act the circumstances in which there is entitlement to the exercise of the power are defined (that is, that there should be a complaint to the Minister as to the operation of the scheme being a complaint which could not be considered by a consumers' committee). Reliance was placed upon a passage in the speech of Lord Cairns L.C. in *Julius* v. *Bishop of Oxford.*[6] Lord Cairns said[7] that the cases decided D E F G

[6] 5 App.Cas. 214.

[7] Ibid. 225.

> "that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

In my view, this passage does not avail the appellants. I can see no provision in the Act showing that the appellants or others who might make a complaint similar to theirs were "entitled" to call upon the Minister to exercise the power given to him. At most their entitlement was that the Minister should consider and should decide whether or not in the exercise of his discretion he would refer a complaint. It would have to be shown that the Act gave the appellants a "right" to have their complaint sent to the committee before the power in the Minister could be held to be one that he was bound to exercise. Thus in his speech in *Julius* v. *Bishop of Oxford*[8] Lord Blackburn said that

> "if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf."

So also Lord Blackburn said[9]:

> "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

Where some legal right or entitlement is conferred or enjoyed, and for the purpose of effectuating such right or entitlement a power is conferred upon someone, then words which are permissive in character will sometimes be construed as involving a duty to exercise the power. The purpose and the language of any particular enactment must be considered. Thus in *Rex* v. *Mitchell*[10] consideration was given to the words of section 9 of the Conspiracy and Protection of Property Act, 1875, namely:

> "Where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with

[8] 5 App.Cas. 214, 241.
[9] Ibid. 244.
[10] [1913] 1 K.B. 561; 29 T.L.R. 157, D.C.

an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly."

A declaration of objection to being tried by a court of summary jurisdiction was duly made by a person accused of an offence made punishable by the Act who was entitled to object. It was held that accordingly he had a right to trial by jury and that the justices were bound to give effect to his claim and had no jurisdiction to try the case.

On the principles laid down in *Julius'* case [11] it becomes necessary to consider the language used in the Agricultural Marketing Act and the purposes of the Act. A consumers' committee under section 19 (2) is charged with the duty of considering and reporting to the Minister on the effect of a scheme on consumers and also on " any complaints made to the committee as to the effect of any such scheme on consumers of the regulated product." The words in section 19 (3) are in marked contrast. A committee of investigation is only charged with the duty of considering and reporting " if the Minister in any case so directs." The Minister may refer to them a report of a consumers' committee. He may refer to them a complaint which has been made to him and which in his view could not have gone to a consumers' committee. The language here is, in my view, purely permissive. The Minister is endowed with discretionary powers. If he did decide to refer a complaint he is endowed with further discretionary powers after receiving a report (see section 19 (6)).

I cannot, therefore, accept the contention of the appellants that they had a right to have their complaint referred to the committee and that the Minister had a positive duty to refer it. The Minister, in my view, had a discretion. It was urged on behalf of the respondent that his discretion was in one sense an unfettered one, though it was not said that he could disregard the complaint. The case proceeded on an acceptance by the respondent that he was bound to consider the complaint and then, in the exercise of his judgment, to decide whether or not to refer it to the committee.

If the respondent proceeded properly to exercise his judgment then, in my view, it is no part of the duty of any court to act as a Court of Appeal from his decision or to express any opinion as to whether it was wise or unwise. The Minister was given an executive discretion. In speaking of a power given by statute to a local authority to grant certain licences Lord Greene M.R. said

[11] 5 App.Cas. 214.

in his judgment in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [12]:

> " When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law."

I think it follows that an order of mandamus could only be made against the Minister if it is shown that in some way he acted unlawfully. A court could make an order if it were shown (*a*) that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or (*b*) that he misinterpreted the law or proceeded on an erroneous view of the law or (*c*) that he based his decision on some wholly extraneous consideration or (*d*) that he failed to have regard to matters which he should have taken into account. I propose to consider whether any one of these is established. The order that was made by the Divisional Court commanded the respondent

> " to consider the said complaint of the applicants according to law and upon relevant consideration to the exclusion of irrelevant considerations."

As to (*a*) it cannot be asserted that the respondent failed to consider the appellants' complaint. In his affirmation the respondent states that he considered the complaint and all the matters put before him by the appellants. He states that he came to his decision for the reasons indicated in the letters of March 23 and May 3, 1965, namely that he

> " considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

As to (*b*) I do not consider that the respondent is shown to have misinterpreted the law unless it could be said that any of the considerations recorded in the letters from the Ministry were so inadmissible as to involve that the respondent took a wrong view of the law or misdirected himself in law. I turn therefore to consider the letters. They formed the foundation for the submission that on the basis of (*c*) and (*d*) above the order of the Divisional Court was appropriately made.

As the respondent states in his affirmation that he came to his decision for the reasons indicated in the two letters, it is primarily

[12] [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

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those letters that are to be studied. As, however, he states that in deciding as to the application he had read a letter dated May 1, 1964, written by a Ministry representative and as he has not stated that he excluded from his mind the considerations therein recorded, I think that it is a reasonable inference that they had, or may have had, some influence. It is fair, I think, to regard all three letters as revealing what was in the mind of the respondent. His decision was that the complaint was not one that in his view was suitable for investigation by means of the particular procedure of a reference to the committee of investigation. That decision was essentially a policy decision. It concerned a situation that was known and understood in the industry. The main facts in regard to it were known. The differential, or the range between producers' net prices, stands at 1·19 pence per gallon. It has stood at that figure for some years. It was a figure that was first fixed during the war. That fact was known to all concerned. So also must it have been known to all concerned that if true marketing costs were taken "fully" into account the range would be much higher. The question must therefore have been a perennial one as to whether the differential should be varied. If it were, then producers in some regions would get more and producers in other regions would get less. A constant major policy problem must have been whether it is desirable to encourage production in those regions where, if there were no scheme, producers would not fare very well. So also it must have been widely known that two committees had made suggestions relating to this long-standing problem. One of them (the Cutforth Committee) had reported as far back as 1936. Another (the Davis Committee) had in 1963 suggested that the country should be divided into five price zones each with a different differential and that the total range of the prices at the farm gate should be the figure of 2·4 pence per gallon instead of the figure of 1·19 pence per gallon. But all these facts and considerations must have been well known.

I know of no reason to assume or to suggest that the members of the board in the discharge of their duties have acted irresponsibly. Because a policy decision under a national scheme results in a measure of advantage to some and a measure of disadvantage to others it does not follow that the members of the board have been guided, not by considerations of the national interest or of the general interest of their industry, but solely by considerations as to how the pockets of their colleagues would be affected.

At any time during the sequence of the past years it would

have been open to a Minister, had he considered it desirable and politic, to take the initiative under section 20 subsection (2) of the Act and to give directions to the board concerning prices. It was at all time a question of policy for successive Ministers, whether or not they should take such action. For any decision or for any inaction a Minister would be answerable in Parliament.

It was against all this background that the respondent had to consider the appellants' request in the early part of 1965. In agreement with Diplock and Russell L.JJ. I do not consider that it has been shown that he failed to exercise his discretion: nor has it been shown that he was guided by irrelevant considerations or that he failed to consider relevant matters. A study of the letters leads me to the view that the respondent considered it desirable that the milk industry should, in accordance with its own scheme, be self-governing and that it would not be good policy for him to over-rule decisions of the Milk Marketing Board which fixed the price to be paid in a particular region or to particular persons. I do not find in the letters any statement that the respondent considered that he had no power to refer the appellants' complaint to the committee: nor any statement that the respondent considered that he was compelled to leave price fixing to the Milk Marketing Board. Rightly or wrongly he considered it best to do so.

As a result of the meticulous scrutiny to which the three letters have been subjected the appellants contend that irrelevant or inadmissible considerations were taken into account by the respondent.

1. Criticism is made of the passage in the letter of March 23 to the effect that the complaint of the appellants was "one that raises wide issues going beyond the immediate concern of your clients which is presumably the prices they themselves receive." In the following sentence it is pointed out that the complaint would also affect the interests of other regions and involve the regional price structure as a whole. I do not read that passage as involving that the complaint ought not to go to the committee merely because it raised wide issues. What I think was being pointed out was that the appellants' complaint would necessarily involve a complete review of the prices in all the regions as fixed by the board. I see no reason to think that the respondent was unaware of his powers as, for example, under section 20 (2). What I think is revealed is that the respondent as a matter of policy considered it undesirable or inappropriate for him to over-rule the

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board in regard to price fixation. This is shown by the letter of May 1, 1964, where it said:

> "It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales."

2. Criticism is made of the passage in which it is said that the Minister considered that the issue was of a kind which properly fell to be resolved within the framework of the scheme. It is said that he was mistaking his powers and was being unmindful of the courses of action open to him either under section 20 (2) or after a report from a committee under section 19 (6) (*c*). I see no reason to deduce that the respondent was oblivious of his powers: nor that he was not appreciating that under the machinery of the scheme a majority vote could result in disadvantages for some districts. If the respondent nevertheless decided that the self-governing machinery should operate, his decision could be attacked as being impolitic, but I do not think it could be attacked as being made on inadmissible considerations.

3. Criticism is further made of the sentence in the letter of May 1, 1964, which reads:

> "In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory Order to give effect to the committee's recommendations."

This sentence may be obscure and imprecise but I doubt whether we ought to put the most unfavourable construction upon it. If there was a reference to the committee and if the committee reported that some act of the board was contrary to the interests of consumers or "of any persons affected by the scheme" and was not in the public interest, then the Minister would himself have a discretion as to whether or not to take any course of action designated in section 19 (6).

There may be cases where from a knowledge of the problem and all its aspects and because of his own firm view as to what course the public interest demands, a Minister could see that a reference could lead to no useful result. A Minister might conclude that whatever report a committee might make a reference to them

would only produce needless confusion and disappointment and would not prompt him to follow a course of action that he considered undesirable. Though the 1964 letter is not very explicit, it is for the appellant to show that the respondent was guided by irrelevant considerations. In agreement with Diplock and Russell L.JJ. I consider that the appellants have failed to show this.

For the reasons which I have set out I would dismiss the appeal.

LORD HODSON. My Lords, the appellants say in the first place that this is a case which satisfies the test, propounded in *Julius* v. *Bishop of Oxford*,[13] drawing the distinction between a power coupled with a duty and a complete discretion. In the former case enabling words are said to be compulsory when they are words to effectuate a legal right.

It is argued that the Minister is subject to mandamus here, for he is given a power to be exercised in favour of persons who are defined and accordingly are given a right to have their claim submitted to a committee of investigation under the provisions of section 19 of the Agricultural Marketing Act, 1958. This argument was abandoned before the Divisional Court, not put forward in the Court of Appeal but was resurrected before your Lordships by way of Supplemental Case. Section 19 (3), so far as material, reads:

> "A committee of investigation shall— . . . (*b*) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumer's committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee under the last foregoing subsection."

Schemes for regulating the marketing of agricultural products were introduced by the Agricultural Marketing Act, 1931, and are compulsory in their operation upon consumers, who are protected as to price and supply, upon distributors and upon producers, who get the advantage of having no milk left on their hands unsold.

The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection introduced by the words "if the Minister in any case so directs" nor in the context of the Act and earlier legislation to support the view that an absolute right to an

[13] 5 App.Cas. 214.

enquiry is given to an aggrieved person. The argument of the appellants is undermined, in my opinion, by their concession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case. True that the scheme is of a compulsory nature and section 19 is designed for the redress of grievances but this is not to exclude the Minister's discretion to reject a complaint if he exercises his discretion according to law. The succeeding section, section 20 of the Act, indicates the position of the Minister as responsible for giving directions to a board as to its acts or omissions as he considers necessary or expedient in the public interest and his directions have to be complied with so far as the board is not required to do anything which it has no power to do.

If the Minister has a complete discretion under the Act, as in my opinion he has, the only question remaining is whether he has exercised it lawfully.

It is upon this issue that much difference of judicial opinion has emerged although there is no divergence of opinion as to the relevant law. As Lord Denning M.R. said, citing Lord Greene M.R. in the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [14]:

> ". . . a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

In another part of this judgment [15] Lord Greene drew attention to that which I have mentioned above, namely, the necessity to have regard to matters to which the statute conferring the discretion shows that the authority exercising the discretion ought to have regard. The authority must not, as it has been said, allow itself to be influenced by something extraneous and extrajudicial which ought not to have affected its decision.

I come now to the facts of the present case. In 1933 the Milk Marketing Scheme (amended in 1955) came into operation. The members of the board consist of 12 regional members elected for the several regions by the registered producers and three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister (see Part II of the scheme, paragraph 9). Questions arising at a

[14] [1948] 1 K.B. 223, 229. [15] Ibid. 228.

meeting of the board are decided by a majority of the votes of the members present (see Part II, paragraph 24). The price of milk is fixed by the board for milk delivered at the farm gate.

The South-Eastern farmers being much nearer to the great population of London are paid what is called a differential to compensate them for the loss of the advantage they would otherwise have over most other districts in consequence of their proximity to a large market. The differential was fixed many years ago at 1·19d. per gallon and the South-Eastern farmers have long complained that it is too low and sought without success to obtain redress of their grievance from the board. They have been outvoted since, in the interests of their own pockets, so it is said, a majority of the other regions opposed them. This decision has been reached notwithstanding the recommendations of two committees set up at different times who have recognised the justice of their claim. On the Davis Committee, set up in 1963, making its report without any benefit to the South-Eastern farmers ensuing, and the board having rejected their claim, the first named appellant approached the Minister at the end of January, 1964, asking what means the Ministry could suggest for investigating and remedying the grievance felt by his committee concerning the regional price of milk in the south-east.

Correspondence ensued to which it will be necessary to refer and the decision of the Minister refusing to refer the complaint to the investigating committee was contained in a letter of March 23, 1965. The letter reads, so far as material:

> "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

In response to a further letter from the appellants' solicitors a letter dated May 3, 1965, was received referring to the Minister's unfettered discretion and adding that in reaching his decision

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he had had in mind the normal democratic machinery of the Milk Marketing Scheme in which all registered producers participated and which governs the operations of the board.

Upon the appellants' solicitors enquiring whether it would be asserted that the letters of 1965 were the only matters present to the Minister's mind at the time of his decision, to the exclusion of the considerations set out in the letters which had passed in the year 1964, the Minister affirmed on November 4, 1965, he having been appointed on October 19, 1964 (after the 1964 letters had passed):

> "3. In considering the applicants' application I read among other papers the letter signed by Mr. J. H. Kirk and dated May 1, 1964. . . .
> "4. Before reaching my decision not to refer the applicants' complaint to the committee of investigation I considered all the matters put before me on behalf of the applicants in support of their application.
> "5. I came to my decision for the reasons indicated in the letters dated March 23, 1965, and May 3, 1965, . . . namely that I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

If the letter of May 1, 1964, be looked at, and it was not disowned by the Minister in his affirmation or at all, it throws further light on the refusal of the Minister to exercise his discretion by referring the complaint to the investigating committee. This letter contains the following :

> "3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a Statutory Order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable.
> "4. The reasons which led us to this conclusion were explained to you as follows: (*a*) The guarantee given to milk producers under the Agriculture Acts is a guarantee given to the board on behalf of all producers. The Minister owes no duty to producers in any particular region, and this is a principle that would be seriously called into question by the making of an Order concerned with a regional price; (*b*) Such action would also bring into question the status of the Milk

Marketing Scheme as an instrument for the self-government of the industry and such doubt would also, by extension, affect the other marketing schemes as well; and (*c*) It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales. "5. I wish to point out that the statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

The reasons disclosed are not, in my opinion, good reasons for refusing to refer the complaint seeing that they leave out of account altogether the merits of the complaint itself. The complaint is, as the Lord Chief Justice pointed out, made by persons affected by the scheme and is not one for the consumer committee as opposed to the committee of investigation and it was eligible for reference to the latter. It has never been suggested that the complaint was not a genuine one. It is no objection to the exercise of the discretion to refer that wide issues will be raised and the interests of other regions and the regional price structure as a whole would be affected. It is likely that the removal of a grievance will, in any event, have a wide effect and the Minister cannot lawfully say in advance that he will not refer the matter to the committee to ascertain the facts because, as he says in effect, although not in so many words, "I would not regard it as right to give effect to the report if it were favourable to the appellants."

It has been suggested that the reasons given by the Minister need not and should not be examined closely for he need give no reason at all in the exercise of his discretion. True it is that the Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner, but when, as here, the circumstances indicate a genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation. As the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest.

I would allow the appeal accordingly and remit the matter to the Queen's Bench Division so as to require the Minister to consider the complaint of the appellants according to law. I agree

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with the order for costs proposed by my noble and learned friend, Lord Reid.

LORD PEARCE. My Lords, prima facie the appellants have a complaint of substance. They are "persons affected by the scheme." The "act or omission of the board" in not paying them a higher price differential is "contrary to their interests." And apparently reasonable prima facie arguments have been advanced to show that this "is not in the public interest." The appellants' complaint is therefore prima facie suitable to be considered by the committee of investigation.

The outline of their complaint is simple. They farm in the more populous South-Eastern Region. In a more populous region milk is more valuable. The consumer is near at hand. The cost of transport is less. And milk which is drunk fetches higher prices than that which is used for manufacture. As against this the overheads of production are, generally speaking, somewhat higher than in some more rural regions. For instance, the land in the more populous region is almost inevitably more expensive. It seems to follow that if the producer of milk in a populous region is paid precisely the same price as the producer in a sparsely populated rural region, the former is not being fairly treated. Some acknowledgment of this fact is made in a differential of 1·19 pence per gallon which was, we are told, fixed by the Minister during the war. Of this figure ·71 of a penny related to the cost of transport. With rising prices the present differential cost in respect of transport has risen to over 3d. No acknowledgment of this increase in cost has ever been made in the price paid to the farmers in the South-Eastern Region. Yet, unless the figure fixed by the Minister in the war was too large, which has not been suggested, it would seem that in view of increased costs it must now be too small. Prima facie this would seem unfair. Two committees, one in 1956 and one in 1963, have, on investigation, lent weight to the appellants' contention. But the gain of the South Eastern would mean some loss in some regions elsewhere. The South-Eastern Region is in a minority on the board. They have been unable, in spite of fifteen attempts, to persuade the majority to do anything about it. The appellants contend that the present situation is not only unfair to them but also it is not in the public interest. They argue, for instance, that the present situation discourages the production of milk in the region where it is most valuable. Against this, of course, may be set the benefit of

encouraging milk production in more sparsely populated regions. Any final conclusion on this matter obviously needs close consideration of all its relevant detail. One may sum it up superficially by saying that there is prima facie a complaint of some substance, that it has had support from two committees, and that there seems little likelihood of the majority of the board doing anything to remedy it.

This is not a criticism of the majority. Most of them are elected to represent their own regions. One can hardly expect them to vote in favour of something that will injure their own regions. Nor would it be very conducive to the success of the scheme if a region felt that its representative was pursuing altruistic policies in favour of other regions at the expense of those whom he is elected to represent. If justice to a minority is to be imposed at the expense of a majority, it is probably more convenient that it should be imposed aliunde.

This fact was, in my opinion, recognised by Parliament. It was obvious that the scheme and the Act created a monopoly and imposed severe restrictions on individuals' liberty of action. With the aim of general betterment Parliament was interfering with the individual farmer's method of earning a livelihood and subjecting him to the mercies of the majority rule of the board. But (no doubt with these considerations in mind) Parliament deliberately imposed certain safeguards. Two independent committees must be appointed (section 19). First there is the "consumers' committee" to deal with consumers' complaints. The findings of this committee do not, however, produce any effective result, unless and until they have been considered by the more important committee of investigation. That committee is

> "charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumers' committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee."

The Minister is bound to publish that report.

> "If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated product, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit so to do after considering the report,"

may either amend the scheme so as to rectify the matter, or revoke the whole scheme, or direct the board to take steps to rectify the matter (after hearing any representations from the board). By section 20 the Minister has a right of his own motion, independently of the investigation committee, to impose his will on the board. But in that case the board can ask to have the matter heard by the committee of investigation, and if the committee's report is in the board's favour the Minister cannot impose his will on them.

Thus the independent committee of investigation was a cornerstone in the structure of the Act. It was a deliberate safeguard against injustices that might arise from the operation of the scheme. There is provision for arbitration between individual producers and the board. But this is clearly not intended to deal with a case such as the present; and the board has rightly refused arbitration on this matter.

The appellants have therefore no avenue for their complaint except through section 19. And that section makes access to the committee of investigation dependent on a direction of the Minister to the committee of investigation. There is no provision as to what are the duties of a Minister in this respect. Has he a duty to further complaints of substance which have no other outlet? Or can he refuse them any outlet at all if he so chooses? Need he have any valid reason for doing so? Or if he refuses without any apparent justification, is he exempt from any interference by the courts provided that he either gives no reasons which are demonstrably bad or gives no reasons at all? No express answer to these questions is given in the Act. The intention of Parliament, therefore, must be implied from its provisions and its structure.

Both sides placed some reliance on the case of *Julius* v. *Bishop of Oxford*.[16] This dealt with a somewhat analogous problem under an Act which said "it shall be lawful" for the bishop to issue a commission. It was held that the words gave the bishop a complete discretion to issue or decline to issue a commission. That decision rested on the construction of the particular Act and it made clear that in the context of an Act is to be found the answer to the question how a power given by it is to be exercised. Lord Cairns L.C. said[17]:

> ". . . the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit

[16] 5 App.Cas. 214. [17] Ibid. 225.

> of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

Lord Penzance said [18]:

> "The words 'it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it."

And Lord Selborne said [19]:

> "The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

It is quite clear from the Act in question that the Minister is intended to have *some* duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) "I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation." To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely, that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no

[18] 5 App.Cas. 214, 229–230. [19] Ibid. 235.

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good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act.

In the present case it is clear that Parliament attached considerable importance to the independent committee of investigation as a means to ensure that injustices were not caused by the operation of a compulsory scheme. It provided no other means by which an injustice could be ventilated. It was not content to leave the matter wholly in the power of a majority of the board. Nor was it content that the removal of injustice should be left to the power of the Minister. It wished to have the published views of an independent committee of investigation (with wide power to explore the matter fully). It also wished that committee to consider and weigh the public interest—a fact that makes it clear that the question of public interest was not at that stage being left to the Minister. When the report is published then the Minister may and must make up his own mind on the subject. He has power to do what he thinks best and decide whether or not to implement the report. He is then answerable only to Parliament, which will have the advantage of being able to understand the pros and cons of the matter from the published report of an independent committee. Until that is published nobody can effectively criticise his action, since nobody will have a balanced view of the strength of the grievance and its impact on the public interest.

It is clear, however, as a matter of common sense, that Parliament did not intend that frivolous or repetitive or insubstantial complaints or those which were more apt for arbitration should be examined by the committee of investigation. And, no doubt, the Minister was intended to use his discretion not to direct the committee to investigate those. It is argued that, if he has a discretion to *that* extent, he must also have an unfettered discretion to suppress a complaint of substance involving the public interest which has no other outlet. I cannot see why this should be so. Parliament intended that certain substantial complaints (involving the public interest) under the compulsory scheme should be considered by the investigation committee. It was for the Minister to use his discretion to promote Parliament's intention. If the court had doubt as to whether the appellants' complaint was frivolous or repetitive, or not genuine, or not substantial, or unsuitable for investigation or more apt for arbitration, it would

not interfere. But nothing which has been said in this case leads one to doubt that it is a complaint of some substance which should properly be investigated by the independent committee with a view to pronouncing on the weight of the complaint and the public interest involved.

The fact that the complaint raises wide issues and affects other regions was not a good ground for denying it an investigation by the committee. It is a matter which makes it very suitable for the committee of investigation, with its duty to report on the public interest, and its capacity to hear representatives of all the regions.

Moreover the Minister was mistaken in thinking that " normal democratic machinery of the Milk Marketing Scheme " was a ground for refusal to have the complaint investigated. It is alleged that the normal democratic machinery of the board is acting contrary to the public interest. The investigation under section 19 and the Minister's powers under section 20 were intended to correct, where necessary, the normal democratic machinery of the scheme. Parliament had put into the hands of the Minister and those of the committee of investigation the power and duty where necessary to intervene. A general abdication of that power and duty would not be in accord with Parliament's intentions.

I would allow the appeal.

LORD UPJOHN. My Lords, this appeal is of great importance to the milk producing industry and therefore to the country in general, for it is concerned with the refusal of the respondent Minister to order an inquiry into the complaint of the appellants representing the milk producing farmers of the South-Eastern Region.

In 1931 Parliament, in order to produce better conditions within the agricultural industry and more efficient and economical methods of production and distribution, enacted the Agricultural Marketing Act, 1931, which provided for schemes to be prepared for the control of various sections of the industry. In 1933 pursuant to the provisions of the Act, the Milk Marketing Scheme, 1933, for England and Wales was prepared and approved by Parliament and is, subject to many subsequent amendments, still in force; I shall refer to it as " the scheme." Many other schemes relating to the control of other sections of the industry have been prepared and approved and the Act now controlling these schemes is the Agricultural Marketing Act, 1958, an Act consolidating the

Act of 1931 and later amending Acts. For all relevant purposes schemes have statutory force.

As was intended by Parliament, the scheme was prepared by the industry itself, a circumstance much relied upon in argument on behalf of the Minister; but of course that does not mean that it received the unanimous approval of all milk producers; that would be impossible to expect of any scheme. The scheme provided for a board to administer it consisting of members elected by the eleven regions into which the country was for the purposes of the scheme divided, one of them being the South-Eastern Region. It provided for the registration of producers of milk and in those days when compulsory powers were less familiar than today, went so far as to provide that no unregistered producer should sell any milk. Furthermore the scheme empowered the board (a power quickly exercised and still in force) to resolve that registered producers should sell only to the board and then only at the price and upon the terms prescribed by the board. No one doubts that these provisions were greatly to the advantage of the industry as a whole, but a scheme which put the milk industry into such a straight jacket may produce anomalies and individual discontent. In my opinion it was with this (inter alia) in view and in the realisation that such matters should receive review at ministerial level that Parliament enacted the provision now to be found in section 19 of the Act of 1958.

That section provided that the Minister should appoint two committees, a consumers' committee and a committee of investigation. The former committee is bound to consider and report to the Minister upon any approved scheme and any complaints made to them as to the effect of the scheme on consumers, a matter with which this appeal is not concerned.

The committee of investigation is by section 19 (3) (*b*)

> "charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any complaint made to the Minister as to the operation of any scheme which . . . could not be considered by a consumers' committee . . ."

These committees are by the Act permanent committees and have been set up by the Minister to receive and deal with, from time to time, matters referred to them, another indication that Parliament realised that schemes might require inquiry and review in operation as time went on and circumstances changed.

The South-Eastern region contend that for many years they have received too low a price for their products for the reasons I

A shall not discuss, for they are set out fully in the speech of my noble and learned friend, Lord Reid. Further, it is perfectly clear upon the facts that this question, having been considered by two independent committees (with results on the whole favourable to the South-Eastern Region) and having been raised on no less than fifteen occasions at board meetings by the South-Eastern B regional representative since 1958, cannot be dismissed as frivolous, vexatious or trivial. In fairness to the Minister and his advisers let it be said that this has never been suggested.

At first sight, therefore, I should suppose that this was precisely the type of matter which Parliament had envisaged would be fit for investigation by the committee of investigation and report C to the Minister, but the Minister has declined either to investigate the complaint himself, as of course he was perfectly entitled to do, or to refer it to the committee of investigation.

Section 19 (3) as a matter of language confers a discretion upon the Minister as to whether any complaint made to him should be referred to the committee of investigation, the relevant D words being "if the Minister in any case so directs," plainly words of discretion and not of duty. But it was argued before your Lordships, perhaps more strenuously at the first hearing than at the second after Supplemental Cases had been delivered, that the case was governed by the principle established by the well known case of *Julius* v. *Bishop of Oxford*[20] where it was held E that words of permission such as "it shall be lawful" might in some cases in fact call for its exercise and create a duty upon the donee of the power or permission to exercise it. It was held not to do so in that case where Parliament had conferred upon the bishop a power to issue a commission, but, like so many cases in our law where it was held that the principle did not apply, it is the F leading authority for the proposition that there may be, as it is so often said, "a power coupled with a duty." In other words, as was so succinctly stated by the court in *Rex* v. *Steward of Havering Atte Bower*,[21] "the words of permission . . . are obligatory"; briefly they create a duty, not a power.

But, in my opinion, that principle can have no application to G the present where it is clear that Parliament would have used different words if it had intended that the Minister was under a duty to refer every complaint to the committee of investigation; in fact Parliament would have adopted precisely the same language as in section 19 (2) where consumers are empowered to make their

[20] 5 App.Cas. 214.

[21] (1822) 5 B. & Ald. 691, 692.

complaints direct to the consumers' committee without any intermediate reference to the Minister. A

So it is clear that the Minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.

My Lords, upon the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case. B

The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker C.J., in the Divisional Court): (*a*) by an outright refusal to consider the relevant matter, or (*b*) by misdirecting himself in point of law, or (*c*) by taking into account some wholly irrelevant or extraneous consideration, or (*d*) by wholly omitting to take into account a relevant consideration. C

There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings I have mentioned. D E

In the circumstances of this case, which I have sufficiently detailed for this purpose, it seems to me quite clear that prima facie there seems a case for investigation by the committee of investigation. As I have said already, it seems just the type of situation for which the machinery of section 19 was set up, but that is a matter for the Minister. F

He may have good reasons for refusing an investigation, he may have, indeed, good policy reasons for refusing it, though that policy must not be based on political considerations which as Farwell L.J. said in *Rex* v. *Board of Education*[22] are pre-eminently extraneous. So I must examine the reasons given by the Minister, including any policy upon which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or, as it is frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so, the court has no jurisdiction to interfere. It is not a Court G

[22] [1910] 2 K.B. 165, 181; 26 T.L.R. 422, C.A.

of Appeal and has no jurisdiction to correct the decision of the Minister acting lawfully within his discretion, however much the court may disagree with its exercise.

In his affidavit filed in opposition to the appellants' application for the order of mandamus the Minister, after referring to the fact that he had read the letter dated May 1, 1964, of Mr. Kirk, an Under Secretary of the Ministry, stated that he reached his decision for refusing a reference to the investigating committee for the reasons given in his private secretary's letters of March 23 and May 3, 1965, all addressed to the respondents or their solicitors. So to these letters I must turn to see whether his reasons are open to challenge on the ground of being unlawful.

The first letter, that of March 23, 1965, in which the Minister gave his reasons was, so far as relevant, in these terms:

> "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

This letter seems to me to show an entirely wrong approach to the complaint. The Minister's main duty is not to consider its suitability for investigation; he is putting the cart before the horse. He might reach that conclusion after weighing all the facts but not until he has done so; but perhaps this is the least of the criticisms (arising out of his letter) to be directed at the Minister. But I have dealt with it as in argument it was seriously pressed upon your Lordships as a conclusive consideration in answer to any challenge to his powers.

His next statement—that it raises wide issues, etc.—shows a complete misapprehension of his duties, for it indicates quite clearly that he has completely misunderstood the scope and object of section 19. It is when wide issues are raised and when the complaint of one region raises matters which may affect other regions and the regional price structure as a whole, that the

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Minister should consider it as a most powerful (though not conclusive) element in favour of referring the complaint instead of the reverse. Then, again, in his final paragraph of this letter the Minister reveals the same misconception. It was just because it was realised that the board structure might produce within its framework matters for complaint by those vitally affected that the machinery of section 19 was set up. This letter shows that the Minister was entirely misdirecting himself in law based upon a misunderstanding of the basic reasons for the conferment upon him of the powers of section 19.

I will turn to his second letter, that of May 3, 1965, which so far as relevant was in these terms:

> "You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the Milk Marketing Scheme, in which all registered producers participate and which governs the operations of the board."

This introduces the idea, much pressed upon your Lordships in argument, that he had an "unfettered" discretion in this matter; this, it was argued, means that, provided the Minister considered the complaint bona fide, that was an end of the matter. Here let it be said at once, he and his advisers have obviously given a bona fide and painstaking consideration to the complaints addressed to him; the question is whether the consideration given was sufficient in law.

My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in section 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.

The second sentence of this letter again only shows what I have earlier pointed out, that the Minister has failed to understand that it may be his duty to intervene where there is a serious complaint that the "democratic machinery" of the board is producing unfairness among its members.

Those are the reasons relied upon by the Minister for refusing a reference. Summing up the matter shortly, in my opinion every reason given shows that the Minister has failed to understand the object and scope of section 19 and of his functions and duties thereunder which he has misinterpreted and so misdirected himself in law.

The matter, however, does not end there, for in his affidavit the Minister referred, as I have already mentioned, to Mr. Kirk's letter of May 1, 1964, without disapproval. That letter contained this paragraph:

> "3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable."

This fear of parliamentary trouble (for, in my opinion, this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament if a statute has cast upon him an obligation in the proper exercise of a discretion conferred upon him to order a reference to the committee of investigation.

My Lords, I would only add this: that without throwing any doubt upon what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for

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reaching that conclusion and order a prerogative writ to issue accordingly.

The Minister in my opinion has not given a single valid reason for refusing to order an inquiry into the legitimate complaint (be it well founded or not) of the South-Eastern Region; all his disclosed reasons for refusing to do so are bad in law. I would allow this appeal in the terms proposed by my noble and learned friend, Lord Reid.

Appeal allowed.

The House of Lords ordered that the cause be remitted to the Divisional Court of the Queen's Bench Division to require the respondent, the Minister of Agriculture, Fisheries and Food, to consider the complaint of the appellants according to law. It further ordered that the respondents do pay to the appellants the costs incurred by them in the courts below and also two-thirds of the costs incurred by them in respect of the appeal to the House of Lords.

Solicitors: *Biddle & Co.; The Solicitor, Ministry of Agriculture, Fisheries and Food.*

F. C.

[PRIVY COUNCIL]

P. C.*

1967 *Nov.* 27, 28; 1968 *Jan.* 22

KULAMMA *v.* MANADAN

Fiji—Native land—Unlawful "dealing" with—Share farming agreement—Agreement of purely contractual and personal character—Whether agreement an "alienation" of the farmer's interest—Whether a "dealing with the land"—Native Land Trust Ordinance, Cap. 104 (*Laws of Fiji,* 1955 *Rev.*), *s.* 12.

A share farming agreement made between the appellant's late husband, S., and his brother, the respondent, M., relating to native land, provided:

"1. The owner S. will employ the farmer M. to farm and the farmer will farm the said land to the best of his skill and ability. 2. This agreement shall enure until all moneys owing by the owner to M.H.S. are fully paid. 3. The farmer will at all times . . . cultivate and farm . . . according to

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* *Present*: LORD GUEST, LORD WILBERFORCE and LORD PEARSON.

[HOUSE OF LORDS]

SECRETARY OF STATE FOR EDUCATION AND SCIENCE . . . . . APPELLANT

AND

TAMESIDE METROPOLITAN BOROUGH COUNCIL . . . . . RESPONDENTS

1976 July 22, 23, 26 — Lord Denning M.R., Scarman and Geoffrey Lane L.JJ.

1976 July 29, 30, 31; Aug. 2; Oct. 21 — Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Salmon and Lord Russell of Killowen

Education—School—Secretary of State, powers of—Local education authority proposing to introduce comprehensive system of education—Scheme approved by Secretary of State—Control of authority passing to political opponents committed to retention of grammar schools—Authority proposing selective entry to grammar schools—Direction by Secretary of State to implement scheme of comprehensive education—Whether lawful—Whether authority "proposing to act unreasonably"—Whether sufficient time for authority to put proposals into effect—Duty of teachers to cooperate—Education Act 1944 (7 & 8 *Geo.* 6, *c.* 31), *ss.* 1 (1), 8 (1), 13 (1) (4), 68 [1] (*as amended by Education Act* 1968 (*c.* 17), *s.* 1 (2)

A local education authority proposed to bring all the schools in their area under the comprehensive principle. Their scheme was approved by the Secretary of State for Education and Science in November 1975, and implementation of the scheme was envisaged by the beginning of the school year in September 1976. In May 1976 local government elections were held, and in the authority's area the survival of the grammar schools was a strongly fought issue on which the opposition party took a stand. The opposition party gained control of the authority, and considered that they had a mandate to reconsider their predecessors' education policy. The new authority proposed to continue and complete three new comprehensive schools which were in the course of construction, to continue 16 secondary modern schools and to postpone plans for conversion of three grammar schools into comprehensive schools or sixth form colleges. In a letter to the Secretary of State on June 7, they said that the schools in their area were not ready for the changed roles proposed by their predecessors and that implementation of those proposals in September would have caused grave disruption to the children's education. They summarised their present plans as being "the maintenance of

[1] Education Act 1944, as amended, ss. 1 (1), 8 (1): see post, p. 1053B, C–E.
S. 13: "(1) . . . where a local education authority intend to make any significant change in the character, . . . of a county school, they shall submit proposals for that purpose to the Secretary of State. . . . (4) Any proposals submitted to the Secretary of State under this section may be approved by him after making such modifications therein, if any, as appear to him to be desirable: . . ."
S. 68: see post, p. 1046E–F.

the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals." All allocations of pupils for the forthcoming year made by their predecessors—some 3,000—would be honoured subject to parents' agreement. Two of the grammar schools would remain grammar schools open to 11-year-old entry, making 240 selective places available. All parents of 11-year-olds were to be given the right to apply for reallocation. If, as was likely, the number of applicants exceeded the number of places available, those pupils most suitable and most likely to benefit from that type of education would be selected by a combination of reports, records and interviews. There would be no formal 11-plus examination. (In the event, there were 783 applications by parents of 11-year-olds for the 240 places in response to letters sent out to 3,200 parents.)

On June 11 the Secretary of State, acting under section 68 of the Education Act 1944, directed the authority to give effect to the proposals approved by him in November 1975 and to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming year on a non-selective basis. His letter of direction stated "A change of plan at this stage of the year, designed to come into effect less than three months later, must . . . give rise to considerable difficulties . . ."

On June 18, 1976, the Secretary of State applied for an order of mandamus ordering the authority to comply with his direction. The Divisional Court held that the Secretary of State was justified in saying that in the circumstances there was no time to carry out the proposed selection procedure by September and that accordingly there had been material on which he had been entitled to express himself as satisfied that the authority were going to act unreasonably. They made the order of mandamus.

The Court of Appeal received evidence to the effect that the selection procedure proposed by the authority (on the basis of reports, records and interviews) was well known and tried and workable and that sufficient teachers were available to form a selection panel. They allowed the authority's appeal and quashed the order of mandamus.

On appeal by the Secretary of State:—

Held, dismissing the appeal, that under the Act of 1944 a local education authority were entitled to have a policy, and section 68 did not entitle the Secretary of State to require them to abandon it because he disagreed with it; that he could give a direction only if they were acting unreasonably in doing what they were entitled to do; that his objection that their policy was creating a dilemma for parents was insupportable in view of the fact that the electorate, including many parents, had voted for a selective basis of secondary education and the authority were providing it; that the critical question was whether on June 11, 1976, the Secretary of State had had a sufficient factual basis for believing that the change proposed by the authority would lead to educational chaos or undue disruption, bearing in mind that the electorate must have accepted that there would be some disruption; that the question which the Secretary of State should have considered was whether a reasonable authority would have attempted to carry out the selection procedure proposed in the time available or at all; that he did not appear to have directed his mind properly or at all to that question; that although the authority's letter stating that selection would be by a combination of

reports, records and interviews was lacking in specification it must have conveyed sufficient to the experts at the Department of Education and Science to have enabled them to understand what was meant, and such defects as there were in the proposed procedure did not enable it to be said that no reasonable authority would have attempted to carry it out; that the teachers were public servants with responsibility for their pupils and a duty to produce reports and it could not have been unreasonable for the authority to have taken the view that if the Secretary of State did not intervene the teachers would cooperate; and that, accordingly, there had been no ground on which the Secretary of State, properly directed, could have found that the authority were acting or proposing to act unreasonably (post, pp. 1046H—1047C, 1048B–C, 1050H—1051A, E–G, 1052A, E–G, 1054C, 1058H—1059A, 1061D, F–G, 1062E–G, 1064B, E, G—1065B, 1066B–C, E–F, G—1067A, 1070B–D, F–G, 1071B–C, H, 1072B–C, 1073B–C, 1074D–E, 1075F, G–H, 1076C–D).

Per Lord Russell of Killowen. "Unreasonably" is a very strong word indeed (post, p. 1075C). Facts subsequently brought forward as existing on June 11 could not properly be relied on as showing that the authority's proposals were not unreasonable unless they were of such a character that they could be taken to have been within the knowledge of the Secretary of State (post, p. 1076E).

Decision of the Court of Appeal, post, pp. 1020H et seq., affirmed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Secretary of State for Employment v. *ASLEF (No. 2)* [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.

W. (An Infant), In re [1971] A.C. 682; [1971] 2 W.L.R. 1011; [1971] 2 All E.R. 49, H.L.(E.).

The following additional cases were cited in argument in the House of Lords:

Cumings v. *Birkenhead Corporation* [1972] Ch. 12; [1971] 2 W.L.R. 1458; [1971] 2 All E.R. 881, C.A.

McEldowney v. *Forde* [1971] A.C. 632; [1969] 3 W.L.R. 179; [1969] 2 All E.R. 1039, H.L.(N.I.).

Padfield v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.).

Reg. v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587; [1960] 2 All E.R. 407, D.C.

Rex v. *Bishop of Sarum* [1916] 1 K.B. 466.

Sadler v. *Sheffield Corporation* [1924] 1 Ch. 483.

The following cases are referred to in the judgments of the Court of Appeal:

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

City of Plymouth (City Centre) Declaratory Order 1946, In re; Robinson v. *Minister of Town and Country Planning* [1947] K.B. 702; [1947] 1 All E.R. 851, C.A.

Liversidge v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.).
Nakkuda Ali v. *Jayaratne* [1951] A.C. 66, P.C.
Padfield v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.).
Ridge v. *Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.).
Secretary of State for Employment v. *ASLEF* (*No.* 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.
W. (*An Infant*), *In re* [1971] A.C. 682; [1971] 2 W.L.R. 1011; [1971] 2 All E.R. 49, H.L.(E.).

The following additional cases were cited in argument in the Court of Appeal:

Bradbury v. *Enfield London Borough Council* [1967] 1 W.L.R. 1311; [1967] 3 All E.R. 434, C.A.
British Oxygen Co. Ltd. v. *Board of Trade* [1969] 1 Ch. 57; [1968] 3 W.L.R. 1; [1968] 2 All E.R. 177.
Cumings v. *Birkenhead Corporation* [1972] Ch. 12; [1971] 2 W.L.R 1458; [1971] 2 All E.R. 881, C.A.
Hanks v. *Minister of Housing and Local Government* [1963] 1 Q.B. 999; [1962] 3 W.L.R. 1482; [1963] 1 All E.R. 47.
Mountview Court Properties Ltd. v. *Devlin* (1970) 21 P. & C.R. 689, D.C.
Sadler v. *Sheffield Corporation* [1924] 1 Ch. 483.
Watt v. *Kesteven County Council* [1955] 1 Q.B. 408; [1955] 2 W.L.R. 499; [1955] 1 All E.R. 473, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

On June 11, 1976, the Secretary of State for Education and Science, in the exercise of the powers conferred by section 68 of the Education Act 1944 and vested in him by the Secretary of State for Education and Science Order 1964, directed the Tameside local education authority, the Tameside Metropolitan Borough Council, to give effect to proposals which he had approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as were required to give effect to the proposals. His letter of direction read:

"I am directed by the Secretary of State for Education and Science to refer to correspondence between the department and the authority beginning with Mr. J. I. Langtry's letter of May 11 which asked whether the authority intended to implement the secondary reorganisation proposals approved by the Secretary of State on November 11, 1975, and, in the event of the authority deciding not to implement those in September, for full details of the arrangements proposed for the transfer of pupils to county secondary schools in September. On May 19 the education services committee recommended that the authority should not implement the approved proposals but made no statement of any alternative arrangements for the transfer of pupils for the coming school year. On May 20 the authority were invited to discuss the situation with the Secretary of State in the week beginning May 24, but were unable to do so. The department accordingly wrote to the authority again on May 26 asking for a precise and detailed

statement of the plans which the authority hoped to put into effect in September. As a result of that letter, a meeting took place on Wednesday, June 9, between the Secretary of State and representatives of the authority including Councillor Grantham, leader of the council, and Councillor Thorpe, chairman of the education services committee.

"The background to the meeting is that on March 19, 1975, the authority submitted to the Secretary of State proposals under section 13 of the Education Act 1944. These proposals provided for changes in the character of all their county secondary grammar and modern schools in September 1976 in such a way as to end selection by ability and aptitude and to establish a comprehensive system of secondary education. The Secretary of State approved the proposals on November 11, 1975. Since that date extensive preparations have been made to put the proposals into effect. Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work directly related to changes in the character of some schools has been put in hand; and over 3,000 children due to transfer from primary schools this year have been allocated to secondary schools without reference to ability or aptitude, the former selective processes being no longer appropriate, and largely by reference to parental choice.

"At the meeting on June 9 the authority's representatives informed the Secretary of State that the council had on June 8 resolved to continue the 21 schools which were the subject of the proposals approved under section 13, the five grammar schools as '11 to 18 academic high schools' and the remainder as '11 to 16 secondary schools,' and accordingly to modify the arrangements already made for the allocation of pupils to secondary schools for the coming year. Their reasons for these proposals were set out in a letter from the chairman of the education services committee dated June 7 and the proposals themselves were explained in detail by the authority's representatives at the meeting.

"The Secretary of State has given the most careful consideration to the representations made to him. He is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the Education Acts 1944 to 1976* regarding the provision of secondary education for their area and in particular with respect to their powers and duties (express and implied) under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools on transfer from primary schools at the beginning of the coming school year, i.e., on September 1, 1976. A change of plan at this stage of the year, designed to come into effect less than three months later, must in his opinion give rise to considerable difficulties. The authority's revised proposals confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational

* *Reporter's note.* "1976" refers to the Education Bill.

validity. Furthermore it is clear from the terms of paragraph 10 of the resolution adopted at the special council meeting of June 8, which were elaborated in the course of the meeting of June 9 by the authority's representatives, that an abnormally high proportion of pupils might need to be reallocated to different secondary schools during, or at the end of, the educational year beginning in September 1976. This would impose a further measure of disturbance on top of the present uncertainty. In addition the change of plan at this time in the educational year threatens to give rise to practical difficulties in relation to the appointments of staff already made and the construction of buildings for the new comprehensive schools and to create a degree of confusion and uncertainty which could impair the efficient working of the schools.

" In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him by the Secretary of State for Education and Science Order 1964, the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as is required to give effect to the proposals."

By notice of motion dated June 18, 1976, the Secretary of State applied pursuant to leave granted by the Divisional Court on that date for an order of mandamus directed to the council requiring them to exercise the powers conferred and duties imposed on them by and under the Education Acts 1944 to 1976 [sic] in accordance with his directions dated June 11, 1976, on the grounds that he, having been satisfied that the council were proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the the Acts of 1944 to 1976 [sic] regarding the provision of secondary education for their area, as he had been entitled to do by section 68 of the Act of 1944, as amended, had given directions to the council dated June 11, 1976; that it had been then and thereafter the duty of the council to comply with that direction and that they did not intend to do so unless required to do so by the court.

On July 12, 1976, the Divisional Court granted the order. In his judgment, Lord Widgery C.J. said:

> " In the end Mr. Woolf's argument, as it seems to me, was this. He said there are lots of things which are going to cause trouble if we get a sudden change of plan at the last minute like this. There are all sorts of difficulties arising and all sorts of wasted building work will occur, but absolutely crucial in this case is the fact that there are 240 grammar school places to fill. They are available to be filled in September. The children have been warned suitably in advance. Yet, says Mr. Woolf, there is nothing in the proposals of the Tameside authority as to how this selection is to be carried out either in the time available or at all.
>
> " We can only set aside the Secretary of State's directions if we are satisfied that he has gone outside his jurisdiction and has made this order when there is no ground upon which it can lawfully be made.

Although I have not found this an easy case, and although, I confess, my opinion of the conclusion has wavered from time to time from one side to the other, I think in the end Mr. Woolf has satisfied us that there was here before the Secretary of State material upon which he could express himself as satisfied that the local authority were going to act unreasonably.

"This is not in any sense a victory for comprehensive education or selective education. It is simply a conclusion that, when the Secretary of State says there is no time to get this done by September, I think he is right on that one point. I am not required to go into any other grounds. On the question of whether there was time to get this done by September he says he thought not. In my view there was material upon which, if he thought fit, he could reach that conclusion."

Cusack J. agreed. May J., also agreeing, said:

"Having heard the argument on both sides, I have ultimately come to the conclusion that there was relevant material upon which the Secretary of State was entitled to come to the conclusion to which he did come. Shortness of time coupled with the lack of cooperation from some of the teachers in the area I think provided him with sufficient evidence to entitle him to decide as he did. On the affidavits and exhibits before us, I am not impressed with the other grounds referred to by the Secretary of State—the fresh contracts which it is contended have been entered into with teachers within the new comprehensive system; the building work which it is alleged has been put in hand; still less the planning of the new courses which it is said has been done. Further, had the local authority had the cooperation of the teachers concerned, it would I think have been difficult for the Secretary of State to have contended that there was then any relevant material before him upon which he could have reached the necessary conclusion under section 68 of the Act of 1944. Without that cooperation, however, it is certainly arguable that it is difficult to see how all the children under the aegis of this local authority could fairly have been allocated to appropriate secondary schools in time for the new term in September next, and in the end I have come to the conclusion that this was sufficient material upon which a Secretary of State could decide as the Secretary of State in fact did."

The council appealed.

Anthony Lloyd Q.C., *Leon Brittan* and *Andrew Caldecott* for the council.

David McNeill Q.C. and *J. J. Hodgson* for six parents.

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State.

LORD DENNING M.R. There is a controversy on this question: should the grammar schools be turned into comprehensive schools? Most educationalists and parents know what the controversy is all about, but for others who do not know the background perhaps I may say a word. The difference lies in the way the children are selected on and after the age of 11.

In order to go to a grammar school, a boy or girl of age 11 has to show some marked ability or aptitude. When he gets there, he or she will mingle with other bright youngsters and be taught there right through until the age of 18. But a comprehensive school takes any boy or girl of age 11 without reference to his or her ability or aptitude. The bright and the dull start together in classes, but they are divided into different streams as they develop in ability or aptitude. They remain at the comprehensive school until they are 16. Most of them then leave to go to work. But those who wish can go on for two more years at a sixth form college where they are given more advanced teaching. That is from 16 to 18.

Each system has its advocates. Those who support the grammar schools point to their long and distinguished record going back before the Reformation. They were, says Trevelyan, " the typical unit of Elizabethan education . . . where the cleverest boys of all classes were brought up together ": see *Trevelyan, English Social History* (1944), p. 162 [Illustrated English Social History (1949–1952), vol. 2, p. 23]. Those who seek to retain them claim that they retain the inherited virtues of sound learning and hard work leading to fine achievement: and many parents, they say, wish still to send their children to a grammar school, if it is available, rather than to a comprehensive. In contrast the comprehensive schools are of recent origin. Those who support them claim that they give equally good education for the able children as the grammar schools; and, what is more, they provide better education for the many others. So much support is now given to comprehensive schools that a bill before Parliament seeks to declare that " the comprehensive principle " is to be applied throughout our educational system. It says that pupils are *not* to be selected " by reference to ability or aptitude."

We, of course, in this court support neither side in this controversy: but we have to take notice that the political parties are concerned in it. This is shown by the dispute which is now before the court. It is about education in the Tameside metropolitan area (which was formed in 1974 as a part of Lancashire and Cheshire). Before May 1976 the council was controlled by the Labour party. But on May 6, 1976, there were local elections which brought the Conservatives to power. Whilst the Labour councillors were in the majority, they had made plans to change over to the " comprehensive principle " as soon as it could be done. On March 19, 1975, they made detailed proposals to the minister whereby they were going (1) to put into use three new purpose-built comprehensive schools; (2) to bring 16 secondary modern schools into the comprehensive principle; and (3)—this is the particular proposal now in question—to shut down five grammar schools and to turn three of them into three comprehensive schools and the other two into two sixth form colleges. The buildings for this changeover were not to be purpose-built. The staff and pupils were still to be in the old grammar school buildings. On November 11, 1975, these proposals of the old council were approved by the Secretary of State. But they were opposed by the Conservative party in the council as being premature. At the local elections in 1975 and 1976 the Conservative councillors made it one of their planks in their election campaign. Their leaflets put it in this way:

" Education.
" Present comprehensive plan will not be implemented.
" A review of complete education system will be undertaken to improve opportunities for all children together with freedom of parental choice."

On May 6, 1976, the Conservative party gained control. They approved and adopted much that their predecessors had done towards the comprehensive principle. For instance, three new comprehensive schools had been built—purpose-built—as comprehensive schools. The Conservative party considered these as a valuable nucleus for the future. They also approved the proposal that the 16 existing secondary modern schools should be brought into line with the comprehensive principle. But here is the point: they proposed to postpone the plans for the five grammar schools because they thought that the changes would themselves cause much disruption and disturbance to the children's education and it would be better to continue the five grammar schools as they were for a time so that the position could be reviewed. Their policy was, they said, to maintain " the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals."

When the Secretary of State heard of the postponement by the new council he was much concerned. He thought that the plans of the previous council had gone too far to be put into reverse in this way. He thought that the new council were acting, or proposing to act, unreasonably in postponing the changeover. On June 11, 1976, he directed the new council that they were to implement the old council's proposals and a week later, on June 18, 1976, he followed this up by applying to the Divisional Court for an order of mandamus commanding the new council to implement the old council's proposal. On July 12, 1976, the Divisional Court granted the mandamus. The new council appeal to this court and are supported by some of the parents of the children affected.

Before I go into what the minister has done and his reasons, I will consider the facts by summarising the arguments put on either side on this proposed postponement. The new council—that is, the local authority—rely on the result of the May election. They say that the issue was put plainly before the electorate. The new council consider that they have a mandate for postponing the old council's proposals and that they are morally bound to honour that mandate if they can legitimately do so. That is their first argument.

The new council also say that the old council were proceeding with too much haste to implement the changeover. They say that if the proposals of the old council were implemented immediately—without a pause for review—it would lead to disruption of the studies of many pupils, especially those already in the sixth form (where they spend two years) and those due to go up into it. Those pupils who had been there for one year already would have to stay in the old grammar schools for their last year, taught, they expect, by junior teachers. Those going up into the sixth form at age 16 would have to go to the new sixth form colleges for their last two years in new surroundings and with new teachers and with building work not started or not completed and this, they say, would be at a crucial

time when they were to take their examinations (such as the " A " levels) on which their future careers depend. Those are not all, but only some, of the arguments which were being adduced by the new council.

On the other hand, there are arguments on the other side. The Secretary of State has strong arguments against any postponement. He says that many preparations have been made for the changeover to take place on September 1, 1976, and it would cause unwarranted disruption if these were now to be put into reverse. These preparations were summarised by the department in these words in the letter of June 11:

> " Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work . . . has been put in hand; and over 3,000 children " (of 11) ". . . have been allocated [places] without reference to ability or aptitude."

Those are the principal arguments being put forward by the Secretary of State.

But to these arguments the new council make their answer. They admit that if the proposals were to be postponed there would be some disruption, but they assert that there would be not nearly so much disruption as the department fears. Staffing, they suggest, will present few problems because 95 per cent. of the teachers will remain in the same schools anyway, and their new contracts will be honoured. The new courses, they say, have not been planned in detail and can readily be revised before the new term starts. Little building work has been put in hand, and a great deal will not be completed in time for the new term. As to the 3,000 new 11-year-olds who are coming up, they say that the great majority of parents are content with the places allocated to them. They have written to all those parents with youngsters who are coming up to 11, and have had replies from all. Only 783 wish their children to go to a grammar school, if available. The new council admit that, if the grammar schools are to be retained for a year pending review, there will be only 240 places available. (These will arise because of the change back from the proposed sixth form colleges, Ashton and Hyde.) So the new council will have 240 places available for those 783. It will be necessary to find some way of selecting the 240 children to fill them; and furthermore to make the selection in time for the new term starting in September 1976. Eventually, as the argument proceeded, it seemed that this selection became the main crux of the difference between the parties before us.

Now it is most important to remember that we have to view the matter —as the parties had to view the matter—as at June 11, 1976, when the Secretary of State made his decision. What were the materials then before the new council? They were hopeful that those 240 could have been selected well and fairly before the end of the summer term. It would not end until July 23. So they had six weeks, and they say that it could have been done if the teachers and staff had been willing to cooperate with the new council in making the selection. They would go through the records and recommendations from the primary schools. They would have standardised reasoning tests and then the selection could be well and truly made if only the teachers and staff were willing to cooperate. But unfortunately it

appears that some of the trade unions, speaking through the teachers consultative committee, said that they were unwilling to cooperate in this changeover. Faced with the unwillingness of some at least of the teachers to cooperate, the new council had then in their minds—and have since formulated in affidavits before us—a plan to overcome this difficulty. They say that they will be able to get the records of the 783 pupils from the primary schools and that they can get a "selection panel" of 20 teachers who are willing to serve on a selection board. The chairman is to be the headmaster of a junior school of much experience. He says in his affidavit:

> "If I had a selection panel of 20 teachers (10 couples) I am of the opinion that a fair, feasible and practicable selection of 240 places from 783 applications can comfortably be made within one week."

If this view of the new council is accepted, then it does appear that, although it would be far from perfect, a selection can be made out of the 783 children whereby 240 of the best and brightest of these youngsters can be allocated places at the grammar schools. It can be done even now with only five weeks to go before the new term. All the more so could it have been done on June 11, 1976, when the matter has to be tested. They had good reason then to believe that a fair selection could be made.

Now we have to come to the point: Was the Secretary of State warranted in the course which he took on June 11, 1976? He said he was satisfied that the new council was acting or proposing to act unreasonably. He relied on his powers under section 68 of the Education Act 1944. The question for the court today is whether he was lawfully exercising his powers under that section or not. So I must read it, because the whole case turns upon it. It says, as amended:

> "If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority . . . [has] acted or [is] proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient."

The governing words which we have to consider here are, first, "If the Secretary of State is satisfied," and, secondly, "that any local education authority . . . [has] acted or [is] proposing to act unreasonably." So much depends on the interpretation of those words that I must say something upon them.

So far as "satisfied" is concerned, it is suggested—and was suggested by the chief officers of the local authority on June 21, 1976—that once the Secretary of State said that he was "satisfied" his decision could not be challenged in the courts unless it was shown to have been made in bad faith. We were referred by Mr. Bingham to *Liversidge* v. *Anderson* [1942] A.C. 206, where Lord Atkin drew attention to cases where the Defence Regulations required the Secretary of State to be "satisfied" of something or other. Lord Atkin said, at p. 233: "In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good

faith," to which I would add a similar passage by Somervell L.J. in *In re City of Plymouth (City Centre) Declaratory Order 1946: Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702, 721. Those statements were made, however, in relation to regulations in war time or immediately after the war when the decisions of the executive had to be implemented speedily and without question. That was pointed out by Lord Radcliffe in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 77 and by Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40, 73. Those statements do not apply today. Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another. To my mind, if a statute gives a minister power to take drastic action if he is "satisfied" that a local authority has acted or is proposing to act improperly or unreasonably, then the minister should obey all the elementary rules of fairness before he finds that the local authority is guilty or before he takes drastic action overruling them. He should give the party affected notice of the charge of impropriety or unreasonableness and a fair opportunity of dealing with it. I am glad to see that the Secretary of State did so in this case. He had before him the written proposals of the new council and he met their leaders. In addition, however, the minister must direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he has to consider and the decision to which he comes must be one which is reasonable in this sense: that it is, or can be, supported with good reasons or at any rate is a decision which a reasonable person might reasonably reach. Such is, I think, plain from *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 which is a landmark in our administrative law and which we had in mind in *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455, 493, 510. So much for the requirements if the minister is to be "satisfied."

Now I turn to the other important words in this section: that he is satisfied that the local education authority have acted or are proposing to act "unreasonably." The question often arises whether someone has acted, is acting or is proposing to act "unreasonably." To decide this question, it must be remembered, as Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700:

> "Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable."

It is one thing to say to a person: "I think you are wrong. I do not agree with you." It is quite another thing to say to him: "You are being quite unreasonable about it." I know it is often done. It is commonplace to say to your adversary: "You are being very unreasonable" when all you mean is: "I think you are wrong." Such hyperbole is excusable in ordinary mortals but not in those who have to consider and apply Acts of Parliament. No one can properly be labelled as being unreasonable unless

he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view. A

All the more so when a man—be he a judge or a minister— is entrusted by Parliament with the task of deciding whether another person has acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views—and perhaps his own strong views—as to what should or should not be done. He must be very careful then not to fall into the error—a very common error—of B thinking that anyone with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite view cannot be reasonably held by anyone. But he must pause before doing so. He must ask himself: "Is this person so very wrong? May he not quite reasonably take a different view?" It is only when the answer is: "He is completely wrong. No reasonable person would take that view" C that he should condemn him as being unreasonable. During the argument I was interested in the question which Scarman L.J. put to Mr. Bingham, and which he accepted: In order for the new local authority to be unreasonable, it must be apparent to them that in all probability the solution which they are suggesting will not work. Put in another way, it seems to me that if, on June 11, 1976, the new council reasonably took the view that their solution would work, and in particular that a D fair selection of the 240 could be made in time for the new term, it could not be said that they were acting unreasonably.

It is on this point—on the interpretation of unreasonableness—that I think the minister must have misdirected himself. In his decision letter of June 11, 1976, he has set out the reasons why he thinks the new council are acting wrongly in postponing the changeover. He says: "A change of plan at this stage . . . must . . . give rise to considerable diffi- E culties," that the parents will be confronted with a "dilemma," and that the "improvised selection procedure" is such as to "raise substantial doubts about its educational validity." All these are reasons why the minister thinks that the new council are acting, or proposing to act, *erroneously.* But none of them in my view are reasons for saying that the new council are acting, or proposing to act, *unreasonably.* It seems to me that in con- F sidering whether they are acting unreasonably or not there are many considerations to be borne in mind besides those expressly mentioned by the minister. There is the mandate itself which the council believe they have obtained from the electorate. There is the disruption which they feel will result from the premature implementation of the old council's proposals. They admit that the selection tests in the circumstances of the case are not perfect, but they believe they will work. All these are G considerations showing they were acting reasonably: and there is no trace that the minister had regard to them. All things considered, I do not find any evidence on which the minister could declare himself satisfied that they had acted or were proposing to act unreasonably.

In the circumstances, it seems to me that the minister's directions were not validly made in accordance with the Act of Parliament. Being invalid, H it is not a case for any issue of an order of mandamus to the new council.

One word more on a technical point. It was said that mandamus did not lie directly for a failure to obey directions under section 68, and

that, before applying for mandamus, the minister ought to have gone through the extra procedure of a declaration of default under section 99. If I am right in thinking the directions under section 68 were invalid that point does not arise for decision in this case, and therefore I will say nothing on it.

But on the principal point in the case it seems to me that the minister was not justified in asserting that he was satisfied that the new council were acting or proposing to act unreasonably. It is therefore no case for a mandamus. I would allow the appeal accordingly.

SCARMAN L.J. This appeal raises two questions. One is of technical law, the meaning of the adverb "unreasonably" in section 68 of the Education Act 1944. The other is a question of legal principle in the field of administrative law—the scope of judicial review where what has to be resolved is a dispute as to their powers between two elected authorities, one being the central government and the other a local authority.

I need not rehearse the facts. The dispute is between the Secretary of State for Education and Science and a local education authority, the metropolitan borough council of Tameside. The Secretary of State has directed that proposals previously made by the authority and approved by him for the introduction into the area of universal comprehensive education be implemented. The council, whose political control has changed hands in a recent election, has changed its policy and no longer wishes to implement the proposals. The Secretary of State says that he is satisfied that the council is, or is proposing, to act unreasonably in the exercise of its powers or in the performance of its duty under the Act and has issued his direction under section 68. The council having made plain that they do not consider themselves bound to comply with the direction, he asks the court for an order of mandamus requiring them to do so.

It is sufficient, for the purposes of my judgment, to bear in mind (1) that on November 11, 1975, the Secretary of State gave his approval under section 13 of the Education Act 1944 to proposals (which I shall call the section 13 proposals) put forward by the local education authority for introducing universal comprehensive education into the area, beginning on September 1, 1976; (2) that his approval of those proposals imposed no duty upon the local education authority to implement them; (3) that in the election of May 6 of this year control of the authority passed from the Labour party, who supported the section 13 proposals, to the Conservatives who did not, and do not; (4) that the local education authority, now under Conservative control, informed the minister in May that they intended not to implement the section 13 proposals but to retain the existing mixed pattern of education, which includes three comprehensive schools, 16 secondary modern schools and five grammar schools, until such time as a new, well thought out system of education might be devised for the area; (5) that, after receiving the written representations of the local education authority, and after according their representatives a meeting to discuss, in particular, the detailed proposals for the change of plan, the Secretary of State invoked section 68 of the Act of 1944 and

issued by letter dated June 11 his direction to the local education authority to implement the section 13 proposals.

The authority challenges the lawfulness of his direction. It is, as I have said, a dispute between two public authorities. Judicial review can resolve it: but the review has to embrace not only the lawfulness, or otherwise, of the Secretary of State's direction but also the validity of the local education authority's decision not to implement the section 13 proposals.

Ultimately there is, I think, only one issue: whether the direction of the Secretary of State was lawful. For, if it was, there can be no doubt, in my judgment, but that mandamus must go. I reject the submission that, even if the direction be lawful, the court in the discretion which it undoubtedly possesses should refuse the order sought. But the submission as to discretion, though it must be rejected, has drawn attention to an aspect of the case of considerable importance, namely, that the local education authority is entitled to have its decision treated with the same respect and approached in the same way as the minister's. The case is no more an appeal against the decision of the local education authority not to implement the section 13 proposals than it is an appeal against the Secretary of State's direction to the authority to implement it. In respect of each decision the court's role is strictly limited to judicial review.

As I have said, the Secretary of State acted under section 68 of the Education Act 1944. Being satisfied that the Tameside local education authority—that is to say, the metropolitan borough council of Tameside—was proposing to act unreasonably, he issued his direction by letter of June 11, 1976. He expressed his satisfaction in these terms:

> "He"—that is, the Secretary of State—"is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the Education Acts . . . regarding the provision of secondary education for their area and in particular with respect to their powers and duties (express and implied) under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools on transfer from primary schools at the beginning of the coming school year, i.e., on September 1, 1976."

His direction in the same letter was put in these terms:

> "In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him by the Secretary of State for Education and Science Order 1964, the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as is required to give effect to the proposals."

I accept the submission of Mr. Bingham, for the Secretary of State, that

we must look primarily to the letter for the reasons for his satisfaction, though the Secretary of State is not to be precluded from relying on other reasons if they existed when he gave his direction. The primary reason given in the letter was put as follows:

> "The authority's revised proposals confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substiantal doubts about its educational validity."

The letter does refer to additional difficulties arising from the change of plan by the local education authority. But undoubtedly the real reason for the Secretary of State's direction was his concern over the difficulties of selection and reallocation arising from the change of plan. The other difficulties loom large—surprisingly large, I venture to think—in the evidence by which the Secretary of State seeks to persuade the court to grant him the order he seeks. But I agree with Lord Widgery C.J. when he said, in giving judgment in the Divisional Court, that the allocation problem was the "situation . . . very largely relied upon in the end by the Secretary of State. . . ." Lord Widgery C.J. examined the other matters relied on by the Secretary of State and thought little of them. He based his judgment "on that one point," that is to say, that the selection of children to fill the 240 places made available by the change of plan at the two grammar schools (which under the section 13 proposals were to become sixth form colleges) could not be carried out "in the time available or at all." Cusack J. agreed with him: and so did May J. in a judgment which revealed his profound scepticism as to the validity of the other reasons advanced.

As always with judicial review, it is vital to determine, and then strictly to follow, the correct judicial approach to the problem placed before the court. Mr. Bingham put it correctly when he submitted that the letter of June 11 was crucial to the Secretary of State's case, and that it must be read fairly, not legalistically, and must be studied in its contemporary context, that is to say, as things were on June 11. Mr. Bingham was also right to remind the court that it is not suggested (a) that in the letter any reliance was placed on extraneous or irrelevant matters; (b) that the Secretary of State had omitted or failed to take into consideration any relevant matters (unless being misinformed is such a failure); (c) that the Secretary of State in using his power of direction under section 68 had any intention other than to secure compliance with the policy and intendment of the statute; (d) that there was bad faith on his part. He submitted—rightly, in my opinion—that *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 is not directly in point, since in that case the minister's reasons for refusing to appoint a committee of investigation were held to be outside the policy and intendment of the statute. When, however, Mr. Bingham came to summarise the law, he put it, I think, a little too narrowly. He submitted—and, if I may, I will

put his submissions in my own words and not necessarily his—that (1) section 68 confers on the Secretary of State a "subjective" discretion; (2) while judicial review of the exercise of the discretion is not excluded by the section, the court can declare the Secretary of State's direction unlawful only if there be proved to exist one or other of the following situations: bad faith on the part of the Secretary of State, misdirection in law, taking account of irrelevant matters or omitting to consider relevant matters, and finally a situation where the Secretary of State has taken a view which on the material and the information available to him no reasonable man could have taken; (3) the court must assume the discretion to have been lawfully exercised, until the contrary be shown; (4) the court must always bear in mind that the discretion is the minister's, not the court's. He relied on a well known line of cases, of which the familiar landmarks are *Liversidge* v. *Anderson* [1942] A.C. 206 (particularly the dissenting speech of Lord Atkin, at pp. 232, 235 and 245) and *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223. I agree with the great majority of Mr. Bingham's submissions. But, first, I think that the epithet "subjective" is of no assistance in this context. The point of principle is simply that it is not a judicial but a ministerial discretion in an administrative matter which is under review. Of course, the unusual feature of the present case is that we have under review two administrative decisions, each by a different authority: the Secretary of State's decision to use his section 68 power of direction, and the local education authority's earlier decision not to implement the section 13 proposals, the decision which in fact led the Secretary of State to act under section 68.

Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr. Bingham. I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact may be either physical, something which existed or occurred or did not, or it may be mental, an opinion. Suppose that, contrary to the minister's belief, it was the fact that there was in the area of the local education authority adequate school accommodation for the pupils to be educated, and the minister acted under the section believing that there was not. If it were plainly established that the minister was mistaken, I do not think that he could substantiate the lawfulness of his direction under this section. Now, more closely to the facts of this case, take a matter of expert professional opinion. Suppose that, contrary to the understanding of the minister, there does in fact exist a respectable body of professional or expert opinion to the effect that the selection procedures for school entry proposed are adequate and acceptable. If that body of opinion be proved to exist, and if that body of opinion proves to be available both to the local education authority and to the minister, then again I would have thought it quite impossible for the minister to invoke his powers under section 68.

Lord Denning M.R. has briefly referred to some of the case law on the matter; and in the short time available I have looked to see if there is authority which would belie what I believe to be the law, and there is none. I think that the law which I believe to exist follows from the

cases to which Lord Denning M.R. has referred, and is really to be deduced from a well-known passage in *S.A. de Smith, Judicial Review of Administrative Action*, 3rd ed. (1973), p. 320, where he says:

> "Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by applying a wrong legal test to the question before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied. Such criteria are sufficiently elastic to justify either a broad or a narrow test of validity; and they seem to have become increasingly popular. Thirdly, a court may state its readiness to interfere if there are no grounds on which a reasonable authority could have been satisfied as to the existence of the conditions precedent. This test can be combined with the first and the second."

I would add by way of parenthesis and somewhat out of place that in the present case the evidence now before the court does show that the Secretary of State either misunderstood or was not informed as to the nature and effect of the professional educational advice available to the local education authority.

I have already put in my own words the situation which I think, in addition to those more commonly described, enables the court to exercise its power of review. I would now try to put that situation into a formula; and my formula would be as follows: that the Secretary of State cannot lawfully be satisfied that the local education authority is proposing to act unreasonably unless upon the information that was or ought to have been available to him the local education authority, acting reasonably, could not have acted, or proposed to act, as it in fact did. In other words, while it is not for the court to substitute its view for the minister's, it is also the law that the minister cannot substitute his view for that of the local education authority, provided always that an authority, acting reasonably, could have made the decision that in fact it made.

Turning to the facts, I think that it is likely that the Secretary of State was not as fully informed as he might have been upon the possibilities of setting up a viable and acceptable method of selecting pupils for the two grammar schools. The weight of advice available to him was that it was not possible to make an acceptable selection between June 11, the date of his direction, and September 1, the beginning of the new school year. But we know, and the minister ought to have been apprised of the fact, that the local education authority could rely on perfectly respectable professional advice that it was possible. Unless this advice can be shown to be unsound, I do not see how it was possible for the Secretary of State to be satisfied that the local education authority was proposing to act unreasonably. We have admitted, without objection, evidence which was not before the Divisional Court, evidence from which it is abundantly clear that, though there might be difficulties, there was no insuperable problem in setting up and carrying through selection tests after June 11 and in time for the new school year beginning on September 1. I would refer to paragraph 6 in the affidavit of Mr. Thomas, one of Her Majesty's chief inspectors of schools. It is to be remembered that on June 11 there

were still almost six weeks of term left in which to have whatever discussions or interviews were needed with teachers or pupils.

There was no suggestion that this period of term time was not enough. The real point was that the teachers' associations, being strongly opposed to the local education authority's change of plan, would not cooperate to get the work done. The point is hypothetical: for no one knows what the teachers would have done had the Secretary of State accepted the decision of the local education authority. But from the mere possibility that the unions might in any event have urged their members not to cooperate with the local education authority one is not, in my judgment, to infer that the local education authority was proposing to act unreasonably. Moreover, as we now know from the evidence adduced in this court and as could have been discovered by the Secretary of State prior to June 11, there was, and is, a sufficient number of teachers willing to cooperate in the selection tests and, as I have already mentioned, a respectable body of professional opinion that the job of selection not only could have been, if started in June, which is the critical moment of time, but can even now be acceptably accomplished by September 1.

Thus, while there are differences of opinion as to the acceptability of the tests proposed, there is none, as I understand the evidence, as to the time factor. There was time enough in June. How can, then, the Secretary of State have been satisfied that the course of action proposed by the local education authority was unreasonable? It may have been unwelcome, attended by some risk and one that called for effort and drive. But none of these factors could, in isolation or accumulatively, constitute unreasonableness. And, when the local education authority had to balance the difficulties associated with "going comprehensive" by September 1, which, as the evidence shows, were genuine difficulties, against those associated with a decision to revert to the existing mixed pattern of comprehensive, secondary modern and grammar school education, I find it impossible to say that there existed grounds on which the Secretary of State could have been satisfied that the local education authority was proposing to act unreasonably. "Unreasonably" must mean in the context of section 68 not "unreasonably policy-wise" but "unreasonably" in the administrative sense: for the Secretary of State very properly concedes that section 68 is not an appropriate vehicle for imposing an unwelcome educational policy upon a local education authority. Moreover, the word "unreasonably" means not "mistakenly" nor even "wrongly" but refers only to a situation in which the authority is acting or proposing to act in a way in which, in the circumstances prevailing and on the expert advice available, no reasonable authority could have acted. The local education authority, being a public authority, is entitled to have its acts assessed by the Secretary of State on that basis.

Finally, there is and can be no suggestion that the Secretary of State has allowed political considerations to influence his decision in this case. The truth is that the Secretary of State was not fully informed as to the practicability of what the local education authority had in mind to do. His advisers may have jumped to the conclusion that the local education authority's proposals were unworkable and unacceptable. But we now know that they were practicable and that their acceptability is recognised

by respectable professional opinion. The local education authority, like the Secretary of State, is a democratically elected authority entitled to have its opinion of administrative problems within the area of its responsibility respected. If grounds cannot be shown to exist for treating their decision as unreasonable, it should not be too difficult to show that the Secretary of State had no grounds for being satisfied that they were proposing to act unreasonably. I think that they have shown that he had none: and I would allow the appeal, declaring that no order of mandamus should go.

Mr. Lloyd, for the local education authority, did raise a further point upon section 99 of the Education Act 1944. He submitted that the machinery for taking action in the event of default by a local education authority under that section was exclusive of the right of the Secretary of State to bring mandamus proceedings in any case in which that statutory machinery had not been invoked. Like Lord Denning M.R., I reserve my opinion on the point, but I will say that I would be very surprised if Mr. Lloyd was right.

GEOFFREY LANE L.J. On June 11 of this year the Secretary of State for Education and Science gave a directive to the metropolitan borough of Tameside under section 68 of the Education Act 1944. That directive was that the borough should implement proposals approved by the Secretary of State in November 1975 under section 13 of that Act.

That directive the borough has declined to obey for all practical purposes. Thereupon the Secretary of State on July 12 moved the Divisional Court for and succeeded in obtaining an order of mandamus requiring the borough to comply with his directive. From that order the borough appeals.

The principal if not the only question to be decided is whether the directive from the Secretary of State was a lawful and valid order which under the terms of the Act the borough was obliged to obey.

The details of the unhappy differences between the Secretary of State and the new councillors for Tameside have already been given, and it is unnecessary for me to repeat them. The two sides of the dispute can perhaps be conveniently summarised as follows. The Secretary of State is saying that there is already in process of being implemented a scheme approved by him for replacing the selection of pupils by merit with the so-called comprehensive system of education. The proposal, he says, of the borough to revert to the old merit system and to retain the grammar schools in their old capacity is an unworkable proposal and is therefore unreasonable. Therefore, he says, "I, the Secretary of State, direct you the borough to discontinue your plan and to implement the comprehensive system which I have already approved."

On their side the borough reply by saying that they appreciate that there are difficulties in the path of their proposals. But, they say, there are difficulties of at least comparable size in the path of the comprehensive system proposed by the minister. Their own difficulties, they say, can all be overcome.

At the root of the dispute, and there is no advantage in closing one's eyes to the fact, are the two opposing views as to the better form of secon-

dary education. Unfortunately the argument has become politically aligned, with the result that the true issues may sometimes become lost in the dust of political battle.

One thing is, however, clear in the present case and that is that both sides are fervently and genuinely convinced that their own view is the correct one—not only that their own scheme is the best for the pupils, but that their own scheme is practicable.

The situation is somewhat unusual. We are concerned to decide not the question whether the Secretary of State is in breach of a duty cast upon him by law, but whether the directive from the Secretary of State requiring the borough to act was a lawful order. There are thus two stages rather than the more usual one single stage. What is being judged is the Secretary of State's judgment of the actions of the borough. It is of course not for the court to substitute its own views for those of the Secretary of State. The task of the court, in the present circumstances, is to decide whether there was any foundation of fact upon which the Secretary of State could properly come to the conclusion on June 11, 1976, that the borough had acted as no reasonable local authority could have acted in refusing to implement the comprehensive scheme. If there was such a foundation, then he was entitled to issue the directive even though the court may differ from his view.

What then were the grounds upon which the Secretary of State reached his conclusion? In the affidavit sworn on his behalf by Mr. Jenkins the reasons for his decision are not expressly set out. Reference is made to the letter of June 11, and one is left to extract such reasons as one can from that and also from the statements in the affidavit. Mr. Lloyd, on behalf of the borough, submits that there are five such reasons. Four, he says, are plainly wrong and the fifth (which he suggests was an afterthought) is on closer examination no better. Mr. Bingham, for the Secretary of State, submits that the first four so-called reasons were not reasons at all, but only part of the historical background, and that Mr. Lloyd's fifth reason was a more than adequate basis for the Secretary of State's directive. I, myself, have no doubt at all that the four items were being put forward as reasons by the Secretary of State, and not merely as part of the history. There was no reason, otherwise, for selecting them as part of the historical background rather than a hundred other facts. Those four reasons are set out in the affidavit of Mr. Jenkins, that affidavit being dated June 17, and there is no need for me to read them in full here. It is clear in short, to my mind, that none of those four grounds has any substance and indeed I have to say that Mr. Jenkins' affidavit is something less than frank on one of them—that is, the second—which suggests on first reading that a large number of transfers of staff had been made to implement the original scheme; when, however, one comes to examine the figures in detail it seems that only 35 transfers have been made and the rest were promotions and other appointments. It is the fifth ground which is really the nub of the case, and that is the suggestion that in the time available it is not possible to operate a sufficiently accurate merit selection system which is the foundation of the borough's whole scheme. The objection is that it is impossible to carry out the selection procedure in time for the beginning of the new term on September 1. This has been complicated,

it seems, by the attitude of some of the teachers' unions who have encouraged their members not to cooperate with the borough's proposals. Affidavits from Mr. Beard, who has accepted an invitation to act as chairman of the selection panel, and from Mr. Potts, who is a very experienced educationalist, which are before this court make it clear that even in the short time of five weeks available from today it will be possible to carry out a reasonably accurate selection for the 780-odd children who are involved in the difficulty. The one matter which could frustrate that objective would be if the heads of the junior schools refused to release the records of pupils. These records belong to the borough, and I find it hard to believe that any of the heads involved would take such a step as to withhold those documents from the people who are entitled to have them. I think we should assume that they will not withhold them. There will, it is true, be insufficient time for a standardised verbal reasoning test to be carried out. Such a test is desirable in order to cater for the differing standards amongst the junior schools, but its lack is not fatal to a selection procedure, as Mr. Thomas, one of Her Majesty's chief inspectors of schools, in an affidavit made clear. The furthest that he goes is to say in the final paragraph of his affidavit:

> "I conclude that the arrangements for the selection of pupils for grammar schools in Tameside this year which are referred to in Mr. Beard's affidavit would not, with reasonable certainty, allow a fair selection between border-line candidates."

That, it seems to me, is a tentative statement, and it was a statement made on July 21 of this year. We are now at the end of July. Had the Secretary of State allowed the borough's plans to go forward on June 11 instead of placing an embargo upon them, then these difficulties would, practically speaking, have no doubt disappeared. I do not believe that the teachers would have taken the attitude which they have taken if that directive had not been given by the Secretary of State. I believe that the heads would have cooperated. Thus the minister's action is itself partly responsible for the existing situation.

I find it quite impossible to say that there were any valid grounds for the Secretary of State's decision when it was given that no reasonable local authority could have acted as the borough did here. No doubt the Secretary of State is convinced that the borough's decision is wrong and even deplorable. No doubt the borough think the same of the Secretary of State's attitude. But that is not to say that either is acting unreasonably or that anyone can legitimately come to the conclusion that either is being unreasonable. I would allow the appeal on this ground, and I agree that that decision makes it unnecessary to consider Mr. Lloyd's further point and ancillary argument based on his interpretation of section 99. I would allow the appeal.

Appeal allowed with costs.
Leave to appeal refused.

Solicitors: *Oswald Hickson, Collier & Co.; Vaudrey, Osborne & Mellor, Manchester; Treasury Solicitor.*

A. H. B.

On July 29, 1976, the Secretary of State petitioned the House of Lords for leave to appeal. A

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State. It is accepted that you are not entitled to say that a person is unreasonable because he disagrees with you. The question is whether, viewed objectively, the decision is unreasonable or not. The fact that discretion is entrusted to a minister by Parliament does not mean that his exercise of it is not open B to review by the courts. It can be challenged if it can be shown that he has misdirected himself in law. But neither the council here, while saying that the Secretary of State's letter of June 11 is a misdirection, nor the Divisional Court, have been able to show that it contains a misdirection in law. It is not suggested that the matters in paragraph 2 of the letter are matters to which the Secretary of State should not have paid attention. C The moment the court says that what the Secretary of State was being told about the selective system was wrong, it is entering into the discretion which has been entrusted to the Minister. The principle enunciated by Scarman L.J. regarding new evidence, ante, p. 1030E, is not only new but wrong. It is a vastly important extension of the field of judicial review, and potentially very extensive. If the Secretary of State took the view that the council's selection system could not be put into operation fairly, then that D entitled him to take the view that the council were being unreasonable. He did not take into account things which he ought not to have taken into account, etc., and in so far as the Court of Appeal took new evidence into account that was a new principle and ought to be gone into. The Court of Appeal were wrong in not confining their decisions to saying that there was material on which the Secretary of State could say that the council were acting unreasonably. They strayed into being conditioned, E at least, by material which had not been available to the Secretary of State. The new evidence to the effect that the council's procedure would be satisfactory is not accepted.

While the court should be astute to restrain a minister from acting in excess of his powers—that is recognised as a function of the rule of law—the converse applies too: the minister should be free to exercise his execu- F tive authority within its field. The Court of Appeal here has nullified a decision which the Secretary of State was perfectly entitled to make. They relied on grounds which were not legitimate for doing what they did.

Anthony Lloyd Q.C., Leon Brittan and *Andrew Caldecott* for the council. The council make the following points. 1. Three judges in the Court of Appeal have all come to the conclusion on the facts that there was no G ground here on which the Secretary of State could lawfully be satisfied that the council were acting or proposing to act unreasonably: see, e.g., *per* Lord Denning M.R., ante, p. 1026D. He drew the inference, at p. 1026G, that the Secretary of State must have misdirected himself as to the question which he should ask: not, did he agree with the council, but, was the council acting unreasonably? The section 76 point is a difficult one. It H is easier to carry out one's policy if the electorate is with you. Geoffrey Lane L.J., ante, p. 1035F, allowed the appeal on the basis that there were no valid grounds on which the Secretary of State could have come to his

conclusion. Much the same view was in fact taken by Lord Widgery C.J. in the Divisional Court, ante, pp. 1019G—1020C, and by May J., ante, p. 1020C–F.

The teachers' consultative committee have met, and invited the head teachers to hand in the reports. Seven have, and there is no reason to suppose that the others will not. This does not bear on the rightness of the Secretary of State's decision, but had it been before the Divisional Court they would not have taken the view that the Secretary of State had established grounds for making his direction because of the opposition to the council's scheme. At that stage the teachers were in dispute. If it had been apparent to the council that they would not be able to put their scheme into operation, they would not have attempted to do so. The three judges in the Divisional Court would have come to the same conclusion as the Court of Appeal if they had had this evidence. So the council's case is a strong one on the facts.

2. There is no great question of law here. It is fundamentally a question of fact whether there were grounds for the Secretary of State's decision. If there is a great question of constitutional law here, it is not seemly to deal with so important a question at too great a pace.

3. It may be that the importance of the case has been, or could be, exaggerated in other respects, besides that of the law. If here the future of 3,000 children were at stake, it would be a very serious matter, but that is not the case. The council are proposing simply to maintain the status quo for a year, not to rush into anything in September. The effect of preserving the status quo in relation to the two grammar schools is that 240 places will be available for boys and girls. The council could have left the 240 places empty without affecting the character of the schools. By not turning them into sixth form colleges they simply have 240 places available. Against that background, it is almost absurd to talk of jeopardising the whole educational position of this age group. There will be no imbalance between boys and girls. There have been only 198 applications by girls out of the total of 783 applications. That is the same proportion—a quarter— as the places available for girls (60).

Although Scarman L.J.'s judgment is important, it is not of such importance that your Lordships should give the Secretary of State leave to appeal. In his petition for leave, the Secretary of State seems to be saying that, assuming that the Court of Appeal were right on the evidence before them, they should have shut their eyes to that evidence and decided the appeal solely on the material which had been placed before the Secretary of State. That, if correct, is a remarkable proposition. The Court of Appeal rightly asked themselves: could the Secretary of State have been satisfied on the evidence? The Secretary of State's reasons for his decision should be considered together: one cannot subtract the bad reasons and ask whether the rest were all right. It is not right to say that the Court of Appeal equated the role of the Secretary of State in relation to the council to that of the court reviewing a decision of the Secretary of State, but none the less there are distinct similarities (see *per* Lord Upjohn in *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997).

David McNeill Q.C. and *J. J. Hodgson* for the six parents adopted the submissions for the council.

Bingham Q.C. in reply. Lord Widgery C.J. correctly directed himself as to the question of law which he had to answer, and correctly answered it. A

The Appeal Committee (Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Salmon and Lord Russell of Killowen) granted the Secretary of State leave to appeal. The hearing of the appeal took place on July 30 and 31.

B

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State. It was a question in the Court of Appeal whether section 8 of the Education Act 1944, beginning "It shall be the duty . . .," imposed any duty with regard to allocation to schools. There was a decision in 1972 that it did, and it is not really contested. *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12 shows that it is an administrative discretion which has to be exercised fairly and reasonably. If the authority are acting unreasonably, they are acting in breach of the power in section 8. The Secretary of State's approval under section 13 is only a starting point: it gives leave; it does not impose an obligation. The authority do not have to go ahead if they do not want to. The two criteria in section 13 (10) of the Act of 1944, added by section 1 (2) of the Education Act 1968 are satisfied here: alterations in age, and alterations in admission arrangements by reference to ability and aptitude. The relevance of section 17 is that it is in some sense the counterpart of section 8: a particular choice at particular schools. Under section 37 there is a right of parental choice unless good reason is given. The Secretary of State cannot hold examinations, but he can satisfy himself that the selection procedure is satisfactory. Here, a system is proposed which is not satisfactory. 500 parents are likely to complain. The Secretary of State will find himself in a position in which he cannot satisfy himself that the selection procedure is satisfactory. These are not mere difficulties, but are very substantial obstacles to the proper performance of his duty to resolve disputes when they arise. [Reference was made to section 68 and 99 of the Act of 1944.] A week before June 11, the teachers were stating their view. The crux may be whether they were going to cooperate, and here is material on which the Secretary of State was clearly entitled to take the view that they were not. *Provided* that the council had had the cooperation of all concerned, perhaps they would have been entitled to act as they did, but, on the material before the Secretary of State, they did not have that cooperation. Strictly, one has to judge their reasonableness as at that moment, though the same state of affairs persisted thereafter. C D E F

Just because the Secretary of State has given reasons for his decision, he cannot be shut out from saying that his mind was affected by other things, even if he does not refer to them specifically. The collective disputes procedure in operation between three of the teachers' unions and the council is not so far outside what he had referred to that it ought to be shut out. It is clearly capable of being regarded as evidence of unreasonableness on the part of the council when someone says that they are going ahead despite those factors. On the other side, see the report of the chief executive, the director of education and the director of administration to the council on June 21, 1976. There was evidence on which the G H

A Secretary of State could take the view that what the council were proposing to do was (having regard to the time scale) unreasonable and their objections to the implementation of the approved comprehensive scheme were trivial compared with the objections the other way.

As regards the giving of reasons, the Secretary of State relies on what Scarman L.J. said, ante, pp. 1028H—1029A. Where reasons are given in fairly general terms, the court should not exclude material falling within B the ambit of those reasons if it appears likely that it will have affected the mind of the person giving them.

The principles governing the approach of the Court of Appeal to ministerial discretion in this case are as follows. 1. Its function is to see that the Secretary of State does not exceed his power. 2. The scope of review is determined by the language of the grant of power. "Satisfied" leads C to a different review from "has reason to believe" (*Liversidge* v. *Anderson* [1942] A.C. 206) or "if it appears to the Minister." The Secretary of State does not know of any other section with language comparable to that of section 68. 3. The Secretary of State's decision can be impugned if it can be shown that he misdirected himself in law, on the familiar grounds. 4. The Secretary of State's duty is to take such steps as are reasonably necessary to satisfy himself. 5. His decision may, depending D on the circumstances, be open to challenge if he is shown to have misdirected himself in fact on the material before him. The authority for this proposition is extremely slender (see *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455. It would be contrary to principle for the Secretary of State's decision to be impugned on the basis of material which comes into existence after it has been made. [Reference was made to *S.A. de Smith, Judicial Review of Administrative Action*, 3rd ed. E (1973), p. 320; *Reg.* v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587.]

There is no reason to suppose that the Secretary of State was not fully alive to the meaning of "reasonable" and gave it proper consideration. [Reference was made to *McEldowney* v. *Forde* [1971] A.C. 632, *per* Lord Diplock, at p. 659.] There is no substantial support for some of F the passages in *de Smith* quoted by Scarman L.J. in the Court of Appeal.

Lastly, reasonableness is a matter of fact and degree, so long as there is some evidence of it: see *per* Lord Hailsham of St. Marylebone L.C. in *In re W. (An Infant)* [1971] A.C. 682, 699. The teachers' non-cooperation is at the heart of this matter.

Anthony Lloyd Q.C., *Leon Brittan* and *Andrew Caldecott* for the council. The council's propositions are as follows. 1. The question which G the Secretary of State should ask himself under the Act is: "Am I satisfied that the council are proposing to act in a way in which no reasonable council would act in the particular circumstances?" It would not be enough for him merely to disagree with them or think them wrong. "Unreasonably" must be interpreted in its full sense (this is now probably common ground): see *per* Lord Hailsham of St. Marylebone L.C. in H *In re W. (An Infant)* [1971] A.C. 682, 699–700. "Reasonably" should not be whittled down. It is used in the context of the Act where there is an elaborate balance of powers and duties. The Act did not intend a collision unless the local authority were acting unreasonably.

2. The Court of Appeal is entitled, indeed bound, to look at the reasons given by the Secretary of State for saying that he is satisfied. If the Court of Appeal takes the view that no reasonable person could be satisfied on those reasons, there is no doubt that it can set the Secretary of State's decision aside. The field of review is already set very narrowly. Because that is so, while being fair to the Secretary of State, one should perhaps not give him the benefit of the doubt.

If the council had been neglecting the view that there might be non-cooperation by the teachers, that would make their view unreasonable.

Assuming that the Secretary of State is a reasonable man, he must have misdirected himself on some question of law or fact. So approached, the case is well within *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997: see *per* Lord Denning M.R., at p. 1006; the council also rely on *Secretary of State for Employment* v. *ASLEF* (*No.* 2) [1972] 2 Q.B. 455. A misdirection in fact means a misdirection on the facts as they really were at the time, not just on the facts which were before the Secretary of State.

3. Having regard to the reasons given in the Secretary of State's letter of direction, and particularly in his letter of May 26, 1976, and in Mr. Jenkins's affidavit, the Secretary of State is not just saying (if he is saying it at all) that it is too late now to carry out a proper selection test. What he is saying is that the progress towards comprehensive reorganisation has now gone so far that it would be unreasonable for the council to turn back.

There is no distinction between a reason which is intrinsically irrelevant and a reason which is potentially relevant but which has no substance in fact. The reasons regarding staff and buildings, which were originally put forward by the Secretary of State with vigour (less so in the Court of Appeal), have now virtually gone. Really the only reasons which are put forward are those in the Secretary of State's letter of May 26, 1976. The Secretary of State ignored responsible and professional opinion as to the feasibility of selection tests; the council adopt what the Court of Appeal said on this.

It is not right as a matter of law to say that the court is confined to looking at the material which the Secretary of State himself had, or ought to have had, unless by that one means all the relevant material. Suppose that he genuinely thought that on the material which he had the selection process could not be completed by September; the highest at which the matter could then be put in his favour would be: "how can he be said to have acted unreasonably when on the material which he had a reasonable person could have taken the view which he has in fact taken?" That illustrates the fallacy in the Secretary of State's argument regarding confining the matter to the material which was before him. The question is not whether the Secretary of State himself subjectively was acting reasonably or unreasonably. The question is objective: on the reasons which he has given, do those reasons objectively support the view his view on the material which was available at the time, not just the material which he in fact had? Suppose that the Secretary of State decided to close down a school on the ground that there were too many schools in the area, and without his knowledge another school had burned down. That sort of argument would get nowhere. The question, on a judicial review,

whenever one is dealing with a misdirection in fact, as in law, does not depend on the material actually before the Secretary of State, or on what he ought to know (unless one assumes that he ought to know all the material facts). One assumes that he is going to know all the relevant facts, not just that he is going to do his best. He must inform himself of all the relevant facts.

The question which the Secretary of State asks in relation to the authority is, is it acting reasonably or unreasonably? The court does not ask, is the Secretary of State acting reasonably (subjectively). If he has not all the relevant facts, his decision, objectively, goes. If his function is, as it is, to have regard to the true facts, evidence was admissible in the Divisional Court to establish what those facts were. As to what Scarman L.J. said, the test is not what he knew or ought to have known. Scarman L.J., rather than going too far, does not go far enough. His judgment is a valuable reformulation of the law rather than an extension of judicial review. The question is not whether there was a body of opinion available to the Secretary of State, but whether it existed. The Secretary of State has a duty to inform himself of all relevant facts, not just to take all reasonable steps to do so.

To summarise the council's argument on the selection point: 1. It is an obvious point that parents did not have to apply on behalf of their children for the 240 places. There was no pressure on them to reply; they were merely invited to do so. To talk of a "dilemma" is extravagant, just as it is to talk of the educational provision for the whole age group being put in jeopardy. 2. In the very broadest sense (only), it was not unreasonable for the council to attempt to put into practice the policy which they had indicated to the electorate in two elections. 3. It was not unreasonable—again in the broadest sense—for the council to *attempt* to fill the 240 places which would have been left empty by not going ahead with the sixth form colleges. If the worst came to the worst, they could have left the places empty. 4. The council have not attempted at any stage to "override" the views of the teachers; they have attempted to carry the teachers (or their unions) with them. 5. When they were asked to explain their plans, they did so in considerable detail in their letter of June 7, 1976. It was a very reasonable letter to write, both in content and in manner. 6. It was not unreasonable for them to hope that the teachers would cooperate, although it was true that they had declared a dispute, at least to the extent that they would hand over the reports and records. If the worst came to the worst, the council could have compelled them to do so. If necessary, they would have taken that course.

In this connection, the council now apply to put before the House an affidavit bringing this matter up to date. It shows, first, what may have been true of the attitude of the teachers on June 11: that they are now prepared to hand over the records. Secondly, on the question of discretion: if the House feels that it is now too late for the council to go ahead with their plans, it should be aware that the records are now being handed over. It is evidence of a state of mind.

Bingham Q.C. The affidavit should not be let in without an opportunity being given to the Secretary of State of answering it.

[LORD WILBERFORCE. The House will not admit the affidavit at this stage.]

Lloyd Q.C. continuing. There was no material on which the Secretary of State could properly come to the conclusion that it was unreasonable for the council to try to put their plan into operation. He should at least have allowed them to try a bit longer.

The disturbance to the pupils if the approved plans had been carried out would have been much greater than if the council's selection system were operated. It would clearly have been sensible to wait for a year until the buildings were completed before putting the approved plan into operation. The council had to choose between two courses, each involving some disruption. How can it be said that in choosing one difficulty rather than the other they were acting in a way in which no reasonable council would have acted? It comes down to one point: all that the Secretary of State is putting forward is grounds on which one might disagree with what the council are doing, but there is no ground sufficient in law to say that they were unreasonable in what they were doing.

The Act does not say on what basis the Secretary of State decides. The question is not between comprehensive and selective education, but between one comprehensive scheme and another.

There are the following additional points. When the court is looking at the reasons for a decision, it infers two things: (1) that the reasons given are the best reasons; (2) that all the reasons played some part in the decision-making process. It follows from (1) that the Secretary of State cannot add to his reasons: there is neat authority for this in *Reg.* v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587. What is added will be second best. The reason is one of policy as much as anything. Equally, the Secretary of State cannot subtract from his reasons, because all are presumed to have played some part in the decision-making process. [Reference was made to *Sadler* v. *Sheffield Corporation* [1924] 1 Ch. 483.] This point is another way of saying that if the Secretary of State takes into account irrelevant considerations then his decision must fall.

Discretion only arises if the council are wrong in their argument so far. The Secretary of State arrived at a correct decision, but on what is now known it had no substance in fact, and, assuming that the court had no power to declare his decision invalid—the council says that it had—no court in the circumstances would enforce it by mandamus.

On section 68, the only people who have the right to choose a school are the parents or the Secretary of State, not the local authority. One would think that it would be provided that the local authority should allocate the children between schools, but that provision simply is not there: there is no such power or duty.

On section 99, a procedural point, the council would accept that once a direction is given under section 68 there is a duty on the local authority to comply with the direction, provided, of course, that it is valid. Until the direction is given, however, there is no duty to implement the section 13 proposal, even though it has been approved by the Secretary of State. The duty arises for the first time under section 68. The question then is how it is to be enforced: normally by mandamus. Most statutes, however

(see, e.g., the Housing Finance Act 1972, section 95), especially those regulating procedure between local and central government, have a procedure by way of default orders. Turning to the default section in the Act of 1944, section 99 (1), this lays down how the Secretary of State is to enforce the duty in case of a default. Here, the Secretary of State has jumped a step, eliding the step which he should have gone through in section 99. In every case where action is being brought by central government against the local authority under this Act which provides for a default order, this default order is an important step which must be complied with.

Bingham Q.C. in reply. It would be odd to find the Secretary of State in his decision letter saying: "I have given 'unreasonable' the following meaning. . . ." Nor should the court say "It is 50/50 what he meant." It should approach his decision on the basis that he is likely to have directed himself correctly regarding an expression common in statutes. It is not desirable that he should be cross-examined as to what he meant.

Regarding the correspondence leading up to the Secretary of State's direction, it is unlikely that the department would have specified express concern about selection if it had known what was proposed about selection. Everything which the Secretary of State relies on is covered by the wording which he uses. It is not tied to a particular intake of pupils, or to a particular aspect of the matter. He cannot be said to have thought of things ex post facto. He should certainly have asked himself: "If I do not intervene, will the teachers do their duty?" The construction of section 68 for which the council contend would make it virtually a dead letter: the Secretary of State could never discover all the facts. He is dealing with a local authority which ex hypothesi is proposing to act unreasonably. He is entitled to rely on the educated knowledge and experience within his department.

In *Reg.* v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587 the minister was obliged to give reasons. His decision could not be upheld on the basis of reasons which he had not given. The case is distinguishable.

As to discretion, where there is a public duty to perform, mandamus will lie. Discretion has a very small part to play. [Reference was made to *Rex* v. *Bishop of Sarum* [1916] 1 K.B. 466, 470.]

Section 8 creates a power *and* a duty. Lord Denning M.R. so treated it in *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12, 35–36.

There are four distinctions between section 99 and section 68. (1) Section 99 has been in the Education Acts in one form or another for a long time, first in section 16 of the Act of 1902 (public inquiry held first), then in section 150 of the Act of 1921. Section 68 was first included in 1944. (2) Section 68 is both prospective and retrospective, section 99 retrospective only. (3) Section 68 refers to powers and duties, section 99 to duties alone. (4) Section 99 makes express reference to mandamus; section 68 does not. There are two explanations for these distinctions. First, historical: in 1902 it was sought to make it clear that mandamus would lie. Secondly, to make it clear that mandamus was available at the suit of the Secretary of State and not of anybody else.

The real objection to the council's argument is the practical one. On that argument, if the Secretary of State were satisfied that a local authority

were proposing to act unreasonably, he would take the following course: (i) give a direction; (ii) wait to see what course the local authority would follow; (iii) make a default order under section 99; again, a pause, then (iv) apply for mandamus. One would need very strong arguments on construction to conclude that the legislature intended anything so unwieldy: see, again, *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12. A real remedy is provided, not just a press-button for section 99.

The six parents did not appear and were not represented at the hearing of the appeal.

August 2. Their Lordships announced that they were of the opinion, for reasons to be announced, that the appeal failed.

Their Lordships took time for consideration.

October 21. LORD WILBERFORCE. My Lords, this appeal is concerned with secondary education in the metropolitan borough of Tameside. Tameside is a new unit of local government created under the Local Government Act 1972; it includes areas formerly in Cheshire and Lancashire. Its resources in secondary education included 16 secondary modern and five grammar schools and three purpose-built comprehensive schools under construction. Soon after its creation the council, as local education authority, put forward a scheme for bringing all the schools in the area under the comprehensive principle—"comprehensive" in this context not bearing its normal meaning in English, or the meaning it bore in the Education Act 1944, but its meaning in modern political jargon of a system which, in theory, lets everyone in to any school without selection by aptitude or ability. Grammar schools, by contrast, allocate places by selection. This scheme was brought in and, as the law required, was laid before the Secretary of State for Education and Science on March 10, 1975; it was very detailed and would clearly take some time to implement. Briefly, it provided (1) for setting up three new purpose-built comprehensive schools (those mentioned above) (2) for bringing the 16 secondary modern schools into the comprehensive principle (3) for abolition of the five grammar schools by turning three of them into comprehensives and two into sixth form colleges. These proposals in due course, on November 11, 1975, received the Secretary of State's approval, and the council then became entitled to put them into effect: but—and this is important—the Secretary of State's approval imposed no duty on the council to implement them. In fact, the council did take some steps towards their initial implementation by the beginning of the school year in September 1976. These steps were of a rather hurried nature, and, the respondents now contend, premature, and made not without an eye upon the local government elections to be held in May 1976. It is certainly fair to say that it was and is clear that necessary buildings for the changeover could not be completed, or in some cases more than just begun, by September 1976, and that if the new proposals were to start at that date there would be a good deal of improvisation and temporary disruption. There was some impressive evidence of this from a number of experienced teachers.

Local elections were held on May 6, 1976. The issues no doubt were numerous and of varying importance, but the survival of the grammar schools as selective entry schools was one issue strongly fought, and on which the opposition party took its stand. A large number of parents had signed a petition against the 1975 proposals and no doubt supported the opposition. The opposition gained control of the council, and they considered themselves to have been given a mandate to reconsider their predecessors' education policy. They formulated their own proposals as not involving a total reversal of that policy. They set them out in a carefully thought out and moderate letter addressed to the Secretary of State on June 7, 1976. They proposed to adopt what had already been done in the direction of comprehensive education—the three new comprehensives would be continued and completed as "a valuable nucleus of any future scheme." The 16 secondary moderns would be continued. But they did not propose to implement at once the plans for conversion of the grammar schools. They proposed to postpone these plans and to continue the schools for a time so that the position could be reviewed, in the light, amongst other things, of the new Education Bill then before Parliament. Their policy was

> "... the maintenance of the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals."

The Secretary of State, and his department, were greatly concerned with the difficulties likely to be brought about by a change in control of the local education authority. Undoubtedly such changes are an administrator's nightmare. The department had approved the "comprehensive" plan, and they knew and approved that the authority had planned to start introducing it in September 1976. A change of course only three months before the new school year was to start very naturally worried the officials. There was correspondence between the department and the authority in May and June in which the authority was asked to explain its plans, particularly with regard to the selection of pupils; there was a meeting on June 9, which does not seem to have been amicable or conclusive. The Secretary of State remained of the opinion that it was too late to reverse the previous council's plans and that the new council were acting unreasonably in doing so. So on June 11, 1976, he gave a direction to the council to implement their predecessors' proposals, and on June 18, 1976, he asked for an order of mandamus that they should do so. This order was granted by the Divisional Court but on July 26, 1976, on appeal by the authority, it was discharged by the Court of Appeal, leave to appeal being refused. By an emergency procedure which started with an application for leave to appeal on July 29 and which phased into a full hearing of the appeal, your Lordships heard full, and I must say admirable, arguments on a complete documentary record on July 29 to 31. I would like to acknowledge the efforts and cooperation of those advising each side which enabled this exceptionally quick procedure to be carried out. The argument was concluded on July 31, and on August 2 it was announced that their Lordships were of opinion, for reasons to be announced and now set forth, that the appeal failed.

I must now set the legal scene. The direction of June 11, 1976, was given under section 68 of the Education Act 1944. Education is still governed by this notable statute, as amended, and it is necessary to understand its structure. Under the Act responsibility for secondary education rests upon a fourfold foundation: the Minister (as he was then called); local authorities; parental wishes; and school managers and governors. All have their part to play. The primary responsibility rests on the Minister. He has to promote the education of the people of England and

> ". . . to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive" (old meaning) "educational service in every area." (section 1.)

But local education authorities, which are elected, have their place defined. It is they who are responsible for "providing secondary education" in schools

> ". . . sufficient in number, character, and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, . . ." (section 8.)

Section 13 is an important section—it is that which was acted on in 1975. It enables local education authorities to make "significant changes" in the character of any school but requires them to make proposals to that effect to the Secretary of State. So the initiative is theirs: ultimate control is with the Secretary of State: there is no obligation, before or after his approval, on the authority to carry its proposals out. Section 68 must be quoted in full:

> "If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors, give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . ."

This section does not say what the consequences of the giving of directions are to be, but I accept, for the purposes of the appeal, that the consequences are to impose on the authority a statutory duty to comply with them which can be enforced by an order of mandamus.

Analysis of the section brings out three cardinal points.

(1) The matters with which the section is concerned are primarily matters of educational administration. The action which the Secretary of State is entitled to stop is unreasonable action with respect to the exercise of a power or the performance of a duty—the power and the duty of the authority are presupposed and cannot be interfered with. Local education authorities are entitled under the Act to have a policy, and this section

does not enable the Secretary of State to require them to abandon or reverse a policy just because the Secretary of State disagrees with it. Specifically, the Secretary of State cannot use power under this section to impose a general policy of comprehensive education upon a local education authority which does not agree with the policy. He cannot direct them to bring in a scheme for total comprehensive education in their area, and if they have done so he cannot direct them to implement it. If he tries to use a direction under section 68 for this purpose, his direction would be clearly invalid. A direction under section 68 must be justified on the ground of unreasonable action in doing what under the Act the local authority is entitled to do, and under the Act it has a freedom of choice. I do not think that there is any controversy upon these propositions.

The critical question in this case, and it is not an easy one, is whether, on a matter which appears to be one of educational administration, namely whether the change of course proposed by the council in May 1976 would lead to educational chaos or undue disruption, the Secretary of State's judgment can be challenged.

(2) The section is framed in a "subjective" form—if the Secretary of State "is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455, *per* Lord Denning M.R., at p. 493.

(3) The section has to be considered within the structure of the Act. In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. This Act, of 1944, is quite different from those which simply create a ministerial discretion. The Secretary of State, under section 68, is not merely exercising a discretion: he is reviewing the action of another public body which itself has discretionary powers and duties. He, by contrast with the courts in the normal case, may substitute his opinion for that of the authority: this is what the section allows, but he must take account of what the authority, under the statute, is entitled to do. The authority—this is vital—is itself elected, and is given specific powers as to the kind of schools it wants in its area. Therefore two

situations may arise. One is that there may be a difference of policy between the Secretary of State (under Parliament) and the local authority: the section gives no power to the Secretary of State to make his policy prevail. The other is that, owing to the democratic process involving periodic elections, abrupt reversals of policy may take place, particularly where there are only two parties and the winner takes all. Any reversal of policy if at all substantial must cause some administrative disruption—this was as true of the 1975 proposals as of those of the respondents. So the mere possibility, or probability, of disruption cannot be a ground for issuing a direction to abandon the policy. What the Secretary of State is entitled, by a direction if necessary, to ensure is that such disruptions are not "unreasonable," i.e., greater than a body, elected to carry out a new programme, with which the Secretary of State may disagree, ought to impose upon those for whom it is responsible. After all, those who voted for the new programme, involving a change of course, must also be taken to have accepted some degree of disruption in implementing it.

The ultimate question in this case, in my opinion, is whether the Secretary of State has given sufficient, or any, weight to this particular factor in the exercise of his judgment.

I must now inquire what were the facts upon which the Secretary of State expressed himself as satisfied that the council were acting or proposing to act unreasonably. The Secretary of State did not give oral evidence in the courts, and the facts on which he acted must be taken from the department's letters at the relevant time—i.e., on or about June 11, 1976—and from affidavits sworn by its officers. These documents are to be read fairly and in bonam partem. If reasons are given in general terms, the court should not exclude reasons which fairly fall within them: allowance must be fairly made for difficulties in expression. The Secretary of State must be given credit for having the background to this actual situation well in mind, and must be taken to be properly and professionally informed as to educational practices used in the area, and as to resources available to the local education authority. His opinion, based, as it must be, upon that of a strong and expert department, is not to be lightly overriden.

The first letter from the department to the local education authority was dated May 26, 1976. This refers to "a great deal of educational and administrative planning" which had taken place since approval of the "comprehensive" plan in November 1975. Particular matters mentioned without details were (i) allocation of children to schools; (ii) progress in staffing arrangements including the offer and acceptance of contracts; (iii) planning of curricula and courses; (iv) some building work. Reference is also made to the "continuing absence of any precise alternative plans." Tameside answered this on June 7, 1976, in a long letter. I must summarise it at some length because argument has tended to become concentrated on one or two narrow points rather than upon a balanced overall view of the council's plans. I have already commented on the general character and tone of this letter, which is moderate and appreciative of the difficulties, and which shows at least an intention and purpose to reduce them to the minimum.

The letter begins with a narrative section stating that no comprehensive

reorganisation in Tameside had yet taken place. The schools were not ready for their changed roles; building works were not completed, and not in most cases begun. Implementation (sc. of the 1975 proposals) in September 1976 would have caused grave disruption to the children's education. A particular case of this would be disruption of the education of 16-year-old pupils, who under the 1975 proposals would have been turned out of the sixth forms of three grammar schools and transferred to two non-selective sixth form colleges. I do not think that any of this is disputed. The authority's own plans were set out under 10 points, which involved continuation of the five grammar schools, continuation and completion of the three new purpose-built comprehensives and continuation of the remaining secondary schools. Their policy as regards allocation to schools is spelt out in five paragraphs. All allocations of pupils for the forthcoming year—about 3,000 in all—made by the old council would be honoured subject to agreement by the parents concerned. Ashton and Hyde grammar schools—by the old council destined to become sixth form colleges—would remain grammar schools and would be open to 11-year-old entry, thus making 240 selective places available. All parents of 11-year-olds were to be given the right to apply for reallocation of their children, but if they were satisfied with the existing allocations those allocations would stand. Then it is said (paragraph 7):

> "If the number of applicants to the grammar schools exceeds the number of places available, as is likely, then those pupils most suitable and most likely to benefit from that type of education will be selected by a combination of reports, records and interviews. There will be no formal 11-plus examination."

Finally, it was said that there would be a review of the first year entries, and a very flexible transfer system would be operated at the end of the first year, or earlier if required. I do not think that we need to consider this proposal since there is plenty of time for it to be reconsidered.

The letter also stated that, apart from these immediate plans, longer term proposals would have to be worked out and would need to comply with whatever terms might be contained in the pending Education Bill as and when enacted.

The proposals in this letter were explained, it is said, at a meeting held at the House of Commons on June 9.

On June 11, the direction under section 68 was given in a letter of that date. The letter stated that the Secretary of State was satisfied that the authority was proposing to act unreasonably according to the formula used in section 68 of the Act. A change of plan designed to come into effect in less than three months must, in the opinion of the Secretary of State, give rise to "considerable difficulties." It pointed out that over 3,000 pupils transferring from primary schools had already been allocated and allotted places. Then followed this paragraph (which I shall call "paragraph A").

> "The authority's revised proposals *confront* the parents of children due to transfer in September *with the dilemma* of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else *submitting* to an improvised

selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational validity." (My emphasis.)

A further objection was taken to the proposed possible reallocation during or after the first year—I have commented on this above. The change of plan at this time in the educational year threatened to give rise to practical difficulties in relation to the appointments of staff already made and the construction of buildings for the new comprehensive schools and to create a degree of confusion and uncertainty which could impair the efficient working of the schools.

These arguments were restated and expanded in the affidavit sworn on behalf of the Secretary of State in support of the application for mandamus. The affidavit stated three points.

Point (i): that 653 of the 802 transfers, promotions and other appointments (of teachers) required to implement the reorganisation had been made.

Point (ii): that contracts had been entered into for building work directly related to the change in character of two of the schools and work had started under the contracts. In the case of a third school, the authority had entered into commitments for such building work.

Point (iii): that preparations had been made for courses on the basis that the proposals communicated to the Secretary of State would be put into effect.

These points (i), (ii) and (iii) were dealt with fully by the authority and I need say no more about them than that they were completely exploded. They were held to have no substance in them by five of the six learned judges who have considered this matter: the sixth indicated general agreement without specific discussion and indeed point (ii) was criticised with some severity by one of the learned Lords Justices in the Court of Appeal.

Some attempt was made to rehabilitate these points in this House, but learned counsel decided, no doubt wisely, to concentrate on the allocation issue. But these three points cannot just be discarded as if they had never been made. They form part of a composite set of facts relied upon as showing unreasonable conduct, and I am not at all sure that the disappearance of so many planks does not fatally weaken the stability of the platform. At the least—and I will give the department the benefit of this assumption—the remaining factual basis would need to be strong and clear if it alone were to be the basis for the Secretary of State's "satisfaction" as to unreasonable conduct.

So I come to the question of allocation, which was at the centre of the case as argued, and it can best be approached via "paragraph A" above, a paragraph which I regard as revealing. It shows a very strange attitude toward the decision taken by the authority. After the electorate, including no doubt a large number of parents, had voted the new council into office on the platform that some selective basis would be preserved, to say that this created "a dilemma" for the parents, with the undertone that this was something unreasonable, appears to me curious and para-

doxical. Parents desired to have a chance of selective places. The new council was giving it to them. If they did not want selective places, they had no need and no obligation to apply for them. Unless the creation of freedom of choice, where no such freedom existed previously, is intrinsically an evil, it seems hard to understand how this so-called dilemma could be something unreasonably created. The impression which it gives of upsetting 3,000 places is entirely a false one since over 90 per cent. of these would remain unaltered. Then, to refer to "submitting to an improvised selection procedure" hardly does justice to the authority's plan. Some selection procedure was inherent in what the electorate had voted for, a choice which, if it meant anything, must involve some change in allocations for the forthcoming school year and, unless exactly 240 parents applied for the 240 places, some selection. It would seem likely that in voting for this change in May 1976 the electors must have accepted, if not favoured, some degree of improvisation. The whole paragraph forces the conclusion that the Secretary of State was operating under a misconception as to what would be reasonable for a newly elected council to do, and that he failed to take into account that it was entitled—indeed in a sense bound—to carry out the policy on which it was elected, and failed to give weight to the fact that the limited degree of selection (for 240 places out of some 3,000) which was involved, though less than perfect, was something which a reasonable authority might accept and which the parents concerned clearly did accept.

What the Secretary of State was entitled to do, under his residual powers, was to say something to the effect: "the election has taken place; the new authority may be entitled to postpone the comprehensive scheme: this may involve some degree of selection and apparently the parents desire it. Nevertheless from an educational point of view, whatever some parents may think, I am satisfied that in the time available this, or some part of it, cannot be carried out, and that no reasonable authority would attempt to carry it out." Let us judge him by this test—though I do not think that this was the test he himself applied. Was the procedure to be followed for choosing which of the applicants were to be allotted the 240 selective places such that no reasonable authority could adopt it? The authority's letter of June 7 said that selection would be by "a combination of reports, records and interviews." They had about three months in which to carry it out. The plan was lacking in specification, but it must have conveyed sufficient to the experts at the department to enable them to understand what was proposed. Selection by 11-plus examination was not the only selection procedure available. Lancashire, part of which was taken over by Tameside, had evolved and operated a method of selection by head teacher recommendation, ranking of pupils, reports and records and standardised verbal reasoning tests. The Tameside authority had set up in May a panel of selection to operate a procedure of this kind, the chairman of which was experienced in the Lancashire method. He, as he deposed in an affidavit before the Court of Appeal, was of opinion that even though a verbal reasoning test might not be practicable in the time there would be no difficulty in selecting the number of pupils required. There were other opinions, expressed

with varying degrees of confidence by experts, and no doubt the procedure could not be said to be perfect, but I do not think that such defects as there were could possibly, in the circumstances, having regard to the comparatively small number of places involved, enable it to be said that the whole of the authority's programme of which this was a part was such that no reasonable authority would carry it out.

But there is a further complication. The authority's selection plans were opposed by a number of the teachers' unions, and there was the likelihood of non-cooperation by some of the head teachers in the primary schools in production of records and reports. The department letters and affidavits do not rely upon this matter, for understandable reasons, but they must be assumed to have had it in mind. Is this a fact upon which the Secretary of State might legitimately form the judgment that the authority was acting unreasonably?

To rephrase the question: on June 11, 1976 (this is the date of the direction, and we are not entitled to see what happened thereafter), could it be said that the authority was acting unreasonably in proceeding with a selection procedure which was otherwise workable in face of the possibility of persistent opposition by teachers' unions and individual teachers, or would *the only* (not " the more ") reasonable course have been for the authority to abandon its plans? This is, I think, the ultimate factual question in the case. And I think that it must be answered in the negative—i.e., that it could not be unreasonable, in June 1976, and assuming that the Secretary of State did not interfere, for the authority to put forward a plan to act on its approved procedure. The teachers, after all, are public servants, with responsibility for their pupils. They were under a duty to produce reports. These reports and the records in the primary schools are public property. I do not think that it could be unreasonable (not " was unreasonable ") for the authority to take the view that if the Secretary of State did not intervene under his statutory powers the teachers would cooperate in working the authority's procedure—a procedure which had, in similar form, been operated in part of this very area.

On the whole case, I come to the conclusion that the Secretary of State, real though his difficulties were, fundamentally misconceived and misdirected himself as to the proper manner in which to regard the proposed action of the Tameside authority after the local election of May 1976: that if he had exercised his judgment on the basis of the factual situation in which this newly elected authority was placed—with a policy approved by its electorate, and massively supported by the parents—there was no ground—however much he might disagree with the new policy, and regret such administrative dislocation as was brought about by the change—upon which he could find that the authority was acting or proposing to act unreasonably. In my opinion the judgments in the Court of Appeal were right and the appeal must be dismissed.

VISCOUNT DILHORNE. My Lords, in this appeal the comparative merits of comprehensive education and the system it replaces have no relevance to the issues to be determined. All we have to decide is whether the

Secretary of State had power to direct the Tameside Metropolitan Borough Council on June 11, 1976, to implement the proposals which that council, when it had a Labour majority, had submitted to him on March 19, 1975, and which he had approved on November 11, 1975, for the reorganisation of secondary education in their area.

Section 1 (1) of the Education Act 1944 imposes on the Secretary of State the duty

> ". . . to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area."

Section 6 (1) of that Act provides that the local education authority for each county borough shall be the council of the county borough, and section 8 (1) imposes on every local education authority the duty, inter alia, to secure that there shall be available for their area sufficient schools

> ". . . (*b*) for providing secondary education, that is to say, full-time education suitable to the requirements of senior pupils, other than such full-time education as may be provided for senior pupils in pursuance of a scheme made under the provisions of this Act relating to further education . . . ; and the schools available for an area shall not be deemed to be sufficient unless they are sufficient in number, character and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, and of the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their respective needs."

In the discharge of this duty local education authorities are subject to the general supervision of the Secretary of State. Their relationship is not that of master and servant. He has to secure the effective execution of the national policy. They have to carry it out in their areas and they enjoy a considerable degree of autonomy. The Secretary of State is given power by section 68 of the Act to secure that they do so. That section reads as follows:

> "If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . ."

Until the Secretary of State had approved the proposals submitted to him in March 1975, the council had no power to give effect to them, but the giving of that approval, while it gave them power, did not, the Secretary of State recognises, impose on them any duty to do so. Nevertheless, it is his contention that in deciding not to implement them fully but to

modify them the council had acted unreasonably and so he had power to direct them

> ". . . to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alteration to school premises and other matters as is required to give effect to the proposals."

It is not for the courts to usurp the functions of the Secretary of State. If the council had acted or were proposing to act unreasonably, he was entitled to give them these directions or any other directions he thought necessary in discharge of his duty under section 1 of the Act.

In this House it was common ground that the question whether a local authority was acting or was proposing to act unreasonably had to be viewed objectively. It did not suffice that in his opinion the conduct of the authority was unreasonable. For him to have power to give directions, the conduct had to be such that no reasonable authority would engage in it.

The proposals submitted on March 19, 1975, and approved by the Secretary of State were as follows.

Three of the five grammar schools in the area were to be made comprehensive and in the school year beginning on September 1, 1976, 11-year-old children from the primary schools would be admitted to them without being subjected to any test of their ability. So that year and for the next four years the pupils at these schools would consist of selected and non-selected children and it was only after that that these schools would be fully comprehensive.

The remaining two grammar schools were to be converted into sixth form colleges to which pupils would be admitted on September 1, 1976. Those under 16 at this date would be transferred to comprehensive schools.

There was at this time one comprehensive school in existence and two others were being constructed.

The proposals submitted by the Tameside council to the department at the department's request on June 7, 1976, were to continue the five grammar schools as "11 to 18 academic high schools," to continue and complete the three comprehensive schools which, they said, formed "a valuable nucleus of any future scheme" and to continue the remaining 11 to 16 secondary schools.

They proposed that all allocations to schools for 11-year-olds made by their predecessors immediately before the local elections should be honoured and maintained subject to the continued agreement and acceptance by the parents concerned but that parents of 11-year-olds could apply for reallocation if they were dissatisfied with their present allocation.

As the two grammar schools which were to become sixth form colleges were to remain grammar schools and no allocations of 11-year-olds had been made to them under the approved proposals, there would be 240 school places in these schools to be filled; and if the number of applicants for these places exceeded the number of places available they proposed that the pupils most suitable and most likely to benefit from that type of

education should be selected in the light of "reports, records and interviews."

So the new Tameside council only proposed to disturb the allocation on a non-selective basis to secondary schools of the 3,200 or so 11-year-old children leaving primary schools to the extent of selecting 240 from those who applied for admission to the two grammar schools which were not to be made into sixth form colleges.

It was not disputed before us that whether the approved proposals should be implemented was a major issue at the local government elections in 1976. Having gained control of the council on May 6, 1976, the Conservatives could claim to have obtained a mandate not to implement them in the same way as a party which has won a general election can claim to have a mandate to carry out the proposals in its manifesto.

Shortly before polling day, May 6, and presumably because the question was a live issue, the Tameside Teachers Consultative Committee which consisted of representatives of the National Union of Teachers, the National Association of Head Teachers, the National Association of Schoolmasters/Union of Women Teachers and the "Joint Four," which I understand is the name given to four small unions or associations consisting mainly of grammar school teachers, published the following statement:

> "It" (the committee) "wishes it to be clearly known that in its wholly professional opinion, one which is devoid of any political bias, it considers the process of secondary reorganisation too far advanced for any postponement or modification of the present plans."

In a letter dated June 4, 1976, to the department, this committee stated that immediately after this announcement the "Joint Four" had "declared its intention of supporting whatever new proposals might be made, as, indeed, did individual members within the other associations."

Five days after polling day, on May 11, a member of the department wrote to the Tameside council saying that he was directed by the Secretary of State to ask whether it was the intention of the council to implement the approved proposals by September 1, 1976, and, if not, to ask that

> "... full details of the arrangements made or proposed for the transfer of pupils to county secondary schools next September be forwarded ... as a matter of urgency."

On May 12 solicitors acting for the National Association of Head Teachers and the Tameside Head Teachers Association wrote to the council referring to a resolution passed by those bodies in which it had been said that if their members were instructed to implement selection procedures they would invoke "collective disputes procedures" of which it was said that one of the cardinal features was that no action should be taken to implement decisions relating to the dispute until those procedures had been fully implemented.

On May 19 the National Association of Head Teachers, the National Association of Schoolmasters/Union of Women Teachers and the National Union of Teachers (hereinafter referred to as "the unions") declared the dispute to be official.

On May 26, Mr. Jenkins of the department wrote to the council saying:

> "The Secretary of State is aware that since he approved the proposals in November a great deal of educational and administrative planning has taken place with the intention of putting them into effect in September 1976. Children have been allocated to schools, considerable progress has been made in staffing arrangements including, in many cases, the offer and acceptance of contracts and teachers have been planning curricula and courses for the new comprehensive schools. Some building work has also been put in hand.
>
> "The Secretary of State is extremely concerned that the sudden cessation of this planned and orderly development and the continuing absence of any precise alternative plans is causing such uncertainty that the education service as a whole, and the educational provision for the age group about to transfer to secondary schools in particular, are being put in jeopardy. He has asked me, therefore, to request that the authority should provide him with a precise and detailed statement of the plans which it hopes to put into effect in September. This statement should reach him not later than Friday, June 4.
>
> "I am to add that if in the Secretary of State's judgment the authority's revised proposals would involve unwarrantable disruption, he would have to consider whether he should use his powers under section 68 of the Education Act 1944 to direct the authority to implement the original proposals."

By letter dated June 4 the unions informed Mr. Jenkins of their attitude and commented on the council's new proposals which had been communicated to them. In the course of that letter it was said:

> "The corner-stone of our dispute would still be that in the time available it is impossible to do justice to even a straightforward process of assessment let alone one as complicated as this. Head teachers in particular would feel the burden of responsibility intolerable in what is now such an emotive issue."

On June 7 the council wrote telling Mr. Jenkins what they proposed. They first drew attention to a number of matters which they felt had not received the consideration they deserved. They can be summarised as follows. 1. There was no question of a comprehensive reorganisation having taken place and being reversed. It had not yet taken place. 2. Even if the approved proposals met the wishes of the parents and the needs of the children, the schools were not yet ready for their proposed roles, building works had not been completed and in most cases not even begun and thus " . . . implementation in September 1976 would have caused great disruption to the children's education." 3. The planning that had gone on had been totally inadequate in the time available and had the marks of being a rushed job for political reasons. 4. While they regretted the precipitate action of their predecessors in attempting to appoint teachers and make contracts with them before the schools were ready, they would honour the obligations entered into. 5. The approved

proposals were not popular with the people of Tameside and not considered to be in the best interests of the children.

> ". . . we must go back to the drawing board and try again with a more considered, well thought out scheme. At all costs the disruption in children's education which would have been caused by the implementation of the present proposals must be avoided in any future plan."

6. Insufficient attention had been paid to the plight of the 16-year-olds. They would have been turned out of the sixth forms of three grammar schools and have been forced to move to one of the two non-selective sixth form colleges with dislocation of their work and have to work ". . . in the far less academic atmosphere of an open entry sixth form college . . ."

The council then said that their present plans might be summarised as being

> ". . . the maintenance of the status quo with the least disturbance and disruption of the children's education pending any longer term, well thought out proposals."

In addition to the proposals to which I have already referred, the council proposed that 16-year-olds from both the five grammar schools and all other secondary schools who applied and were accepted for "A" level courses might pursue them within the sixth forms of the five grammar schools and at the Tameside College of Technology and they anticipated that wherever possible pupils would wish to stay at their own school where it had a sixth form, but final choice would depend on the particular course chosen. They also proposed that there should be a review of the first year entries and that there would be a very flexible transfer system at the end of the first year (or earlier if required in certain circumstances) to assist pupils, following consultation and agreement with the parents and teachers concerned, to transfer to other schools within Tameside where the child's ability and aptitude during the course of the year had shown that the child would be happier and better suited to a school or course elsewhere. They did not however anticipate that widespread transfers would be necessary or requested.

On June 9 there was a meeting at the House of Commons between the Secretary of State and his officials and Mr. Grantham, the leader of the council, and Mr. Thorpe, the chairman of the education services committee of the council. In affidavits Mr. Grantham and Mr. Thorpe said that at the meeting the Secretary of State appeared already to have made up his mind. Mr. Jenkins in an affidavit sworn on July 2 denied this and said that at the meeting the Tameside representatives were

> ". . . apparently unable to offer any satisfactory detailed explanation of how they proposed to assess, in a sound way from an educational point of view and in the very limited time then remaining to them, the large number of children whose parents had by then requested reallocation for the school term beginning in September 1976."

The large number was 783 applications by parents of 11-year-olds for

the 240 grammar school places in response to letters sent out to 3,200 parents. There were also 190 applications by fifth form pupils in secondary modern schools for grammar school places. Of these 178 had been provided by June 30 and Mr. Thorpe was confident that the remaining 12 applications could be granted.

On June 11 Mr. Jenkins by letter conveyed to the council the Secretary of State's decision to direct them to implement the proposals he had approved. He said, repeating what had been said in the letter of May 26, that since the proposals had been approved on November 11, 1975,

> ". . . extensive preparations have been made to put the proposals into effect. Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work directly related to changes in the character of some schools has been put in hand; and over 3,000 children due to transfer from primary schools this year have been allocated to secondary schools . . ."

The only interference with this allocation that the council proposed was the filling of 240 grammar school places.

In the penultimate paragraph of the letter, Mr. Jenkins stated the reasons for the Secretary of State's decision. That paragraph began with the sentence: "The Secretary of State has given the most careful consideration to the representations made to him." There was no other reference to the matters mentioned at the beginning of the council's letter of June 7 to which reference has been made. The council were given no indication of the result of the most careful consideration of those matters.

The paragraph went on to say that the Secretary of State was satisfied that the authority were proposing to act unreasonably with respect to their statutory powers and duties

> ". . . regarding the provision of secondary education for their area and in particular . . . regarding the admission of pupils to secondary schools . . . at the beginning of the coming school year, i.e., on September 1, 1976."

This echoed what had been said in the letter of May 26 though then the Secretary of State did not know, as he did by June 11, that the only change the council proposed to make in the allocations already made was the selection of 240 11-year-old children for grammar school places.

The paragraph went on to say that a change of plan at that time of year must in his opinion give rise to very considerable difficulties, and that the authority's revised proposals

> ". . . confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure . . . carried out in circumstances and under a timetable which raise substantial doubts as to its educational validity."

This is an interesting and curious paragraph. Giving parents the choice of either adhering to the allocation already made or of applying for admission to a grammar school is called confronting them with a dilemma.

Implementation of the approved proposals in full meant that they would have no such choice—and a choice which the result of the election might indicate a large number of parents wished to have.

It was not said that in the time available a selection of 11-year-olds to fill the 240 places could not be made, only that the selection procedure would be of doubtful educational validity. It may strike some as curious that the Secretary of State should be so concerned about the validity of the selection procedure adopted to fill 240 places when under the proposals he had approved there was to be no selection procedure at all.

The paragraph then went on to say that

> ". . . an abnormally high proportion of pupils might need to be reallocated to different secondary schools during, or at the end of, the educational year beginning in September 1976."

No reasons were given for this opinion nor was it explained why this might result from the filling of 240 grammar school places when the other allocations of 11-year-olds were not affected.

Reference was then made to practical difficulties in relation to the appointments of staff already made, and the construction of buildings for the new comprehensive schools.

In their letter of June 7 the council did not refer to the attitude of the unions and no direct reference was made to that in the letters of May 11 and 26 and June 11 written by the department though in argument in this House it was contended on behalf of the Secretary of State that the reference to the circumstances in which the selection was to be made was a veiled reference to the attitude of the unions. What is clear beyond doubt is that the Secretary of State did not in the letter of June 11 base his decision to give directions on the ground that the policy of non-cooperation by the unions meant that selection of the 240 could not be achieved. Indeed it was only in his second affidavit sworn on July 2 in reply to one sworn by Mr. Thorpe in which he referred to the unions that Mr. Jenkins mentioned them, exhibiting the letter of June 4 which they had sent to the department and saying that a formal dispute had been declared. He did not then assert that the unions' attitude meant that selection could not be made.

As the council were not prepared to comply with the directions, the Secretary of State applied for an order of mandamus. The Divisional Court (Lord Widgery C.J., Cusack and May JJ.) granted his application giving judgment on July 12.

Lord Widgery C.J. did not base his conclusion on anything other than the allocation of the 240 grammar school places. The council's proposals with regard to the two grammar schools which were not to be converted into sixth form colleges were, he thought, ". . . of the utmost importance because they really seem to me to be the core of the case against the local authority." After referring to the contention that the council had not put forward any proper plan for the selection of pupils for these places, Lord Widgery said:

> "To make matters worse—indeed really to clinch matters on this point—there is a difference of opinion of a substantial character between the new Tameside authority and the official organisation of the

teachers, and amongst the other results from that unhappy situation is the fact that the teachers are not prepared to help in devising some kind of selective entry test to take the place of the 11-plus examination which never materialised and the provision of which, in the view of anyone who accepts that the entry should be selective, is absolutely essential."

He said that his opinion had wavered from time to time but that his was

"... simply a conclusion that when the Secretary of State says there is no time to get this" (the selection) "done by September, I think he is right on that one point."

Cusack J. agreed entirely with Lord Widgery and May J. was of the opinion that shortness of time for the selection coupled with the lack of cooperation from some of the teachers entitled the Secretary of State to decide as he did. He went on to say:

"... had the local authority had the cooperation of the teachers concerned, it would I think have been difficult for the Secretary of State to have contended that there was any relevant material before him upon which he could have reached the necessary conclusion under section 68 of the Act of 1944."

So the Divisional Court's decision was based solely on the unions' non-cooperation making it not possible to select 240 pupils for the grammar school places by September 1—and that was not stated in the letter of June 11 to be a reason for the Secretary of State's decision.

Before the hearing in the Court of Appeal further affidavits were filed. In his second affidavit Mr. Thorpe said that when the unions made it clear that they were not prepared to cooperate the council decided to appoint a panel of experienced teachers to carry out a selection procedure which he said was well known, based on head teachers' assessments, pupils' reports and records. By the end of May, 20 senior grammar school teachers and one primary school teacher had said that they were willing to help in this process and 20 teachers were appointed to a selection panel. Mr. Beard, who had served on the selection panel for Lancashire Division 24 since the early 1960s, described this selection procedure in detail and said that it had been followed in that division since that time. In his opinion a fair, feasible and practical selection might be made by a panel of 20 teachers of children to fill the 240 places in one week. Mr. Potts, who had many years' experience of selection procedures, said that in the London Borough of Barnet eight panels of three heads would complete the selection of 850 pupils from approximately 3,000 in 10 working days. He entirely agreed with Mr. Beard and so did Mr. Gilyatt. They all disagreed with Mr. Milroy who had been chief education officer of Gloucester whose view was that such a selection procedure could only operate in term time and would take 12 weeks to operate and that even if the teachers had been prepared to cooperate there would have been insufficient time before September 1 to complete any proper selection and allocation process.

This selection procedure, Mr. Thorpe said, had been that of which they had told the Secretary of State at their meeting on June 9. It is inconceivable

that, operated as it had been for many years in different parts of the country, it was unknown to the department.

It may be that views as to the efficacy of this procedure differ and that it is thought by some to be of doubtful "educational validity," but can it be said that the council in seeking before June 11—for that is the vital date—were acting in a way no reasonable council would in deciding to operate this long established procedure? Were it not for the attitude of the unions, I do not think that that possibly could be said.

So the question to be determined comes down to this: should the council have abandoned the policy for which they had a mandate within just over a month from the election because of the unions' attitude? Were they, the elected body responsible for the education in their area, acting in a way no reasonable council would in not submitting before June 11 to the pressure applied to them? In the course of his excellent argument for the Secretary of State Mr. Bingham conceded that there would have been time to carry out proper tests if the teachers had been prepared to cooperate but it was his contention that before June 11 the council knew or ought to have known that on account of the unions' attitude the procedure they proposed would not work.

I see no grounds for saying that by June 11 the council knew or ought to have known that the selection procedures they proposed would not work. They may have thought it possible that they could persuade the unions to change their attitude and as not beyond the bounds of possibility that sufficient responsible teachers, recognising that the children might otherwise suffer, might cooperate. The unions admitted that some of their members did not agree with their policy. Once the Secretary of State had given his directions, there was no possibility of the unions reviewing their policy, but we have to consider the position not after those directions were given but before.

Further, in the letter of June 11 it was not said that the selection could not be made, only that it was of doubtful "educational validity." If the department was not then prepared to say that it would not work, what warrant was there for condemning the council as acting unreasonably in not recognising that it would not work and for seeking to carry out their policy?

In my opinion there is no ground for holding that because of the difficulties in selecting pupils to fill 240 grammar school places the council acted or were proposing to act prior to June 11 in a way no reasonable council would in deciding not to implement the approved proposals and to maintain the status quo for the time being.

I am inclined to think that too much importance has been attached to this question of selection and insufficient to the disturbance and dislocation that would be caused by implementing the approved proposals by September 1.

The major difference between those proposals and the council's was that the two grammar schools would not be converted into sixth form colleges. The availability of the 240 places was a consequence of that.

One of the matters to which the council drew attention in their letter of June 7 was the plight of the 16-year-olds who would, they said, have been turned out of the sixth forms of three grammar schools and have had

to move to these colleges. Miss Mullenger, a school mistress for 20 years, deposed—and her affidavit sworn on June 30 was supported by many other teachers—that at one of the colleges only the footings for the necessary extension had been put in hand and at the other the necessary extensions and alterations had been delayed. She said it was within her knowledge

> ". . . that if the approved proposals take effect in September, pupils attending the two sixth form colleges would only receive education on a ' part-time ' basis, that is to say that they would be able to attend at the school premises only when they had lessons. For private study, there would be no room to work in classrooms and they would have to work at home or in public libraries or wherever they could find room to do so."

Miss Gabbat, a teacher at the Ashton Grammar School which was to be converted into a sixth form college, in her affidavit sworn on July 20 said that the foundations of the extension proposed there had been laid but that the building could not be completed by September 1976. The original library had been demolished and many of the books would have to be stored in cardboard boxes. Adequate library facilities would not be available until the gymnasium had been converted into a library and work on that had not been started.

In the light of this evidence there were valid grounds for the council thinking that implementation of the approved proposals by September 1 would cause grave disruption of the children's education and they were entitled not unreasonably to conclude that as the sixth form colleges would not be ready for use by September 1 they should seek to maintain the status quo for the time being.

In all the circumstances it does not appear to me that on June 11 there were any valid grounds for concluding that the council were acting or were proposing to act in a way no reasonable council would. Like Lord Denning M.R. I do not find any evidence on which, applying the right test, the Secretary of State could properly have decided that the council proposed to act unreasonably. Either in deciding that he was entitled to give directions he applied the wrong test—and the letter of June 11 and those that preceded it show no indication that he applied the right one and the language of that of June 11 is consistent with the application of the wrong one—or, if he applied the right test, he must have misdirected himself and there is no indication that he attached any weight to the sixth form colleges not being ready for use as such by September 1.

In my opinion the Court of Appeal came to the right conclusion and for the reasons I have stated this appeal should be dismissed.

LORD DIPLOCK. My Lords, the principal Act of Parliament which confers upon the Secretary of State and the Tameside council respectively the cognate powers which each was claiming to exercise in the period between the local government elections on May 6 and the direction given by the Secretary of State on June 11, 1976, is the Education Act 1944. It had been promoted by a coalition government in which all political parties were then represented and at a time when, as I recollect, the social purpose which the system of public education was designed to serve was not, as it

has since become, a matter of acute political controversy upon party lines. The minor amendments that have been made since 1944 do not affect the scheme of the Act.

The responsibility for carrying out the national policy for education is distributed by the Act between the Minister of Education (now the Secretary of State) and local education authorities, acting in partnership, as Lord Widgery C.J. aptly put it, and also governors and managers of the individual schools, with whose function this appeal is not concerned. To these three kinds of public authority concerned with education I would add, and not as junior partners only, the parents of children of school age upon whom by section 36 is placed the primary duty of causing their children to receive efficient full-time education suitable to their ages, abilities and aptitudes. Parental wishes as to the school to be attended by the child (see section 37) and what he is to be taught there are to prevail so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure (see section 76).

Under the Act the actual provision of public education services in each local government area is exclusively the function of the local education authority, i.e., the county or borough council representative of and elected by the inhabitants of the area served by the schools to be provided by the authority. The functions of the Secretary of State, apart from contributing to the cost of the provision of educational services (see section 100), are supervisory only. The execution by the local authorities of the national policy for education is described in section 1 as being under his control and direction; but the extent to which the Secretary of State is empowered to fetter a local authority's choice as to the method of implementing the national policy which it considers to be best suited to its own area is limited by the provisions of the Act. The only question for your Lordships in the instant appeal is whether in giving his direction of June 11, 1976, the Secretary of State trespassed beyond the statutory limits to his powers.

The Act does not leave the national policy for education to be determined from time to time by successive Secretaries of State. The Act itself says what the policy is. In section 1 its purpose is described as being for "providing a varied and comprehensive educational service in every area." In this context "comprehensive" bears its dictionary meaning and not the narrower connotation it has since acquired in the controversy between the rival educational and social merits of secondary schools to which entry is by selection according to ability and those to which it is not. What is to be provided by way of secondary education in accordance with the national policy is expanded in section 8. The number, *character* and equipment of the secondary schools provided by a local authority in its area must be such as

> ". . . to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, . . . including practical instruction and training appropriate to their respective needs."

I pause here to draw attention to the underlying assumptions, as disclosed by the Act read as a whole, and in particular by sections 1, 7, 8 and 36, (a) that the contribution to be made by education towards ". . . the

spiritual, moral, mental, and physical development of the community . . ." (see section 7) is by developing the particular abilities and aptitudes of the individual pupil; (b) that individual pupils differ from one another in ability and aptitude; and (c) that these differences will call for different methods of teaching for pupils of differing ability or aptitude if the statutory policy for education is to be carried out.

The Act leaves to local education authorities a broad discretion to choose what in their judgment are the means best suited to their areas for providing the variety of instruction called for by those provisions which I have mentioned. It is not necessary to discuss here what were the respective responsibilities of the minister and local education authorities in the formulation of the original development plans for primary and secondary education in each area under section 11 of the Act. In Tameside, as elsewhere, this was all in the distant past. It is now common ground that in the spring of 1976, as a result of the approval by the Secretary of State of the proposals of the Tameside council when controlled by a Labour majority, there were two courses lawfully open to the newly elected council. One was to carry out their predecessor's proposals for making entry to all the secondary schools non-selective; the other was to leave the character of all the secondary schools in the area the same as in the previous year, i.e., with selective entry to the five grammar schools according to the pupil's aptitude for academic learning and with non-selective entry to the remaining schools. As between these two courses the right to choose was prima facie that of the council alone. The Secretary of State's power to overrule their choice by giving them a direction under section 68 to act in some other way that he himself preferred and they did not was exercisable only if he had satisfied himself that the council were proposing to act " unreasonably."

My Lords, in public law " unreasonable " as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. It has from beginning to end of these proceedings been properly conceded by counsel for the Secretary of State that his own strong preference and that of the government of which he is a member for non-selective entry to all secondary schools is not of itself a ground upon which he could be satisfied that the Tameside council would be acting unreasonably if they gave effect to their contrary preference for the retention of selective entry to the five grammar schools in their area. What he had to consider was whether the way in which they proposed to give effect to that preference would, in the light of the circumstances as they existed on June 11, 1976, involve such interference with the provision of efficient instruction and training in secondary schools in their area that no sensible authority acting with due appreciation of its responsibilities under the Act could have decided to adopt the course which the Tameside council were then proposing.

It was for the Secretary of State to decide that. It is not for any court of

law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, *per* Lord Greene M.R., at p. 229. Or, put more compendiously, 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 to enable him to answer it correctly?

There has never been the least suggestion in this case that the Secretary of State acted otherwise than in good faith. So one can take the reasons contained in his letter of June 11 as indicating with candour those matters which had influenced his mind in reaching his conclusion that the council proposed to act unreasonably. The material parts of that letter have been cited and the events to which it relates have been analysed in so many judgments in the courts below and speeches in this House that it would be tedious for me to repeat them here. The references in the letter to staffing arrangements, planning of curricula and courses and building work have not been relied upon in the proceedings for mandamus as capable of justifying the Secretary of State's decision. It seems likely that he had been inadequately informed of the facts. What is left then are his criticisms of the way in which the council proposed to allocate to grammar schools the pupils who would be leaving the primary schools in July 1976, at the end of the summer term. There were two aspects of this. First, there were pupils whose abilities and aptitudes suited them for a grammar school education, but who had been allocated to schools which were now to remain secondary modern schools. Secondly, there were pupils who had already been allocated to three of the five grammar schools, but whose abilities and aptitudes made them more suitable for the less academic training provided in secondary modern schools. This second category has not bulked large in the arguments before the courts below or in this House. The evidence discloses that in any system involving selective entry at the age of 11 plus some misfits manifest themselves as the educational year progresses and are transferred to more suitable schools. The council proposed that misfits resulting from the non-selective allocation of unsuitable pupils to grammar schools should be dealt with in this, the usual, way, though there would no doubt be more of them than if the original allocation had been selective.

The argument has largely turned upon the council's proposals for allocating pupils to the 240 places which would be available for entry to the lower forms at Ashton and Hyde grammar schools. What was proposed by the council for these places was selection by a combination of reports, records and interviews. Selection based on reports and records obtained from the pupils' primary schools, together with the use of one of several alternative aids for evaluating possible differences in the standards of assessment adopted in reports from different primary schools, is a well tried system of selection which had been in use in areas as far apart as Lancashire and Barnet and had been adopted in Tameside itself as the selection process in the preceding year. A proposal to adopt it for the school year starting

in September 1976 in circumstances in which it could be carried out effectively could not be " unreasonable " in the sense required by section 13. A

It has not been seriously contended before your Lordships that the time available between June 11 and September 1, when the new term at secondary schools began, was insufficient to enable this method to be carried out effectively, if reasonable cooperation were obtainable from head teachers at the primary schools. However, three of the teachers' trade unions, including those to which the majority of head teachers of primary schools belonged, B had threatened to withhold the cooperation of their members. So the question that the Secretary of State had to ask himself was: in face of the trade unions' threat that their members would refuse to cooperate was the council on June 11 acting unreasonably in not having abandoned by that date all plans for reintroducing selective entry to grammar schools in their area?

The letter of June 11 contains no indication that the Secretary of State C directed his mind to this question, let alone that he realised that it lay at the heart of what he had to decide. In the passage dealing with selection, on which my noble and learned friend, Lord Wilberforce, has already commented, the Secretary of State, despite the weight which the Act itself requires him to attach to parental choice, refers to the opportunity to be afforded to parents of having some choice in the kind of secondary school D their children were to attend as confronting the parents with a dilemma.

The only passage capable of referring, even eliptically, to the unions' threat is the reference to the selection procedure being " . . . carried out in circumstances and under a timetable which raise substantial doubts about its educational validity."

A relevant question to which the Secretary of State should have directed his mind was the extent to which head teachers would be likely to persist E in a policy of non-cooperation if he himself was known to have declined to stop the council from proceeding with their plan. There is no suggestion in the letter, nor in either of the affidavits sworn on his behalf by Mr. Jenkins, that the Secretary of State ever directed his mind to this particular question or formed any view about it. Indeed, it is not until the second affidavit that it is disclosed that the teachers' trade unions had been writing F directly to the department on the matter at all. It is not for a court of law to speculate as to how the Secretary of State would have answered that question had he directed his mind to it, though like others of your Lordships and members of the Court of Appeal I find it difficult to believe that responsible head teachers, regardful of the interests of their pupils, would have persisted in a refusal to do their best to make the selection procedure work fairly and effectively if the Secretary of State had made it clear to G them by his decision that he was not prepared himself to interfere with the council's proceeding with its plans. Assuming, however, that he had formed the view that cooperation by head teachers was likely to be only partial so that the selection process would be liable to greater possibility of error than where full cooperation could be obtained, the Secretary of State would have to consider whether the existence of such a degree of imperfection in the H selection system as he thought would be involved was so great as to make it unreasonable conduct for the council to attempt to fulfil the mandate which they had so recently received from the electors. Again, there is no

indication that the Secretary of State weighed these two considerations against one another.

Like all your Lordships, I would dismiss this appeal, although I prefer to put it on the ground that, in my view, the respondents have succeeded in establishing in these proceedings that the Secretary of State did not direct his mind to the right question; and so, since his good faith is not in question, he cannot have directed himself properly in law.

LORD SALMON. My Lords, in 1975 Tameside had five grammar schools, 16 secondary modern schools, one completed comprehensive school and two others in the course of construction. In March 1975 the local education authority, the metropolitan borough council of Tameside (then under the control of the Labour party), put forward proposals to the Secretary of State for Education and Science under section 13 of the Education Act 1944 for introducing an entirely comprehensive system of education and abolishing all the grammar schools on September 1, 1976. The Secretary of State approved these proposals on November 11, 1975. This approval imposed no obligation on the authority to implement the proposals. They were free to change their mind without obtaining the Secretary of State's permission. It was however unlikely that they would have done so but for the result of the election held on May 6, 1976, when the control of the local authority passed from the Labour party to the Conservative party. One of the chief issues before the electorate of Tameside had been whether or not their grammar schools should be abolished. It is perhaps unfortunate that such an important educational question had become a party political issue, about which feelings ran high and a great deal of heat had been engendered. Broadly, the Labour party is for abolishing grammar schools and the Conservative party for preserving them. There are many impressive reasons which can be advanced by each side in favour of its own point of view. Certainly it is completely outside the province of the courts or this House in its judicial capacity to express any opinion upon the rights and wrongs of this dispute: moreover, it has nothing whatever to do with the determination of this appeal.

The Conservative party having won the election in Tameside on May 6 the authority rightly considered that they had a mandate from the electors to preserve the Tameside grammar schools—the question as to whether or not the grammar schools were to be preserved having been one of the chief issues in the election. The Secretary of State not unnaturally foresaw that the local authority were likely to carry out their mandate and decide not to implement the proposals approved by him in the previous November. On May 11, 1976 (five days after the result of the election had been announced), he caused a letter to be written to the authority asking that

> "... full details of the arrangements made or proposed for the transfer of pupils to county secondary schools next September be forwarded to the Department [of Education] as a matter of urgency."

On May 26, 1976, the Secretary of State caused another letter to be written to the authority expressing his extreme concern that the proposals which he had approved were not being carried out and requesting the

authority to provide him with a "precise and detailed statement of the plans which [the authority] hopes to put into effect in September." The letter ends with a warning or threat that if the authority's plans would, in the Secretary of State's view, involve "unwarrantable disruption" the Secretary of State would have to consider whether he should use his powers under section 68 of the Education Act 1944 to direct the authority to implement the original proposals.

In the meantime some of the trade unions concerned had advised their members (comprising most of the teachers and staff in the primary and secondary schools) not to cooperate with the authority in putting into effect any plans inconsistent with the 1975 proposals. If, as seems to me not improbable, the teachers were apprised of the contents of the letter of May 26 to which I have referred, this certainly would not have discouraged them from complying with the advice which they had received from the trade unions. It must have appeared likely to them that when the Secretary of State came to make his decision he would decide (as he in fact did) to give the authority directions to implement the original proposals and that any time or effort which, in the meantime, might have been spent on furthering the authority's plan would have been wasted.

On June 7, 1976, the authority wrote what I regard as a most courteous, sensible, full, fair and well reasoned reply to the letter of May 26 in which they explained with precision their plans for the future. This is an important letter and I am afraid that I must quote from it at some length:

> "In detail these immediate plans are as follows: 1. Continuation of the five grammar schools in Tameside as 11 to 18 academic high schools. 2. Continuation and completion of the three comprehensive schools as already agreed and for which money has already been spent. We believe that these *purpose-built* comprehensive schools form a valuable nucleus of any future scheme. 3. Continuation of the remaining 11 to 16 secondary schools. 4. All allocations to schools for 11-year-olds made by our predecessors immediately before the local elections to be honoured and maintained subject to the continued agreement and acceptance by the parents concerned. 5. Ashton and Hyde grammar schools now to be open for an 11-year-old entry. Since no 11-year-old allocations to these two schools had been made by our predecessors, this creates approximately 240 selective school places in addition to those already allocated. 6. All parents of 11-year-olds transferring to secondary schools have been invited to reapply for reallocation if they are dissatisfied with their present allocation. If they are satisfied, then of course they need not apply and no reallocation will be made. 7. If the number of applicants to the grammar schools exceeds the number of places available, as is likely, then those pupils most suitable and most likely to benefit from that type of education will be selected by a combination of reports, records and interviews. There will be no formal 11-plus examination. 8. Those not applying for grammar school places, or those unsuccessful in obtaining a grammar school place, will still be offered a reallocation to one of the other secondary schools in Tameside if the parent requests and provided the places are available. It is not intended to follow any neighbourhood

zoning. 9. 16-year-olds from both the five grammar schools, and all other secondary schools, who apply, and are accepted for, "A" level courses may pursue these within the sixth forms of the five grammar schools, or at Tameside College of Technology. It is anticipated that wherever possible pupils will wish to stay at their own school where it has a sixth form, but final choice will of course depend upon the particular courses chosen. 10. A review of the first year entries will be made and there will be a very flexible transfer system at the end of the first year (or earlier if required in certain circumstances) to assist pupils, following consultation and agreement with the parents and teachers concerned, to transfer to other schools within Tameside where the child's ability and aptitude during the course of the year has shown that the child would be happier and better suited to a school or a course elsewhere. It is not anticipated that widespread transfers will be necessary or requested, but the facility to do so will be there.

"I apologise for the length of this letter but I think it important that the Secretary of State should be fully informed of the present position and of our concern for the welfare of Tameside children. For his information I also enclose a copy of a letter which has been sent to all parents in Tameside setting out the position and inviting those who wish to to reapply for secondary school allocation. Whilst we have been advised that we might take action over the unreasonable behaviour of our predecessors in their precipitous action taken only days before the elections, we do not propose to pursue such a course. We believe that it would be in the best interests of Tameside, and of the children, to concentrate on matters of education and to work for the continuing, gentle, considered evolution of our schools to meet parental demands and pupils' needs."

On June 11, 1976, the Secretary of State made his decision and communicated it to the authority by letter of that date. The letter stated that:

"[The Secretary of State] is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by . . . the Education Acts 1944–1976 [sic] . . . with respect to their . . . duties . . . under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools from primary schools at the beginning of the coming school year, i.e., on September 1, 1976."

It then sets out the grounds on which the Secretary of State is so satisfied (to which I shall refer later) and concludes:

"In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him . . . , the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to

school premises and other matters as is required to give effect to the proposals." A

The question that arises in this appeal is one of considerable constitutional importance—was the Secretary of State acting lawfully or unlawfully when on June 11, 1976, he gave the authority the directions which I have recited? Under the Education Act 1944 the local education authorities have the duty imposed on them of securing the provision of primary and secondary schools in their respective areas, and they are invested with the powers necessary to carry out these duties—see sections 8 and 9. They cannot however establish a new county school or close an established one without putting their proposals for doing so before the minister and obtaining his consent—see section 13. Hence the reason for the Tameside authority in 1975 putting the proposals for closing their grammar schools before the Secretary of State. His acceptance of these proposals as I have already observed did not however of itself cast any obligation on the authority to carry them out. B C

As the law stands at present, neither the Secretary of State nor any other member of the executive has any power, in ordinary circumstances, to order local authorities to close down their grammar schools or convert them into comprehensive schools. Accordingly the Secretary of State's directions given on June 11 are unlawful unless they can be brought within the powers conferred upon the Secretary of State by section 68 of the Act of 1944 which reads as follows: D

> "If the Secretary of State is satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by . . . this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient." E

In my opinion, section 68, on its true construction, means that before the Secretary of State can lawfully issue directions under it he must satisfy himself not only that he does not agree with the way in which the authority have acted or are proposing to act nor even that the authority is mistaken or wrong. The question he must ask himself is: "Could any reasonable local authority act in the way in which this authority has acted or is proposing to act?" If, but only if, he is satisfied on any material capable of satisfying a reasonable man that the answer to the crucial question is "No," he may lawfully issue directions under section 68. I would adopt what Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700: F G

> "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable." H

There is certainly no evidence as to how the Secretary of State construed section 68 nor as to the questions he asked himself before deciding to issue his directions set out in the letter of June 11. Neither of the affidavits sworn by Mr. Jenkins, an assistant secretary in the schools branch of the Department of Education and Science, throw any light upon this matter. It may be that the Secretary of State misconstrued section 68, asked himself the wrong question (e.g. " do I agree with the action proposed by the authority? ") and therefore misdirected himself in law. On that assumption, the Secretary of State's directions to the authority on June 11, 1976, would have to be overruled on the grounds of their illegality. Assuming however that he asked himself the right questions and decided that no reasonable authority would act as this authority now proposed to act, I cannot discern any valid ground upon which such a decision could be justified. The grounds upon which the Secretary of State purported to act under section 68 are set out in the letter of June 11; there were five of them. Four of these, which I need not itemise, appeared to the Divisional Court and to the Court of Appeal to have no substance in them. They were not pressed in this House and I do not consider that they lend any support to the Secretary of State's case. Nor am I any more impressed by the fifth ground upon which the Secretary of State succeeded in the Divisional Court and upon which he chiefly relied thereafter. It was only hinted at in the letter of June 11. This was that no reasonable authority in the position of the Tameside authority could have concluded that it had time between June 11 and September 1, 1976, to make a fair and efficient selection on merit of 240 pupils out of the 783 applicants for the 240 places which would be available in the grammar schools on September 1, 1976. The Divisional Court with considerable hesitation decided this question in favour of the Secretary of State only, I think, because of an uncontradicted affidavit by a former chief education officer of Gloucestershire filed at a late stage on July 2 stating that the whole process of selection normally takes a full term of 12 weeks to complete and therefore there was no chance of the test being completed before September 1.

The authority's letter of June 7 had pointed out (paragraph 7) that pupils most suitable and likely to benefit from the type of education would be selected by a combination of reports, records and interviews instead of by an 11-plus examination. The evidence of a number of distinguished educationalists, produced without objection before the Court of Appeal, showed that this alternative method of selection had been widely used since the 1960s in areas as far separated as Lancashire Division 24, close to Tameside, and the London Borough of Barnet and that it had proved entirely satisfactory. With a selection panel of 20 teachers (10 couples) the whole operation of making a fair and accurate selection of 240 from 783 applications could have been comfortably carried out in Tameside within one week. In the London Borough of Barnet for the period 1965 to 1970 eight panels—each consisting of three teachers—yearly completed a fair selection of 850 pupils from about 3,000 in 10 working days.

It seems incredible to me that these facts were unknown to the Department of Education and not available to the Secretary of State on June 11, 1976. It follows that if the Secretary of State before making his decision had asked himself the right question—" could any reasonable authority in

the position of Tameside have reasonably come to the conclusion that a fair selection could have been made to fill the 240 vacancies before September 1, 1976? "—the answer could only have been "yes." It may be that some authorities might have preferred the views of the expert witness upon whose evidence the Secretary of State relied in the Divisional Court to the views of the witnesses upon whose evidence the Tameside authority relied in the Court of Appeal. I find it impossible however to accept that any reasonable man could have been satisfied that no reasonable authority on the evidence could take the view that a satisfactory selection of candidates for the 240 places in the grammar schools could have been made between June 11 and September 1, 1976. Therefore either the Secretary of State must have erred in law by misconstruing section 68 and failing to ask himself the right question or he asked himself that question and answered it "no" without any valid ground for doing so.

It has been argued that before June 11, 1976, the majority of the teachers had refused to cooperate with the authority and that without their cooperation no selection would have been possible. No doubt they were hoping and expecting that the Secretary of State would give directions to the authority to carry out the 1975 proposals—a hope and expectation which must have been fortified by the warning or threat at the end of the letter of May 26 which the Secretary of State caused to be sent to the authority. Even so, 20 of them were prepared to form a panel to carry out the selection under the chairmanship of Mr. Beard, the very experienced former headmaster of a junior county school who had served on the selection panel for Lancashire Division 24 since this type of selection began in the early 1960s.

The facts deposed to in the affidavits of Mr. Beard and Mr. Potts (also a most experienced educationalist) make it plain that in their view the panel of 20 would have plenty of time even between August 2 (the date when your Lordships' decision was announced) and September 1 to make a reasonably accurate selection from amongst the 783 applicants to fill the 240 vacancies in the grammar schools for the beginning of the next term. On June 11 they would have had ample time to make the most meticulous selection well before September 1.

Towards the end of May 1976 the 49 head teachers of the primary schools were asked by the authority to make their records, reports and written personal assessments of the 783 candidates for the 240 vacancies in the grammar schools available to the selection panel appointed by the authority. Only three agreed to do so. The remainder refused on the ground that their trade unions had advised them not to comply with the authority's request. As I have already said, it is, in my view, a fair inference that the trade unions and many of the teachers were hoping and expecting that the Secretary of State would soon be giving the directions threatened in the letter of May 26 and which he in fact gave on June 11. On the other hand, any reasonable authority could reasonably expect, for the reasons stated in their letter of July 7, that the Secretary of State would decide not to give the directions which he did in fact give on June 11 or that, if he gave them, they would be held by the courts to be unlawful either on the ground that the Secretary of State in giving such directions had

misdirected himself in law or that there was no legal ground to support them.

If on June 11 the Secretary of State had, as in my view he should have done, decided, and announced his decision, against giving any directions under section 68 and had allowed the authority's plan for the grammar schools to go forward, I believe that the teachers would have changed the attitude which they had taken up when they were expecting a ministerial embargo. Like Geoffrey Lane L.J. (ante p. 1035E–F), I cannot believe that once they knew that there was to be no ministerial embargo they would have continued to be non-cooperative in an attempt to thwart the authority in carrying out the policy of preserving the grammar schools in Tameside in accordance with the mandate which the authority had been given by the inhabitants of Tameside in the recent democratically held election. I believe that the vast majority of the teachers including all the head teachers in the primary schools would have done their duty and loyally cooperated with the authority which employed them.

The teachers no more than the executive (as I am sure they both recognise) can lawfully impose a policy relating to grammar schools, namely, that of abolishing them, merely because they do not approve of the policy of preserving them which the authority has lawfully adopted.

I am convinced that there are no valid grounds for holding that the authority acted or were proposing to act unreasonably within the meaning of section 68. The directions given by the Secretary of State on June 11, 1976, were in my view unlawful. Accordingly, there is no necessity for me to express any opinion on the point taken by Mr. Anthony Lloyd under section 99 of the Education Act 1944.

My Lords, I would dismiss the appeal.

LORD RUSSELL OF KILLOWEN. My Lords, I would remark upon some matters introductory to consideration of this appeal.

1. In my judicial capacity I must have no preference for a particular system of state supported education, whether mixed or comprehensive. In my personal capacity I have in fact no preference for any particular system, and this fact, while it may disable me from arriving at a conclusion that a particular view is wrong, may assist me in arriving at a correct conclusion as to whether a proposed course of action, motivated in whole or part by a particular view, is "unreasonable." In this latter respect I may indeed, because of my very neutrality, or if you please indifference, be in a position of relative advantage in concluding what may be considered unreasonable, while at the same time (though not paradoxically) being at a disadvantage in concluding which system is the better.

2. There was no obligation whatever in law on the local authority to implement its 1975 proposals, albeit they had been approved by the Secretary of State. Prima facie the local authority was within its rights and duties to change its mind and continue the existing mixed system.

3. In concluding whether the local authority was truly proposing to act unreasonably, the Secretary of State was in a position of considerable disadvantage. His duty in approaching the question was to adopt a

posture of complete neutrality between the educational merits of the comprehensive and the mixed systems: but he was committed in view to the former—I speak here not at all of party politics—and his departmental advisers had deliberated and worked for many months before approving the detailed 1975 proposals which the local authority now proposed at least to defer. It is in that context that I have ventured to refer to a possible advantage, in reaching a true conclusion on the crucial question, of my own neutrality or indifference.

I leave those general considerations to address myself to the particular question in the case: whether there were grounds upon which the Secretary of State on June 11 could properly be satisfied that the local authority was then proposing to act unreasonably. It is, my Lords, no doubt a most serious matter for the judiciary to overset a conclusion of a minister with overall responsibility in a field of such importance to the national welfare as education, when it is not suggested either that the conclusion was motivated by partly political considerations or that it involved bad faith. On the other hand it is not my understanding that the mere expression by the Secretary of State of his satisfaction that particular proposals are unreasonable deprives the court of the ability to decide that there were no sufficient grounds for that satisfaction and that consequently the Secretary of State must in some respect have misdirected himself in applying his mind to the problem. Further I would observe that it is equally a most serious matter for the organisation of education in an area, which is, under the statute (with exceptions), the province of the local authority, to be taken out of its hands by the central government on the ground that the former is proposing to act "unreasonably"—which I take to mean that the course that is proposed is one that in the circumstances no reasonable local authority, with the interests at heart of the education of the young in its area, would take.

The details of the documents leading up to the letter written for the Secretary of State on June 11, 1976, have been set out by my noble and learned friends, and I do not repeat them; nor do I rehearse in any detail the facts of the case, for that would involve tedious repetition. The letter from the newly constituted local authority, whose new constitution was based at least in part upon acceptance by the electorate of proposals to defer implementation of the 1975 scheme, cannot be said to bear the stamp of irrationality or unreasonableness. It stated in sober fashion the objections to implementation of the 1975 proposals in September 1976. It recognised the problems involved in applying the brake to those proposals which of course had acquired a degree of momentum. It arrived at a considered view on balance of disadvantages. From a neutral standpoint on systems of state education I find it quite impossible to conclude that this attitude was one of an unreasonable education authority. I have no doubt that the Secretary of State was satisfied that the local authority was *wrong* to put the brake on the 1975 proposals. Equally I have no doubt that the reconstituted local authority was satisfied that the previously constituted local authority and the Secretary of State were *wrong* to propose and approve the 1975 proposals for initial implementation in September 1976. But to my mind it is quite unacceptable in either case to

proceed from "wrong" to "unreasonable." If by statute comprehensive education is introduced throughout there will no doubt be many who will consider that it is wrong so to do: but it could not be objectively unreasonable, whatever the disruptions resulting from introduction into selected entry schools of non-selected entry primary school children, or the move of 16-year-old children to a different school, or any other change. Equally I apprehend that if in an area a fully comprehensive system of education is established it would not be right to describe a proposed reversion to a mixed system as "unreasonable" as opposed to a view that it would be "wrong." History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. In summary, my Lords, "unreasonably" is a very strong word indeed, the strength of which may easily fail to be recognised and which in my opinion has not been recognised in the instant case by the Secretary of State.

I have, my Lords, referred to the reasonable letter from the local authority. I now refer in slightly more detail to the letter of decision of June 11, 1976. As indicating grounds of unreasonableness on the part of the local authority it appears to me to be unsatisfactory. It does not grapple with the arguments or contentions of the local authority supporting its attitude: it refers only in general terms to consideration of points made. It states that a change of plan at this stage (June 11) ". . . must . . . give rise to considerable difficulties." It refers (as such difficulties) to a number of features, none of them very dogmatically stated, as follows.

(i) Parents of children are presented with a dilemma: this must refer to parents whose child has been allotted (under the 1975 proposals) to a comprehensive based school but who (under the new proposal) would like the child to be considered for one of the 240 places available under the 1976 proposals at the two now retained grammar schools which were to become sixth form schools: the dilemma is either to retain the allocation at a comprehensive or secondary modern or to try for one of the newly available grammar school places. The dilemma suggested is that the parent (who ex hypothesi would prefer a grammar school placing if possible) would in pursuit of that aim risk an unthorough vetting for the vacancies. I do not find it easy to understand this so-called dilemma. Half a loaf is better than no bread for one who seeks bread.

(ii) The system of selection for the 240 grammar school places is to be "improvised" (the precise form of which has not been settled), "carried out in circumstances and under a timetable which raise substantial *doubts* about its educational validity." Assuming that this is a delicate reference ("circumstances") to the fact that at that date a substantial number of teachers for various reasons were refusing to cooperate in tests for the 240 grammar school places, I find it hard to believe that if the Secretary of State had held his hand on June 11 (when there was ample time for a full vetting for the 240 grammar school places) the relevant teachers, who are after all professionals dedicated to the interests of child education, would have refused to do their best for the children under them. The Secretary of State certainly says nothing to the contrary.

(iii) The letter of June 11 referred next to paragraph 10 of the local authority's representations. That paragraph (ante, p. 1069B–C) has

recognised that adherence to the non-selective allocations of the 3,000-odd primary school leavers, already made under the 1975 proposals on the assumption that all the secondary schools were ultimately to become fully comprehensive, might result in some square pegs in round holes under the revised system: for example, a child unsuited to a grammar school might find itself at one of the three. But the paragraph showed that in the view of the local authority a flexible system of interchange in such cases could be operated after or during the first term and that "widespread transfers" would be unnecessary. The department's letter of June 11 stressed that this "might" involve ". . . an abnormally high proportion of pupils [needing] to be reallocated to different secondary schools . . ." What is meant by "abnormally high" except more than usual? This was recognised by the local authority in its letter. And, supposing it to be so, how high is abnormal and what is its contribution to "unreasonably"?

In the end in argument the whole matter of "unreasonableness" came down to the question of the reliability of selection procedures for 240 grammar school places in the time available out of some 800 parental applications. This had to be considered on June 11 by the Secretary of State. Could it then have been described (as it was *not* by the letter of June 11) as unreasonable on the part of the local authority to suppose that the teachers would do their best for the children in this regard? I cannot think so.

Accordingly, my Lords, I am of opinion that the Secretary of State in his letter of June 11 exceeded his powers and this appeal fails.

I would add this. The question whether the Secretary of State was justified in his conclusion that the proposals of the local authority were unreasonable falls to be decided at the date of his conclusion, June 11: that is common ground. I would not however subscribe to the view that facts subsequently brought forward as then existing can properly be relied upon as showing that the proposals were not unreasonable unless those facts are of such a character that they can be taken to have been within the knowledge of the department.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor; Oswald Hickson, Collier & Co.*

M. G.

END OF VOLUME AND OF APPEAL CASES FOR 1977.

A

Supreme Court

Regina (Sainsbury's Supermarkets Ltd) *v* Wolverhampton City Council

[2010] UKSC 20

B

2010 Feb 1, 2; May 12

Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Collins of Mapesbury JJSC

Compulsory purchase — Development — Competing proposals — Planning authority determining how to exercise compulsory purchase powers — Whether entitled when considering benefits of rival schemes to have regard to benefits accruing to site not within proposed development area — Town and Country Planning Act 1990 (c 8) (as amended by Planning and Compulsory Purchase Act 2004 (c 5), s 99, Sch 9), ss 226(1)(a)(1A), 233

C

The claimant supermarket company owned or controlled 86% of site A and another supermarket company, T Ltd, owned or controlled most of the remainder of the site. Both companies wished to develop site A but, unless the defendant local authority used its compulsory purchase powers in respect of that site, neither of the proposed developments could take place. T Ltd also owned site B, about 850 metres away, which contained a number of listed buildings which were in poor condition. For many years it had been an objective of the local authority to secure the regeneration of site B. T Ltd, who considered that it was not financially viable to develop site B on its own, offered to link its scheme for site A with the redevelopment of site B on the basis that that would amount to a subsidy at least equal to the loss it would sustain in carrying out the development of site B. The local authority approved in principle the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990[1] in respect of the claimant's land at site A to facilitate a development of the site by T Ltd. In resolving to make that order, the local authority took into account T Ltd's commitment to develop site B. The claimant sought judicial review of the local authority's decision on the ground that it was illegitimate for the local authority, in resolving to make the compulsory purchase order, to have regard to the regeneration of site B. The judge dismissed the claim. On the claimant's appeal, the Court of Appeal held that section 226(1)(a) required the local authority to be satisfied that the compulsory purchase order would facilitate the redevelopment of site A but that section 226(1A) required it to consider whether and to what extent the redevelopment of site A would bring well-being benefits to a wider area and that, if a redevelopment was likely to act as a catalyst for the redevelopment of some other site, such catalytic effects were capable of falling within the scope of section 226(1A) and it dismissed the appeal.

D E F G

On the claimant's appeal—

Held, (1) that the principles which applied to the determination of planning applications could apply, by analogy, to compulsory acquisition for development purposes, provided that (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of those principles was adopted; that, therefore, a local authority

H

[1] Town and Country Planning Act 1990, as amended, ss 226(1)(a)(1A), 233: see post, para 108.

could take into account off-site benefits of a proposed development provided that such benefits were related to or connected with the development for which the compulsory acquisition was made; and that (per Lord Phillips of Worth Matravers PSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) such a connection had to be a real rather than a fanciful or remote one and (Lord Brown of Eaton-under Heywood JSC dissenting) in the absence of any other connection a cross-subsidy from the acquisition site to another site would not suffice (post, paras 70, 71–72, 80, 82, 83, 84, 89, 90, 97, 98, 120, 127–128, 134–135, 137–138, 151, 168, 173, 181).

(2) That (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) the power of compulsory acquisition had to be capable of being exercised under section 226(1)(a) of the 1990 Act before the limitation in section 226(1A) applied; that (Lord Brown of Eaton-under-Heywood JSC dissenting) the claimed financial connection between the two developments did not amount to a relevant matter for the purposes of section 226(1)(a); and that (Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC dissenting) no different result was required by the fact that T Ltd and the claimant co-owned and were in competition for site A and the council was proposing to dispose of the land to T Ltd under section 233 (post, paras 74, 75, 76, 80, 83, 90, 91, 96, 97, 100, 106, 151).

(3) Allowing the appeal (Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC and Lord Brown of Eaton-under Heywood JSC dissenting), that, accordingly, there should be a declaration that the opportunity for redevelopment of site B was not a lawful consideration in deciding whether to make a compulsory purchase order in relation to site A (post, paras 79, 80, 89, 90, 97, 106).

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87, CA, *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78, CA, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, HL(E) and *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, HL(Sc) considered.

Decision of the Court of Appeal [2009] EWCA Civ 835; [2009] 3 EGLR 94 reversed.

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bradford (City of) Metropolitan Council v Secretary of State for the Environment (1986) 53 P & CR 55, CA

Brighton Borough Council v Secretary of State for the Environment (1978) 39 P & CR 46

Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117

Clunies-Ross v Commonwealth of Australia (1984) 155 CLR 193

Galloway v Mayor and Commonalty of London (1866) LR 1 HL 34, HL(E)

Grampian Regional Council v Secretary of State for Scotland 1984 SC (HL) 58, HL(Sc)

Hall & Co Ltd v Shoreham-by-Sea Urban District Council [1964] 1 WLR 240; [1964] 1 All ER 1, CA

Hanks v Minister of Housing and Local Government [1963] 1 QB 999; [1962] 3 WLR 1482; [1963] 1 All ER 47

Kelo v City of New London, Connecticut (2005) 554 US 469

Municipal Council of Sydney v Campbell [1925] AC 338, PC

Newbury District Council v Secretary of State for the Environment [1981] AC 578; [1980] 2 WLR 379; [1980] 1 All ER 731, HL(E)

Prest v Secretary of State for Wales (1982) 81 LGR 193, CA

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554; [1958] 2 WLR 371; [1958] 1 All ER 625, CA
R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd (1993) 67 P & CR 78; [1993] JPL 538, CA
R v Secretary of State for Transport, Ex p de Rothschild [1989] 1 All ER 933; 87 LGR 511; sub nom *de Rothschild v Secretary of State for Transport* 57 P & CR 330, CA
R v Westminster City Council, Ex p Monahan [1990] 1 QB 87; [1989] 3 WLR 408; [1989] 2 All ER 74, CA
R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12; 237 CLR 603
Rugby Joint Water Board v Shaw-Fox [1973] AC 202; [1972] 2 WLR 757; [1972] 1 All ER 1057, HL(E)
Simpsons Motor Sales (London) Ltd v Hendon Corpn [1964] AC 1088; [1963] 2 WLR 1187; [1963] 2 All ER 484, HL(E)
Sosmo Trust Ltd v Secretary of State for the Environment [1983] JPL 806
Sovmots Investments Ltd v Secretary of State for the Environment [1977] QB 411; [1976] 2 WLR 73; [1976] 1 All ER 178; [1977] QB 411; [1976] 3 WLR 597; [1976] 3 All ER 720, CA; [1979] AC 144; [1977] 2 WLR 951; [1977] 2 All ER 385, HL(E)
Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) 2005 SLT 144; [2006] UKHL 50; 2007 SC (HL) 33, HL(Sc)
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)
Waters v Welsh Development Agency [2004] UKHL 19; [2004] 1 WLR 1304; [2004] 2 All ER 915, HL(E)
Westminster Renslade Ltd v Secretary of State for the Environment (1983) 48 P & CR 255

The following additional case was cited in argument:

Belfields Ltd v Secretary of State for Communities and Local Government [2007] EWHC 3040 (Admin); [2008] JPL 954

APPEAL from the Court of Appeal

The claimant, Sainsbury's Supermarkets Ltd, appealed, with permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Collins of Mapesbury JJSC) granted on 5 November 2009, from a decision of the Court of Appeal (Ward, Mummery, Sullivan LJJ) [2009] 3 EGLR 94 given on 31 July 2009, dismissing its appeal against a decision of Elias J [2009] EWHC 134 (Admin) given on 3 February 2009 whereby he had dismissed its claim for judicial review of the decision of the defendant local authority, Wolverhampton City Council, given on 30 January 2008 to give approval in principle to the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990 in respect of land owned by the claimant. Tesco Stores Ltd was an interested party

The facts are stated in the judgment of Lord Collins of Mapesbury JSC.

Christopher Lockhart-Mummery QC, *Eian Caws* and *Charles Banner* (instructed by *CMS Cameron McKenna LLP*) for the claimant.

Compulsory purchase powers should only be exercised as a last resort, where the interference with property rights is necessary to achieve the relevant objectives. The court must carefully scrutinise the exercise of compulsory purchase powers to ensure that the statutory authority has been properly exercised: see *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198, 211. In deciding whether, and how, to exercise

compulsory purchase powers in relation to a site under section 226 of the Town and Country Planning Act 1990, as amended, a local authority may only lawfully take into account those factors relevant to the achievement of the statutory purpose. A proposal to cross-subsidise development elsewhere is entirely unrelated to the achievement of the statutory purpose and, in making its decision by reference to that factor, the local authority was pursuing a purpose outside the statutory scheme and/or was taking into account an immaterial consideration.

The Court of Appeal's construction of section 226(1A) was fundamentally flawed because it treated the terms of subsection (1A) as an enlargement, rather than as a restriction, of the powers under subsection (1)(a). The power under subsection (1)(a) may be exercised by a local authority if it thinks that the acquisition will facilitate, inter alia, the carrying out of redevelopment on the land to be acquired. However, by virtue of subsection (1A), it may only proceed to exercise that power if it thinks that the redevelopment is likely to contribute to one of the specified well-being objects. Subsection (1A) does not, therefore, confer any power on the local authority to acquire a site under subsection (1)(a) *because* such acquisition is likely to contribute to the well-being objects, but it prevents such acquisition if those benefits are not considered likely to arise as a result of the acquisition: see *Belfields Ltd v Secretary of State for Communities and Local Government* [2008] JPL 954. The exercise of the power of acquisition is rooted in subsection (1)(a) and requires the authority to decide that the acquisition will facilitate the redevelopment of the land that it proposes to acquire rather than some other unrelated land in a wholly different location. The Court of Appeal wrongly treated the limitation on the exercise of the power provided by subsection (1A) as providing a new class of material considerations which may be taken into account by a local authority in deciding whether to exercise its power compulsorily to acquire land under section 226. The ministerial advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, gives no support to the Court of Appeal's approach to the construction of subsection (1A). The claimant's approach to section 226 reflects the approach adopted by Parliament in section 3 of the Local Government Act 2000, under which the power to promote well-being in section 2 of that Act is curtailed by any prohibition, restriction or limitation imposed by another statute. In the field of compulsory purchase, subsections (1)(a) and (1A) of section 226 of the 1990 Act set such constraints on a local authority's powers of acquisition.

Irrespective of the provisions of section 226(1A), an acquiring authority, when making a compulsory purchase order of a site under section 226(1)(a), and the Secretary of State when authorising that order, may not have regard to a commitment to secure through cross-subsidy the development of an unrelated site, thereby seeking to achieve well-being benefits from such development. The lawfulness of the exercise of a statutory discretion is to be determined by looking at the relevant legislation and its scope and object in order to assess whether irrelevant considerations have motivated or influenced the decision. It is also fundamental to the exercise of discretionary powers that decision-makers must not pursue collateral purposes or ends which are outside the objects and purposes of the statute. Where compulsory purchase is concerned, the courts have consistently confined the exercise of such powers strictly to the stated statutory purpose:

see *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43. Where a plurality of purposes is pursued, but one purpose is unauthorised by the statute, the power will have been invalidly exercised. Subsection (1)(a) does not authorise the acquisition of land in order to facilitate the development of some other, unrelated land: see *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117, 125. The contentions of the local authority and the interested party are contrary to the intention of Parliament as expressed in the clear language of section 226. Parliament has provided that the power of subsection (1)(a) is not to be exercised unless the authority thinks that well-being will result from the carrying out of development on the site to be acquired. If Parliament had contemplated that the achievement of the wider well-being of the local authority's area was to be a relevant factor in the overall discretion arising under section 226(1)(a), it would have expressed subsection (1A) differently. A local authority cannot use its powers for an ulterior object, however desirable that object may seem to it to be in the public interest: see *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772.

In the context of planning permission, an offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, is not a material consideration and is regarded as an attempt to buy planning permission: see the *Tesco Stores* case, at p 770. Benefits which are embellishments of the development itself or by way of appropriate mitigation to offset the impacts arising from the development can lawfully be taken into account: see *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538. The possibility of one development cross-subsidising another highly desirable development is capable of being a material consideration under section 70(2) of the 1990 Act if the two developments form part of one composite development project: see *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. Whilst there is not an exact parallel between the scope of the material considerations under section 70(2) and those under section 226, there is no proper basis for distinguishing the approach taken in the planning cases from that involving the exercise of compulsory powers of acquisition. The Court of Appeal's suggestion that, unlike section 70(2), section 226(1A) imposes an express obligation to have regard to off-site benefits, is incorrect. The effect of section 226(1A) is to require consideration of the well-being benefits resulting from the physical development of the site to be acquired, which may in some cases also be experienced off-site, but not to have regard to benefits that might flow from the development of another unrelated site, purely because the prospective developer of the acquired site has chosen to create a financial link between the two developments. The Court of Appeal also erred in attaching weight to the fact that the financial viability of an application for planning permission is unlikely to be a material consideration for the purposes of determining an application under section 70(2) but that it was a highly material factor in the consideration by the Secretary of State of the merits of authorising compulsory acquisition. A distinction has to be made between the viability of the development for which the compulsory purchase order is being acquired and the viability of the development of some other unrelated

land. The former is a material consideration but that does not support the proposition that the latter is also material. The Court of Appeal also wrongly attached significance to the distinction between the scrutiny given to a compulsory purchase order compared with that given to a grant of planning permission. The scope of the power under section 226 cannot be affected by the fact that its purported exercise may be subject to subsequent scrutiny. The courts have defined the legitimacy of off-site benefits by reference to their direct relationship to the development in question in order to avoid a regime whereby planning permission can be granted to the highest bidder. There is an equal need to draw the same dividing line in the case of compulsory purchase, if not a greater need in view of its consequences. A comparison of the statutory language supports that position. The courts have carved out of the phrase "material considerations" in section 70(2) the principle of benefits related to the development. The far more specific language of subsections (1)(a) and (1A) of section 226 compels the same conclusion. There is no discernible justification or logic for treating as material in the context of a compulsory acquisition brought under the 1990 Act a consideration to which it would be unlawful for a planning authority to have regard when deciding whether to grant planning permission for the development which the compulsory purchase order is to facilitate. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2005 SLT 144; 2007 SC (HL) 33 concerns a different statutory provision and can be distinguished.

Neil King QC and *Guy Williams* (instructed by *Wragge & Co LLP, Birmingham*) for the local authority.

In order lawfully to exercise its powers of compulsory acquisition under section 226(1)(a) of the 1990 Act a local authority must think that (i) the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land; and (ii) the development is likely to contribute to the achievement of the promotion or improvement of the economic, social and/or environmental well-being of their area. Thus, subsection (1)(a) is concerned with the purpose for which land may be compulsorily acquired and subsection (1A) is concerned with the consequences, in terms of achieving specific objects, which may flow from the acquisition; but the requirements of both provisions must be met before a compulsory purchase order can be made. The purpose of the acquisition of the claimant's land falls squarely within section 226(1)(a). The development which will be facilitated by the acquisition will then, via a cross-subsidy to the related development, also result in well-being benefits within section 226(1A). ODPM Circular 06/2004 correctly advises that the statutory concept of well-being extends to the whole of the relevant local authority area: see Appendix A, para 6.

The words of section 226(1A) should be given their ordinary meaning. If Parliament had wished to confine consideration to the economic, social and environmental well-being of only the land being acquired, it would have done so, although that would have made little sense. Section 226(1A) requires an acquiring authority to satisfy itself that the proposed acquisition will have beneficial consequences in terms of the well-being of its area. The nature of those consequences will vary widely depending on the circumstances; but there is no reason why bringing forward the beneficial

development of other land in its area is incapable, as a matter of law, of constituting such a consequence. The claimant's argument ignores the requirements of subsection (1A), by virtue of which the authority must think that the proposed development "is likely to contribute to the achievement of" the well-being objects of its area, and it is inconsistent with Government policy as set out in ODPM Circular 06/2004 that the benefit to be derived from exercising the power is not restricted to the area subject to the order, as the concept is applied to the well-being of the whole, or any part, of the acquiring authority's area. The words "contribute to" are wide. As a matter of ordinary language the proposed development will contribute to well-being objectives through the economic, social and environmental benefits which will result from the development of both sites. There is no difference in principle, in terms of the requirements of section 226(1A), between the benefits resulting from the proposed development itself and the benefits resulting from the related development. Section 226 is drafted in broad terms to encompass wide ranging well-being benefits. The necessary connection between the well-being benefit in question and the development of the compulsory purchase order land is clearly set out within subsection (1A). There is no reason to restrict the ordinary meaning of those words. Without the cross-subsidy which the related development will provide, the development of the compulsory purchase order site is unlikely to happen. Thus the development of the compulsory purchase order site is likely to contribute to the objects set out in section 226(1A) through both the development of that site and the consequential development of the other site. Accordingly, the benefits of the related development may lawfully be taken into account by the local authority by reference to section 226(1A) in exercising its powers under section 226(1)(a).

It is not appropriate to carry across dicta in cases which are concerned with the lawfulness of planning conditions and section 106 agreements directly and without any modification to the power to make compulsory purchase orders under section 226. The reasoning of the Court of Appeal, in drawing a distinction between the considerations material to the grant of planning permission under section 70(2) and the approach to the compulsory acquisition of land under section 226, is endorsed. The relevance of the well-being benefits which will be secured through the cross-subsidy which one development will provide for the other is not a matter of law but of weight for the decision-maker. The lawfulness of the considerations taken into account by the local authority should be resolved by reference to the plain wording of section 226 without more.

However, if it is appropriate to apply, in some way, the principles established in relation to section 70(2), it must be done in such a way as properly to reflect the different context and statutory purpose of compulsory acquisition, namely to facilitate development and to promote the well-being of the authority's area. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 does not address, nor does it therefore seek to prescribe, what matters may, or may not, be taken into account by a local authority when deciding whether to exercise its powers of compulsory acquisition in order to facilitate the carrying out of one or other of two, or more, rival schemes of development on a site. In deciding whether to make a compulsory purchase order in such circumstances, there can be no reason in principle why the local authority should be precluded as a matter of law

from taking into account all the benefits to its area which will result from the making of the order: see *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, paras 39, 70. The authority is deciding whether to use its powers of compulsory acquisition in order to facilitate development which would not take place without intervention and so bring about well-being benefits to its area as a whole. Regard must be had to the statutory obligation to take wider well-being benefits into account, and the significance of viability and well-being. [Reference was also made to *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538.]

The weight to be attributed to the cross-subsidy is a matter for the authority, subject to a challenge for unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. The potential materiality of cross-subsidy and financial considerations in the planning permission context is established by *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87: see also *Brighton Borough Council v Secretary of State for the Environment* (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 and *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411.

Even if the well-being benefits which would result from the related development could not lawfully be taken into consideration under section 226(1A), in choosing between the two development proposals in the context of deciding which one, if either, to facilitate through the exercise of its powers of compulsory acquisition, the authority was entitled to take account of the overall benefits to its area which each scheme would provide. Such an approach does not enable a developer to buy the exercise of compulsory purchase powers, rather it means that the authority may take all material considerations into account in determining whether, and in whose favour, to exercise powers of compulsory acquisition.

Christopher Katkowski QC and *Scott Lyness* (instructed by *Ashurst LLP*) for the interested party.

The arguments of the local authority are adopted.

Under section 226(1A) the question is not whether the development is *likely to contribute* to the achievement of any one or more of the specified objects but whether the local authority *think that* it is likely to so contribute. The decision-maker is the local authority and it is then for the Secretary of State, if objection is made, to decide whether the development is likely to contribute to the achievement of one or more of the specified objects. A discretion is therefore given to the decision-maker and there are no clear grounds for interfering with it in this case.

In any event, the statutory purpose is not to be determined from subsection (1)(a) exclusively but from subsections (1)(a) and (1A) together. Even if the benefits of the related development do not fall within subsection (1A), where there is a competition between two rival contenders there is no public law reason not to allow additional benefits put forward by one contender to be taken into account.

Lockhart-Mummery QC replied.

The court took time for consideration.

12 May 2010. The following judgments were handed down.

LORD COLLINS OF MAPESBURY JSC

Introduction

1 This appeal is about compulsory acquisition of private property by local authorities under the Town and Country Planning Act 1990 in connection with the development or redevelopment of land. It raises for the first time, in the context of compulsory acquisition, a number of controversial issues which have arisen in the context of planning permission, including these: how far a local authority may go in finding a solution to problems caused by the deterioration of listed buildings; to what extent a local authority may take into account off-site benefits offered by a developer; and what offers (if any) made by a developer infringe the principle or policy that planning permissions may not be bought or sold.

2 The Raglan Street site is a semi-derelict site situated immediately to the west of, and just outside, the Wolverhampton Ring Road, which encircles the Wolverhampton city centre retail, business and leisure core. Sainsbury's Supermarkets Ltd ("Sainsbury's") owns or controls 86% of the site and Tesco Stores Ltd ("Tesco") controls most of the remainder. Sainsbury's and Tesco each wish to develop the Raglan Street site. Outline planning permission has been granted to Tesco, and the local authority has resolved to grant outline planning permission to Sainsbury's.

3 Tesco controls a site in the Wolverhampton city centre known as the Royal Hospital site, which is about 850 metres away from the Raglan Street site on the other side of the city centre. The Royal Hospital site is a large site with a number of listed buildings which are in poor condition. It has been an objective of Wolverhampton City Council ("the council") over several years to secure the regeneration of the Royal Hospital site. Tesco's position has been that it was not financially viable to develop the Royal Hospital site in accordance with the council's planning requirements and its space requirements on the site for the primary care trust. It offered to link its scheme for the Raglan Street site with the redevelopment of the Royal Hospital site and said that this would amount to a subsidy at least equal to the loss it would sustain in carrying out the Royal Hospital site development.

4 The council accepted that the Royal Hospital site would not be attractive to developers if it were restricted to the council's scheme. Even on optimistic assumptions, there did not appear to be a level of profit available which would make the site an attractive proposition when weighed against the risks. Development was unlikely to take place for the foreseeable future unless Tesco's proposals were brought forward through a cross-subsidy from the Raglan Street site.

5 In January 2008 the council approved in principle the making of a compulsory purchase order ("CPO") under section 226(1)(a) of the 1990 Act in respect of the land owned by Sainsbury's at the Raglan Street site to facilitate a development of the site by Tesco. In resolving to make the CPO, the council took into account Tesco's commitment to develop the Royal Hospital site (and indeed passed a resolution which indicated that one of the purposes of the CPO was to facilitate the carrying out of the Royal Hospital site development).

6 Sainsbury's wishes to develop the Raglan Street site and claims that it is illegitimate for the council, in resolving to make a CPO of the Sainsbury's land on the Raglan Street site, to have regard to the regeneration of the Royal Hospital site to which Tesco will be committed if it is able to develop the Raglan Street site. Elias J dismissed the claim by Sainsbury's for judicial review of the council's decision, and the Court of Appeal [2009] 3 EGLR 94 dismissed an appeal in a judgment of Sullivan LJ, with whom Ward and Mummery LJJ agreed.

Compulsory purchase

7 Section 226 of the 1990 Act, as amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, provides:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land, or (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

8 CPOs made by a local authority under section 226 must be confirmed by the Secretary of State. If the owner of the land which is the subject of a CPO objects to the order, the Secretary of State will appoint an independent inspector to conduct a public inquiry. The inspector's report and recommendation will be considered by the Secretary of State when a decision whether or not to confirm the CPO is taken. Where land has been acquired by a local authority for planning purposes, the authority may dispose of the land to secure the best use of that or other land, or to secure the construction of buildings needed for the proper planning of the area: section 233(1).

9 Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, (1998) ed Forsyth & Hare, p 91.

10 In *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 Lord Denning MR said:

> "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is

A expressly authorised by Parliament and the public interest decisively so demands . . ."

and Watkins LJ said, at pp 211–212:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must B be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

C **11** Recently, in the High Court of Australia, French CJ said in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, paras 40, 42, 43:

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."

D "42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights . . .

"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable E of more than one construction, that construction will be chosen which interferes least with private property rights."

The facts

12 It was originally envisaged by Tesco that the Royal Hospital site would be a suitable location for a scheme which made provision for a F superstore whilst retaining and restoring much of the fabric of the former Royal Hospital buildings.

13 In January 2001, Sainsbury's applied for outline planning permission to redevelop the Raglan Street site for a mixed use development comprising retail uses, residential, leisure, parking and associated highway and access works. The application was called in by the Secretary of State and, following a public inquiry, planning permission was granted on G 12 November 2002.

14 In early 2005 Sainsbury's informed the council that it no longer intended to develop the Raglan Street site, because it had agreed to sell its interests in the Raglan Street site to Tesco, which was developing a revised scheme. Sale documentation was agreed and engrossments circulated for execution. In addition, Tesco acquired interests in the Raglan Street site owned by third parties.

H **15** On 28 June 2005 the council's cabinet (resources) panel reported on the proposed Tesco scheme, and said that the grant of permission would be linked to obligations relating to the Royal Hospital site. The panel approved in principle the use of compulsory purchase powers to assemble the Raglan Street site should the need arise. This was on the then understanding that the

interests of Sainsbury's would be transferred to Tesco by agreement and that any CPO would be required only to acquire minor interests within the site.

16 On 3 November 2005 Tesco entered into a conditional sale agreement with the council, which provided for the sale of the council's interest in the Raglan Street site to Tesco and for the council to use its compulsory purchase powers, if necessary, to facilitate the acquisition of outstanding interests in the site. The agreement also imposed an obligation on Tesco to carry out and complete works of demolition and repairs at the Royal Hospital site before the commencement of works at the Raglan Street site. This agreement was replaced in July 2009 by a conditional agreement for lease.

17 Following exchange of the agreement with the council and its acquisition of third party interests in the Raglan Street site, Tesco sought an exchange of its agreement with Sainsbury's. This did not happen because Sainsbury's decided that it did in fact wish to redevelop the Raglan Street site, and to submit a fresh planning application for redevelopment of the site.

18 In accordance with its obligations in the agreement with the council, Tesco submitted planning applications to the council for the development of both the Royal Hospital site (in April 2006) and the Raglan Street site (in July 2006). In October 2006, Sainsbury's submitted a planning application for a new scheme for redevelopment of the Raglan Street site. Both applications for the redevelopment of the Raglan Street site proposed a supermarket with parking and a petrol filling station, private flats, sheltered housing and small commercial units. The main differences between the schemes were that the Tesco supermarket was more than 50% larger than Sainsbury's, and the Sainsbury's scheme proposed retail warehouses and a leisure centre. Outline planning permission was recommended for both schemes.

19 On 6 December 2006 the council's cabinet noted that Tesco and Sainsbury's were unable to agree on how the site should be developed and resolved to approve in principle the use of CPO powers in relation to the Raglan Street site if necessary, subject to a further report to cabinet setting out all relevant factors including the criteria for selecting the preferred redevelopment scheme.

20 Each of the applications by Sainsbury's and Tesco for development of the Raglan Street site came before the council's planning committee on 13 March 2007 when it was resolved to grant both applications subject to various requirements. In the report to committee concerning the application by Tesco, the case officer said:

> "Initially Tesco indicated that they wished the development of the Royal Hospital site to be linked to the grant of permission for the development of Raglan Street. However, when their agents were asked how such a linkage could legitimately be made, they were unable to make a suggestion. There is therefore no such linkage for committee to consider."

21 Tesco's application for planning permission for development of the Raglan Street site was therefore considered without reference to the benefits of redevelopment of the Royal Hospital site. Planning permission for the Tesco proposal at the Raglan Street site was granted on 22 July 2009, which was also the date of a new conditional agreement for lease between the council and Tesco replacing the conditional agreement for sale of

A 3 November 2005. The agreement gives the council an option to purchase Tesco's interest in the Royal Hospital building. One of the terms is that, once certain works have been carried out by Tesco, then Tesco will make a balancing payment to the council which is to be used solely in connection with the completion of the Royal Hospital building works: schedule 1.

22 On 27 June 2007, in order to decide whose land to acquire compulsorily to facilitate the development of the Raglan Street site, the B council's cabinet resolved to invite both Sainsbury's and Tesco to demonstrate the extent to which their respective development proposals met the council's objectives for the Raglan Street area. It also resolved that Sainsbury's and Tesco be advised that the council's preferred outcome remained that the parties would negotiate with each other to resolve the impasse.

C **23** On 30 January 2008 a report was presented to the council's cabinet which, having set out the statutory background and relevant advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, stated:

> "The remaining sections of this report consider the two schemes against the legal and policy tests set out in the Act and the circular and D compare them with each other. There is no doubt that both the Tesco and Sainsbury's schemes would fulfil the statutory purpose of 'facilitating the carrying out of development, redevelopment or improvement on or in relation to the land'."

24 The report noted that both schemes for the Raglan Street site were acceptable in planning terms. The report went on to describe the E circumstances relating to the development of the Royal Hospital site by Tesco. Tesco was no longer seeking planning permission for a retail store on the site. The council had promoted a proposal by Tesco for a mixed use development comprising housing, offices, primary care centre and administrative offices, retail, financial services and professional offices and food and drink uses, together with associated parking. It would provide F accommodation for a primary care centre and offices for the primary care trust.

25 The report said that Tesco's position was that a Royal Hospital site development in accordance with the council's aspirations was not viable and that the return to a developer in a scheme according with the council's aspirations (including 20% affordable housing content) would involve a substantial loss, which would mainly be caused by the refurbishment of the G listed building element for the primary care trust. The scheme would be viable only through a cross-subsidy from the development of the Raglan Street site.

26 The report went on to say that whilst there was disagreement between Tesco and Sainsbury's about the viability of the Royal Hospital site development, it was clear that Tesco was unlikely to carry out its scheme H unless it was selected as the operator of the store at Raglan Street and were thus able to cross-subsidise the Royal Hospital site development.

27 The report concluded:

> "both schemes would bring appreciable planning benefits and would promote and improve the economic, social and environmental well-being

of the city. However, the Tesco scheme enjoys a decisive advantage in that it will enable the development of the RHS to be brought forward in a manner that is consistent with the council's planning objectives for that site. Making a CPO for the Tesco scheme will therefore result in a significantly greater contribution to the economic, social and environmental well-being of the council's area than would making a CPO for the Sainsbury's scheme. On this basis, and subject to the satisfactory resolution of the matters identified in the recommendations set out at the beginning of this report, there is a compelling case in the public interest to make a CPO to enable the Tesco scheme to proceed."

28 In accordance with the recommendation made in the report, the council's cabinet resolved to approve the principle of the making of a CPO of land owned by Sainsbury's to facilitate the carrying out of (i) Tesco's development proposals for the Raglan Street site and (ii) a mixed use retail, office and residential development of the Royal Hospital site, subject to, amongst other matters, Tesco producing satisfactory evidence of a commitment to the carrying out of the development of the Royal Hospital site before consideration be given to a resolution to authorise the making of the CPO. The cabinet decision of 30 January 2008 was referred to the council's scrutiny board and on 19 February 2008 the board resolved that the report be received and noted.

The issues

29 In the absence of agreement between Sainsbury's and Tesco, the only way in which the Raglan Street site can come forward for redevelopment is through the exercise of compulsory purchase powers. Section 226(1)(a) provides that the local authority has power to acquire compulsorily any land in its area if it thinks "that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". A local authority may use its powers of compulsory purchase to assemble a site for development by a preferred developer: *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, para 6. It is common ground that the compulsory acquisition of the outstanding interests in the Raglan Street site would facilitate the carrying out of development, redevelopment or improvement on the land under either the Tesco scheme or the Sainsbury's scheme such that the test in section 226(1)(a) is met.

30 So also it is common ground that both schemes of redevelopment on the Raglan Street site would promote and improve the economic, social and environmental well-being of the city and therefore satisfy the requirement in section 226(1A) that a local authority must not exercise the power unless it thinks that "the development, redevelopment or improvement is likely to contribute to the achievement" of the well-being objects set out in the subsection. It is also agreed that the redevelopment of the Royal Hospital site as proposed would bring well-being benefits to the council's area, but Sainsbury's says that, contrary to the approach of the Court of Appeal, those well-being objects are not within section 226(1A), because they do not flow from the proposed redevelopment of the Raglan Street site.

31 The issues on this appeal are these. (1) Whether, on a proper construction of section 226(1A), the council was entitled to take into

account, in discharging its duty under that subsection, a commitment by the developer of a site part of which was to be the subject of a CPO to secure (by way of cross-subsidy) the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. (2) Whether the council was entitled, in deciding whether and how to exercise its powers under section 226(1)(a), to take into account such a commitment by a developer.

32 On the first issue, relating to the interpretation and application of section 226(1A), the Court of Appeal, differing from Elias J, found in favour of the council and Tesco. On the second issue, relating to section 226(1)(a), Elias J found in favour of the council and Tesco, but the Court of Appeal did not find it necessary to decide the point because of its conclusion on section 226(1A).

The judgments of Elias J and the Court of Appeal

Section 226(1A)

33 Elias J decided that, contrary to the argument of the council and Tesco, on a proper construction of section 226(1A), the Royal Hospital site benefits did not fall within its ambit. They would have been well-being benefits in relation to a CPO of that site, but in order to fall within section 226(1A) in relation to the development of the Raglan Street site, the benefits must flow from the development of the Raglan Street site alone, since that was the site covered by the CPO. The fact that a link between the two developments could be achieved by an agreement under section 106 of the 1990 Act did not entitle the council to treat what were in reality well-being benefits resulting from development of the Royal Hospital site as if they were generated by development of the Raglan Street site.

34 The Court of Appeal held that the council was entitled to take the Royal Hospital site benefits into account because they fell within section 226(1A). Whilst section 226(1)(a) focused the local authority's attention on what was proposed to take place on the CPO site itself and required the authority to be satisfied that the CPO would facilitate the redevelopment of the CPO site, section 226(1A) required it to look beyond the benefits that would accrue on the CPO site and to consider whether and to what extent the redevelopment of the CPO site would bring well-being benefits to a wider area. If the carrying out of the redevelopment of a CPO site was likely to act as a catalyst for the development or redevelopment of some other site or sites, then such catalytic effects were capable of falling within the scope of section 226(1A).

35 The financial viability of a proposed redevelopment scheme would be a highly material factor, and the proposed redevelopment of a CPO site might have to be cross-subsidised. It would be surprising if the potential financial implications of redeveloping the CPO site, including the possibility of cross-subsidy as a result of facilitating its redevelopment, were immaterial for the purposes of any consideration of the extent to which the carrying out of the redevelopment would be likely to contribute to wider "well-being" benefits.

36 The possibility of one development cross-subsidising another highly desirable development was capable of being a material consideration in the determination of a planning application under section 70(2) of the 1990 Act:

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87. The proposed cross-subsidy was a material consideration in the light of the council's obligation under section 226(1A) to take wider, off-site "well-being" benefits into account and in the light of the significance of financial viability and economic well-being in the CPO context.

Section 226(1)(a)

37 Elias J held that for the purposes of section 226(1)(a), when choosing between two developments either of which would in principle be facilitated by a CPO, the council was entitled to have regard to all the benefits which would flow from the development when determining in whose favour the CPO should be exercised, including any off-site benefits achieved by means of an agreement linking the development of the Raglan Street site to development of the Royal Hospital site. The Court of Appeal decided that it was not necessary to rule on the alternative submission by the council and Tesco that the Royal Hospital site benefits were material considerations under section 226(1)(a) in any event.

The CPO context

38 There is no doubt that where a body has a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose: *Simpsons Motor Sales (London) Ltd v Hendon Corpn* [1964] AC 1088, 1118, per Lord Evershed. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43, Lord Cranworth LC said that persons authorised to take the land of others "cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers". In *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193, 199 the High Court of Australia said that the statutory power to acquire land for a public purpose could not be used to "advance or achieve some more remote public purpose, however laudable". See also *Municipal Council of Sydney v Campbell* [1925] AC 338, 343.

39 So also the familiar rules on the judicial control of the exercise of legislative powers apply in the CPO context as elsewhere: see e g, among many others, *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (Megaw J); *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (as explained in *de Rothschild v Secretary of State for Transport* (1988) 57 P & CR 330; *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117 (Laws J)).

40 Nor can it be doubted that off-site benefits may be taken into account in making a CPO. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33 was a decision on the Scottish compulsory purchase provisions in the Town and Country Planning (Scotland) Act 1997, which are similar to, but not identical with, the equivalent provisions in the 1990 Act. Section 191 provided in substance that where land is acquired or appropriated by a planning authority for planning purposes, the authority might dispose of such land to any person to secure the best use of the land, and that the land could not be disposed of

A otherwise than at the best price or on the best terms that could reasonably be obtained. The property in question was in a run down part of Bath Street and Buchanan Street, Glasgow. Proposals for redevelopment of the site by the developer contained a strong element of planning gain. The issue was whether the planning authority, exercising its compulsory purchase powers to redevelop a site, had acted ultra vires by entering into a back-to-back agreement with the developer in which the council had agreed to transfer the B land to the developer in return for the developer indemnifying the council for the money expended in assembling the site and making it available. In effect the developer was to be put in the same position as if it had itself exercised the power of compulsory acquisition: para 14. It was held that the words "best terms" permitted disposal for a consideration which was not the "best price", and so terms that would produce planning benefits and gains of C value to the authority could be taken into account as well as terms resulting in cash benefits. It was accepted that the local authority could use its powers to assemble the site for development by a preferred developer: para 6. Lord Hope of Craighead (at para 39) and Lord Brown of Eaton-under-Heywood (at para 70) also accepted that account could be taken by a planning authority of the wider, off-site planning gains which would result from the exercise of its compulsory purchase powers. But these were benefits directly D related to the site, and directly flowing from the development, and the decision does not help in the solution of the present appeal.

Other contexts

41 All parties, especially Sainsbury's, relied on authorities relating to planning applications, and in particular on those relating to the extent to E which conditions attached to a planning permission must relate to the development; and the extent to which off-site benefits (whether under a section 106 agreement or not) are "other material considerations" to which the authority must have regard under section 70(2) of the 1990 Act in deciding whether to grant or refuse planning permission (or to impose conditions). In the Court of Appeal Sullivan LJ did not think that a "read-F across" from the limitations on the exercise of the section 70(2) power was appropriate in the context of section 226.

42 In summary, Sainsbury's position was (a) the cases on the legitimate scope of planning conditions were relevant, from which it followed that the only off-site benefits which could be taken into account were those which fairly and reasonably related to the development in relation to which the CPO power was being exercised, that is the Raglan Street development; G (b) the cases on section 70(2) also proceeded on the basis that there had to be a connection between the benefits and the permitted development; (c) a potential cross-subsidy was relevant only where there was a composite development. The position of the council and Tesco was that the Court of Appeal was right to say that there should not be a read-across from the planning permission cases to CPO cases, but in any event the authorities showed that financial considerations, including off-site benefits through H cross-subsidies, were relevant, and were essentially a matter for evaluation by the planning authority.

43 It is necessary to note, at the outset, the relevant legal differences between this case and the cases in which similar questions have previously arisen. The first is that there is a difference between the exercise of powers of

compulsory acquisition and the exercise of powers to control development and grant planning permission, which is rooted in the deep-seated respect for private property reflected in the decisions cited above. The second is that both compulsory acquisition and planning control are solely creatures of statute, and that while the provisions which are relevant on this appeal are contained in one statute, the 1990 Act, the statutory provisions are different. The relevant provisions of section 226 have been set out above, and it is only necessary to repeat that section 226(1)(a) gives the local authority power to acquire compulsorily if "the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land" and does not contain, by contrast with section 70(2) on planning applications, any express reference to the authority having regard to "any other material considerations". Nevertheless the policies underlying planning permission and acquisition for development purposes are similar, and considerable assistance can be obtained from the learning in the case law on planning permissions.

"Fairly and reasonably relate" and "material considerations"

44 In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (reversed on other grounds [1960] AC 260) Lord Denning said (at p 572) in relation to what is now section 70(1)(a) of the 1990 Act:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

Pyx Granite had the right to quarry in two areas of the Malvern Hills. The company required permission to break fresh surface on one of the sites. Conditions attached to the planning permission relating to such matters as the times when machinery for crushing the stone could be used and the control of dust emissions were held valid. The facts do not appear fully in the judgments, but it seems that the equipment was on the part of the land under the control of the company which was not the land in respect of which the application for permission related, but they could properly be regarded (for the purposes of the Town and Country Planning Act 1947, section 14) as "expedient . . . in connection with" the permitted development. Lord Denning said, at p 574: "It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away."

45 Lord Denning's formula that "the conditions must [be] fairly and reasonably [related] to the development" was approved in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599 (Viscount Dilhorne), 607 (Lord Fraser of Tullybelton), 618 (Lord Scarman), 627 (Lord Lane). Viscount Dilhorne said, at p 599:

> "It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them . . ."

A As Lord Hoffmann said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772, as a general statement this formulation has never been challenged. See eg *Grampian Regional Council v Secretary of State for Scotland* 1984 SC (HL) 58, 66. In the *Newbury* case itself it was held that the Secretary of State was entitled to come to the conclusion that a condition imposed by a local authority requiring the removal of existing substantial buildings was not sufficiently related to a B temporary change of use for which permission was granted.

46 The effect of the adoption of the *Pyx Granite/Newbury* formula was to put severe limits on the powers of planning authorities: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772–723. Conditions requiring off-site roadway benefits were held to be unreasonable in, for example, *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* C [1964] 1 WLR 240 (ancillary road condition held to be *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223)); *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55 (where it was suggested that it would make no difference if they were included in a section 106 agreement); cf *Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255 (not legitimate to refuse a planning D application because it did not contain provisions for the increase of the proportion of car parking space subject to public control: the absence of a benefit not a reason for refusing planning permission where the benefit could not have been lawfully secured by means of a condition).

47 Section 70(2) of the 1990 Act provides that in dealing with an application for planning permission, the local planning authority "shall have E regard to the provisions of the development plan, so far as material to the application, and to any other material considerations".

48 There are two decisions of the Court of Appeal, and a decision of the House of Lords, which have a bearing on the questions on this appeal: *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87; *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78; *Tesco Stores Ltd v Secretary of State for the* F *Environment* [1995] 1 WLR 759. They deal with one or more of the following questions: the extent to which financial considerations are "material considerations" in planning decisions; what connection (if any) is required between the development site and off-site benefits for the purpose of material considerations; and the respective roles of the planning authorities and the courts in determining what considerations are relevant and what G connection with off-site benefits is necessary.

49 *R v Westminster City Council, Ex p Monahan* and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* are both cases in which Lord Denning's "fairly and reasonably relate" formula in relation to conditions was extended to, or discussed in connection with, the issue of material considerations under section 70(2). In that context the decisions have been superseded by the decision in the *Tesco* case, but they H contain valuable discussion by some distinguished members of the Court of Appeal on questions of some relevance to the determination of this appeal.

50 In *Ex p Monahan* Lord Denning's formula was discussed in a case involving enabling development, i e development which is contrary to established planning policy, but which is occasionally permitted because it

brings public benefits which have been demonstrated clearly to outweigh the harm that would be caused. The decision also discusses the question of the extent to which the provision of off-site benefits by the developer may be material. In the *Plymouth* case one of the issues was the extent to which off-site planning benefits promised by a section 106 agreement were material considerations.

R v Westminster City Council, Ex p Monahan

51 In *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 the Royal Opera House, Covent Garden Ltd, applied for planning permission and listed building consents to carry out a redevelopment, the central objective of which was to extend and improve the opera house by reconstruction and modernisation to bring it up to international standards, and to develop the surrounding area consistently with that project. Parts of the site were proposed to be used for the erection of office accommodation, which would be a departure from the development plan. The planning authority granted permission for the whole proposed development on the basis that the desirable improvements to the opera house could not be financed unless the offices were permitted. The applicants sought judicial review of that decision on the ground, inter alia, that the fact that a desirable part of a proposed development would not be financially viable unless permission were given for the other part was not capable of being a "material consideration" for the purposes of what is now section 70(2) of the 1990 Act in granting planning permission for the development as a whole.

52 It was held that financial considerations which fairly and reasonably related to the development were capable of being material considerations which could be taken into account in reaching that determination; and that the local planning authority had been entitled, in deciding to grant planning permission for the erection of the offices, to balance the fact that the improvements to the opera house would not be financially viable if the permission for the offices were not granted against the fact that the office development was contrary to the development plan.

53 On this appeal Sainsbury's accepts that in the context of section 70(2) the possibility of one development cross-subsidising another desirable development is capable, in limited circumstances, of being a material consideration, and that *Ex p Monahan* is such a case, where both developments formed part of one composite development. The council and Tesco say that *Ex p Monahan* supports their position because the Court of Appeal held the consequence of the financial viability of the proposed opera house development to be a relevant factor in the planning authority's determination.

54 Kerr LJ's reasoning was essentially this: (1) in composite or related developments (related in the sense that they can and should properly be considered in combination) the realisation of the main objective may depend on the financial implications or consequences of others; (2) provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation; (3) financial considerations may be treated as material in appropriate cases: *Brighton Borough Council v Secretary of State for Environment*

(1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806. He concluded, at p 117, by agreeing with Webster J's conclusion at first instance. Webster J had said:

> "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and to the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal."

55 The "fairly and reasonably related to the development" formula was applied by Kerr LJ (at pp 111–112), and Staughton LJ (at p 122) (who also agreed that there was a composite or related development).

56 There was some discussion in the *Ex p Monahan* decision of the limits of what could be taken into consideration, by reference to two hypothetical examples. The first example (which Kerr LJ said was an extreme example) was the case of the development of an undesirable office block in Victoria which was said to be necessary to generate the finance for a desirable development in Covent Garden. Kerr LJ said that a combination of this nature would be unlikely to be properly entertained as a single planning application or as an application for one composite development, and that such a case would involve considerations of fact and degree rather than of principle: at p 117. Nicholls LJ dealt with this point by saying, at p 121:

> "I am not persuaded by this reductio ad absurdum argument. Circumstances vary so widely that it may be unsatisfactory and unwise to attempt to state a formula which is intended to provide a definitive answer in all types of case. All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites, in Russell Street and elsewhere, and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme. It was open to the authority to treat the consequence, for the opera house works, of granting or withholding permission for offices as a material consideration in considering the part of the application which related to offices."

57 The second hypothetical example, the swimming pool at the other end of the city, was dealt with by Staughton LJ, at p 122:

> "The other extreme arises from the axiom of Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* [1986] 1 EGLR 199, 202G that planning permission cannot be bought and sold. Suppose that a developer wished to erect an office building at one end of the town A, and offered to build a swimming-pool at the other

end B. It would in my view be wrong for the planning authority to regard the swimming-pool as a material consideration, or to impose a condition that it should be built. That case seems to me little different from the developer who offers the planning authority a cheque so that it can build the swimming-pool for itself—provided he has permission for his office development . . . Where then is the line to be drawn between those extremes? In my judgment the answer lies in the speech of Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599, which Kerr LJ has quoted. Conditions imposed must 'fairly and reasonably relate to the development permitted', if they are to be valid. So must considerations, if they are to be material."

58 The ratio of the decision in *Ex p Monahan* is that where there are composite or related developments (related in the sense that they can and should properly be considered in combination), the local authority may balance the desirable financial consequences for one part of the scheme against the undesirable aspects of another part. In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78, 88, Hoffmann LJ observed that the *Ex p Monahan* decision concerned what was treated as a single composite development, and held that there was a sufficient nexus between the office development and the opera house improvements to entitle the planning authority to say that the desirability of the latter fairly and reasonably related to the former, because of (1) the financial dependency of the one part of the development on the other and (2) their physical proximity.

59 The *Ex p Monahan* decision demonstrates, if demonstration were necessary, that financial considerations may be relevant in planning decisions. In *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 (cited on this point with approval by Kerr LJ in *Ex p Monahan*, at p 116) Woolf J accepted that the consequences of the financial viability or lack of financial viability of a development were a potentially relevant factor: the true question was not whether a development would be viable but what the planning consequences would be if it were not viable: see at p 807. See also *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411, 425, per Forbes J (for further proceedings see [1977] QB 411; [1979] AC 144).

R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd

60 The restrictive approach of the courts to conditions was one of the factors which led planning authorities to rely on planning obligations in attempting to secure planning gain. This led directly to the question whether planning authorities were entitled to treat benefits secured by way of a planning obligation as a material consideration in deciding whether to grant planning permission.

61 In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78 it was held that the planning authority could (against the opposition of the Co-op) take into account offers by Tesco and Sainsbury's to enter into section 106 agreements providing for substantial off-site benefits. The off-site benefits included an offer by

A Sainsbury's of a payment of £1m for infrastructure which would enable a separate site to be made available for industrial use, and an offer by Tesco of a park and ride facility on another site. The Co-op's position was that a consideration was only material to the question of whether to grant planning permission, if it was necessary to the grant of permission, i e, overcame some to the proposed development which would otherwise mean that permission could not be granted. It was held that although the benefits had to be B planning benefits and fairly and reasonably relate to the development, they did not have to be necessary.

62 This is a decision in which there was a connection between the development and the off-site benefits. All members of the court (Russell, Evans and Hoffmann LJJ) accepted (at pp 82, 84, 87–88) that the off-site benefits related to the superstore development applications. The offer of C £1m by Sainsbury's for infrastructure would help to compensate for the reduction in the pool of resources for employment land. The park and ride facility offered by Tesco would counteract the increase in traffic caused by the superstore development: at pp 82–83; 90–91.

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D **63** But, although it has not been expressly overruled and the result would be the same today, the reasoning of the *Plymouth* decision can no longer stand, based as it was on the "fairly and reasonably related to the development" test: see at pp 81–82, 87, 89–90. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 there were rival plans for the development of superstores on different sites in Witney, Oxfordshire, by Tesco and Sainsbury's (in conjunction with Tarmac). At an E inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, the inspector approved the proposal for a link road and rejected that for a town centre superstore. Tesco offered to provide full funding for the link road. The Secretary of State allowed the Sainsbury's/Tarmac appeal, and dismissed Tesco's application: the funding offer was not fairly and F reasonably related in scale to the development; although there was a tenuous relationship between the funding of the link road and the proposed foodstore because of a slight worsening of traffic conditions (a 10% increase) the link was not needed. But if it were to be taken into account, then because of the tenuous nature of the connection, the partial contribution was too limited to affect the ultimate decision.

64 The House of Lords confirmed that the Secretary of State had G fulfilled his duty by taking the offer into account but according it very little weight. It was held that a planning obligation offered under section 106 of the 1990 Act by a developer was a material consideration for the purposes of section 70(2) of the Act if it was relevant to the development; and that the weight to be given to such an obligation was a matter entirely within the discretion of the decision-maker. Tesco's offer to fund the link road was sufficiently related to the proposed development to constitute a material H consideration under section 70(2). For the purposes of this appeal, the importance of this decision is the light it throws on the nature of the necessary link between the development and the off-site benefit.

65 The House of Lords held that the *Pyx Granite/Newbury* test for planning conditions was not applicable in the context of the question

whether section 106 obligations were material considerations under section 70(2). Lord Keith of Kinkel said, at pp 764, 770:

> "Sir Thomas Bingham MR in the course of his judgment in this case said that 'material' in [section 70(2)] meant 'relevant,' and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision-maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense . . . An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker and in exercising that discretion he is entitled to have regard to his established policy."

66 All members of the appellate committee agreed with Lord Keith's opinion, and the ratio of the decision is that for the purposes of section 70(2) any benefit whose connection with the development is more than de minimis will be a material consideration, but that the weight to be given to any particular material consideration is entirely a matter for the decision-maker.

67 It has often been said that planning permissions should not be bought or sold: see *City of Bradford Metropolitan Council v Secretary of State for the Environment* 53 P & CR 55, 64, per Lloyd LJ (on which see the *Plymouth* case, at p 84, per Evans LJ; *Ex p Monahan*, at p 122, per Staughton LJ; the *Tesco* case, at p 765, per Lord Keith, and p 782, per Lord Hoffmann); and accepted as a matter of policy in ODPM Circular 05/2005, *Planning Obligations*, para B6 (reflecting its predecessors):

> "The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms . . ."

68 Responding to the point that the approach in the *Plymouth* decision leads to the prospect of the sale and purchase of planning permissions, Lord Hoffmann contrasted cases in which there was a "sufficient connection" between the development and a planning obligations and those in which they were "quite unconnected". He said [1995] 1 WLR 759, 782:

> "This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd*

A 67 P & CR 78, was such a case, leading to concern among academic writers and Steyn LJ in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term 'auction' rather than 'competition' to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits . . ."

Conclusions

69 There is no doubt that in the light of the report of 30 January 2008, the council had purportedly resolved in principle to make the CPO for the purpose of facilitating both the development of the Raglan Street site and that of the Royal Hospital site. That would be sufficient to vitiate the resolution. But Elias J and the Court Appeal accepted that there would be no point in quashing the resolution on that ground alone, since a more felicitously worded resolution could be passed if the benefits to be derived from the development of the Royal Hospital site were relevant under section 226(1)(a) or section 226(1A).

70 What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Ex p Monahan* [1990] 1 QB 87 about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.

71 Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather

than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made.

72 What is the connection in the present case? The expression "cross-subsidy" has been much used by Tesco and the council. The expression bears a special meaning in this case. Its most common use is in the competition field, where it usually connotes improper allocation of costs in different product or geographic markets, which may result in predatory pricing or other anti-competitive activity. Here all it means is that Tesco says that (a) the council's requirements for the Royal Hospital site have the result that Tesco cannot develop it profitably; and (b) Tesco will undertake its development if it can develop the Raglan Street site. Tesco says that the consequence of (a) and (b) is that the Raglan Street site development will "cross-subsidise" the Royal Hospital site development. But the only connections between the proposed Raglan Street site and Royal Hospital site developments are that (a) Tesco says that it will develop the latter if it can develop the former; (b) it has contractually agreed to perform building works on the Royal Hospital site if it acquires the Raglan Street site. The commercial effect will be that the deficiency on the Royal Hospital site will be made up, or "cross-subsidised", by the Raglan Street site development. Nothing in the papers before the court suggests that this will be done by any direct subvention from the income or capital proceeds of the Raglan Street site, but this would not in any event make a difference. It is entirely a matter for Tesco how it funds any loss from, or presents any lower return from, the Royal Hospital site. This is only a connection in the sense that either (a) the council is being tempted to facilitate one development because it wants another development; or (b) Tesco is being tempted to undertake one uncommercial development in order to obtain the development it wants.

73 The crucial question is whether that is a connection which the council is entitled to take into consideration under section 226(1)(a) or section 226(1A). To take the latter first, Elias J was right to hold that section 226(1A) was not the crucial provision for the purposes of this case. It does not answer the prior question of what matters can be taken into consideration.

74 The power of compulsory acquisition must be capable of being exercised under section 226(1)(a) before the limitation in section 226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. The council was entitled to come to the view for the purposes of section 226(1A) that the Raglan Street site development would contribute to well-being in its area, but not on the basis of the benefits which would derive from the Royal Hospital site development. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.

75 But that matters little since the crucial question is whether the council was entitled to take it into account under section 226(1)(a). There can be no doubt that, even if there is no express reference in section 226(1)(a)

A to the local authority taking into account material considerations (by contrast with section 70(2)), only relevant matters may be taken into account. For the reasons given above, the claimed financial connection between the two sites was not such as to amount to a relevant matter. It is true, as Sullivan LJ said (at para 34), that the financial viability of a proposed redevelopment scheme would be a highly material factor, and that a proposed redevelopment of a CPO site might have to be cross-subsidised. B But Sullivan LJ was wrong to conclude that it followed that a cross-subsidy *from* a CPO site to another site was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant connection.

76 Nor do I consider, despite the views of Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC to the contrary, that a C different result on this appeal is required by the fact that Sainsbury's and Tesco were in competition for the site, and that the council is proposing to dispose of the land to Tesco under section 233. They accept that the council was not entitled to take the benefits from the Royal Hospital site development into account in making the CPO, but consider that the opportunity for redevelopment of the Royal Hospital site would be a relevant matter to be taken into account by the council in exercising the D power of disposal to Tesco under section 233.

77 First, as a matter of principle it is impossible to put into separate compartments the exercise by the council of its power of compulsory purchase of Sainsbury's property, and the exercise of the council's power to dispose of Sainsbury's property to Tesco, and then to conclude that the Royal Hospital site development may not be taken into account for the E former, but can be taken into account for the latter. It is wrong for the council to deprive Sainsbury's of its property because the council will derive from disposal of that property benefits wholly unconnected with the acquisition of the property.

78 Second, although it is plain that the power of compulsory purchase may be used to assemble a site for a preferred developer, there is nothing in *Standard Commercial Property Securities Ltd v Glasgow City Council* F *(No 2)* 2007 SC (HL) 33 which supports the proposition that unconnected benefits may be taken into account by a local authority in deciding whether property should be compulsorily acquired for the purpose of disposing of it to a preferred developer. The background to the appeal was a competition between developers for the right to develop a run down part of Buchanan Street, Glasgow. Two developers in particular were keen to develop the G site, Atlas Investments and Standard Commercial, each of which owned part of the site. The council, when inviting all the owners and occupiers of the land on the site to submit proposals for redevelopment, said that successful submissions should seek a mix of activities and functions which would bring added activity to the area outside normal retailing hours, and encouraged applicants to allocate a budget to the cost of integrating public art into the development and include improvements to the relevant areas of H adjoining streets, and so contribute to the transformation of Glasgow city centre. Those were the wider planning gain benefits to which Lord Hope referred in his opinion: para 39. Similarly Lord Brown of Eaton-under-Heywood (at para 70) referred to the council's desire to obtain economic and social benefits for Glasgow. But it is clear from Lord Hope's opinion

in that decision, as he accepts in his judgment on this appeal, that the benefits which the developers were invited to confer were related to the site, and the immediately adjoining area. There is nothing in the decision to support the conclusion that in this case the promise to develop the Royal Hospital site would have been a material consideration in a disposal under section 233.

79 I would therefore allow the appeal, and make an order declaring that the opportunity for redevelopment of the Royal Hospital site is not a lawful consideration in deciding whether to make a CPO in relation to the Raglan Street site.

LORD WALKER OF GESTINGTHORPE JSC

80 In agreement with Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC, I would allow this appeal. I agree with the reasons set out in the full judgment of Lord Collins JSC, supported by the shorter judgments of Baroness Hale and Lord Mance JJSC. But in view of the difference of opinion within the court I will try to summarise my reasons in my own words.

81 This appeal is concerned with compulsory acquisition of land *for planning purposes* (that being the general ambit of both paragraphs (a) and (b) in section 226(1) of the Town and Country Planning Act 1990). The land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential. Economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive. To the authorities mentioned by Lord Collins JSC in paras 9–11 of his judgment might be added the famous split of the United States Supreme Court in *Kelo v City of New London, Connecticut* (2005) 545 US 469, discussed in *Gray & Gray, Elements of Land Law*, 5th ed (2009), paras 11.2.6 and 11.2.7. *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12 mentioned by Lord Collins JSC was also in substance largely a "private to private" acquisition, although the local authority used a declaration of trust to give the acquisition a better appearance.

82 Where a local authority is considering exercising powers of compulsory purchase for planning purposes, planning considerations must be central to the decision-making process. The public purse is to be protected against improvidence, but the local authority should not be exercising its powers in order to make a commercial profit. In *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, Lord Brown of Eaton-under-Heywood, at para 75, described that proposition as "deeply unattractive". Section 233 of the 1990 Act differs from its Scottish counterpart in that subsection (3) expressly contemplates a disposal "for a consideration less than the best that can reasonably be obtained", though only with the consent of the Secretary of State. But both in Scotland and in England a "back-to-back" arrangement (under which the local authority makes neither a commercial loss nor a commercial gain from its participation, using section 226 powers, in a scheme of comprehensive urban redevelopment) is standard practice. The dominant aim is betterment in planning terms.

A **83** That to my mind is why the issue of what would be material considerations for the purposes of deciding an application for planning permission is also relevant to a decision to exercise powers of compulsory acquisition under section 226. The quality of the proposed redevelopment of the site is of crucial importance. Its larger impact on the authority's area is also an essential element in the decision-making process, because of section 226(1A). In common with all the members of the court I consider B that section 226(1A) has the effect of imposing an extra requirement which is a necessary but not a sufficient condition for the exercise of powers under 226(1). Section 226(1A) does not qualify, still less act as a substitute for, the requirements of the preceding subsection.

84 But the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current C owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for. As Lord Collins JSC says in his conclusions at para 71 of his judgment, a real (rather than a fanciful or remote) connection must be shown between any off-site benefits and the proposed redevelopment for D which a compulsory purchase order is proposed.

85 Lord Brown JSC has posed a rhetorical question in para 182 of his judgment. After referring to the *Standard Commercial* case he has commented:

> "it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get E what I called there (para 68) 'the best overall deal available'—that, by the same token as a cash bidding match would have been possible, so too would have been an offer of other benefits, however extraneous. Why ever not?"

With great respect to Lord Brown JSC I think that he has answered his own question in the passage of his speech in the *Standard Commercial* case, at F para 75:

> "I find deeply unattractive the proposition that, almost inevitably at the expense of some beneficial aspect of the development scheme, the authority should be seeking to make a profit out of the exercise of its statutory powers of acquisition."

G **86** A cash bidding match, or the exaction of extraneous benefits, has superficial attractions as a tie-breaker, especially if there are two contenders, both with very deep pockets, like Tesco and Sainsbury. The merits of their respective schemes are closely matched, as appears from the summary in para 11 of the officers' recommendation document dated 30 January 2008. It is true that the Tesco scheme is said in the summary to offer more jobs, but the Sainsbury scheme might create an unspecified number of extra jobs H through re-use or development of its St George's Parade site: para 6.6. The Tesco scheme would be delivered "by a well resourced operator" but the detailed consideration of delivery (para 7) ranked the two contenders as equally capable. Tesco's only apparently decisive advantage was (para 11.3) the offer of cross-funding for the RHS development.

87 Since their proposals are such that there is little, if anything, to choose between them in planning terms, why should not the local authority look to some substantial extraneous benefit which one contender offers, rather than having to make the difficult choice of a winner between contenders whose proposals are equally satisfactory on planning grounds? The answer is simply that it is not the right way for a local authority to make a decision as to the exercise of its powers of compulsory purchase, any more than it could choose a new chief executive, from a short list of apparently equally well qualified candidates, by holding a closed auction for the office. As Lord Keith of Kinkel said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770:

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission."

88 The fact that an exercise of powers of compulsory acquisition and a "back to back" disposal to a developer are prearranged is unable: see Lord Rodger of Earlsferry in the *Standard Commercial* case, at para 53. But that does not mean that the proper consideration of the exercise of powers of compulsory acquisition under section 226 of the 1990 Act can be telescoped into the exercise of powers of disposal under section 233. On this point I am in full agreement with the judgment of Baroness Hale JSC.

89 For these reasons I would allow this appeal and make the declaration proposed by Lord Collins JSC.

BARONESS HALE OF RICHMOND JSC

90 I agree that this appeal should be allowed, for the reasons given by Lord Collins of Mapesbury JSC, together with the further reasons given by Lord Walker of Gestingthorpe and Lord Mance JJSC. Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC also agree with the reasoning of Lord Collins JSC, on the points upon which he differs from Lord Brown of Eaton-under-Heywood JSC, but they disagree in the result. As I understand it, they consider that the extraneous benefit offered by Tesco, although it would not normally be a relevant consideration in the compulsory purchase decision, would be a relevant consideration when the council came to dispose of the land under section 233(1) of the Town and Country Planning Act 1990. Accordingly, as in practice the decisions may be taken simultaneously, that consideration can be read back into the decision compulsorily to purchase the Sainsbury land under section 226(1).

91 For the reasons given by Lord Mance JSC, I find it difficult to accept that proposition. It puts the cart before the horse. The council have nothing to dispose of unless they have acquired the land, whether voluntarily or compulsorily. They can only acquire the land compulsorily under section 226(1)(a) "if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". The matters to be taken into account in making that decision have to be relevant to that purpose.

92 I agree, as Lord Mance JSC puts it at para 98 of his judgment, that the considerations admissible in relation to compulsory purchase are "no wider" than those admissible in relation to the grant of planning permission.

Although the grant of planning permission is a "useful analogy", it is a different exercise. The considerations material to that exercise are also material, but in a rather different way, to the compulsory purchase decision. Thus, under the former version of section 226(1) (quoted by Lord Phillips PSC at para 121 of his judgment), the considerations which would be material to the grant of planning permission for development on the land were also material to whether the land was "suitable for development". That was a sine qua non for compulsory purchase to "secure" development. This seems obvious. It cannot be proper to deprive a person compulsorily of his land in order to secure something which will not be allowed to take place. Under the new version of section 226(1), the permissibility of *some* development (together with a reasonable prospect of its actually taking place) should be a sine qua non for compulsory acquisition in order to "facilitate" it. The question does not arise in this case, because we are agreed that the extraneous benefit to the Royal Hospital site would not be relevant to the grant of planning permission for this site, any more than it is relevant to the compulsory purchase decision.

93 Acquiring the whole of the Raglan Street site *would* facilitate the development of *that* site (although it is worth noting that Sainsbury have so much of the site that they could carry out a development, albeit a less satisfactory one, without further compulsory acquisition). Persuading Tesco to carry out a wholly unrelated development upon another site elsewhere in the city, desirable though that may be for the city and people of Wolverhampton, does nothing to facilitate the development of the Raglan Street site. Rather, it is the other way round.

94 It is difficult to understand why the fact that Sainsbury also wish to develop the Raglan Street site should make any difference. If it would not be permissible to take into account the extraneous benefit when deciding compulsorily to purchase land from an unwilling owner who did *not* himself wish to develop it, it seems even less permissible to take it into account as against an unwilling owner who *does*. In the former situation, a development which would not otherwise take place would be facilitated; in the latter, it would not be facilitated because the development would take place in any event. (I might comment that Sainsbury would probably never have found themselves in this mess if they had not twice changed their mind about whether to develop this site.)

95 The case of *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33 is entirely consistent with this view. A council can agree to assemble a site for development, using their compulsory purchase powers if necessary, and to sell it to their chosen developer. It makes sense, but it is not essential, to conduct the two exercises in tandem. But the considerations relevant to the selection of the developer in that case were all relevant to the development of that site. The selection criteria adopted (and carefully graded) by the council were all directly related to the quality of the development of the site and the feasibility of the would-be developers' carrying it out: see Lord Hope of Craighead, at para 22. There were no subsidiary planning obligations involved, still less any wholly extraneous benefits offered. In any event, the battle was not about the selection criteria, but about whether the proposed terms of disposal were the best obtainable and there was no evidence that they were not. Even if it were permissible to take a wholly extraneous benefit into

account when deciding to whom to sell the land, it does not follow that it is permissible to take that benefit into account when deciding compulsorily to deprive a person of their land.

96 Finally, I agree that section 226(1A) operates as a limitation on the power defined by section 226(1)(a). It is therefore necessary first to consider whether the acquisition will facilitate the development of the land; and only if it will do that, to consider whether the development itself will contribute to the promotion or improvement of the economic, social or environmental well-being of the area.

LORD MANCE JSC

97 I consider that this appeal should be allowed. I agree with the reasons given by Lord Collins of Mapesbury JSC, supplemented by those given by Lord Walker of Gestingthorpe and Baroness Hale of Richmond JJSC, and wish to add only a few comments on one aspect, relating to the basis upon which Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC (and Lord Brown of Eaton-under-Heywood JSC in an alternative) come in their judgments to an opposite result.

98 Like Lord Phillips PSC (paras 134–135), I agree with Lord Collins JSC's conclusion that a planning authority, when considering a planning application, is only entitled to take into account a planning obligation which the applicant offers if that obligation has some connection with the relevant development, apart from the fact of its offer. I also consider that there is a useful analogy between the grant of planning permission and the exercise of a power of compulsory purchase under section 226(1)(a) of the Town and Country Planning Act 1990, and that the considerations admissible in relation to the latter power are, in the respect mentioned in the previous sentence, no wider than those admissible in relation to the former.

99 In this case, the (decisive) attraction of Tesco's proposal in respect of the Raglan Street site consisted of Tesco's offer to use the profits to subsidise the wholly unconnected development by it of the Royal Hospital site, elsewhere in Wolverhampton, which the city council wished to see take place. Lord Phillips PSC accepts in para 138, for reasons which I have summarised in the previous paragraph, that, had Sainsbury been here "simply an owner who was unwilling to sell his land", it would not have been legitimate for Wolverhampton City Council to take this attraction into account in deciding to exercise its powers of compulsory purchase to facilitate Tesco's scheme in respect of the Raglan Street site. Likewise, he accepts (para 140) that, if Sainsbury and Tesco had been seeking in competition with each other to develop a site in the ownership of a third party, then, too, it would not been admissible for the city council to decide compulsorily to purchase the third party site because of the attraction of Tesco's offer to develop a wholly unconnected site.

100 However, Lord Phillips PSC and Lord Hope DPSC consider that it makes all the difference that, in this case, Sainsbury and Tesco were in competition for the same site (in fact owned or controlled as to 86% by the former and 14% by the latter). I cannot accept that distinction. On its logic, it should make no difference if Sainsbury owned and wanted itself to develop the whole Raglan Street site: Tesco, if it wanted to develop that site, could, by offering to devote part of the profits to the Royal Hospital project, still legitimately induce the city council compulsorily to purchase Sainsbury's

property in order to sell it to Tesco for the Raglan Street development. Lord Phillips DPSC's reference (para 147) to "the fact that the compulsory purchase of land owned by one or the other is involved" as "really peripheral" in a case where there are rival developers goes far towards accepting this conclusion. Alternatively, if some way of avoiding this conclusion exists, the logic must still be that Tesco, by acquiring only one house on the proposed Raglan Street site, could alter fundamentally the considerations admissible in relation to a decision whether compulsorily to purchase Sainsbury's property, rather than Tesco's, in order to facilitate the development of the Raglan Street site. In either case, I do not think it right to describe as "motivated by commercial rivalry" (para 147) the wish of a landowner in Sainsbury's position to develop its own land—or its wish to have any decision to compulsorily purchase its land for the benefit of some other developer made by reference to factors having at least some connection with its land.

101 The error in my view lies in divorcing the exercise of the power of compulsory purchase from the property to which it relates. Two different exercises of that power are here in issue relating to two different pieces of land. When a planning authority exercises compulsory purchase powers to promote a particular development, it does this in relation to specific property and only so far as necessary. In the present case, if Sainsbury's scheme is preferred on its admissible planning merits, then only Tesco's property will be compulsorily purchased, and vice versa. The council's first decision is therefore which development it prefers, and that will determine whose property is compulsorily purchased. The council's decision which development it prefers must be taken having regard to considerations which are admissible in the context of the development for which property is to be compulsorily purchased. Thus, when deciding whether compulsorily to purchase Sainsbury's property, it was not admissible to have regard to Tesco's offer relating to the unconnected development of the Royal Hospital site. If the Raglan Street site had already been in council ownership, and there were two interested developers, the council could of course take into account under section 233 any inducement offered by either—whether in terms of price or some unconnected benefit (such as an undertaking to develop the Royal Hospital site)—as Lord Hope DSPC says in para 155. But that is for the very reason that the only relevant decision would then relate to the disposal of the council's own property. Where the council is deciding whether compulsorily to purchase third party property under section 226(1)(a), the interests of the third party mean that the council must have regard only to considerations which are admissible in the context of the development for which such property is required.

102 *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, to which Lord Phillips PSC and Lord Hope DPSC refer, does not in my view support the conclusion which they reach. It was a case where the Glasgow City Council took its decision which development to prefer on grounds which related scrupulously to the merits of the proposed development, without reference to unconnected factors: see e g paras 21–23, per Lord Hope, para 50, per Lord Rodger of Earlsferry and para 73, per Lord Brown. There was, as Lord Hope DSPC notes in para 155 in his present judgment, a strong element of planning gain involved in the potential development. But it was planning gain related to the development,

not to some entirely unconnected development, so that the case has no analogy with the present.

103 The issue before the House arose because all potential developers were required to provide an indemnity for Glasgow City Council's costs in effecting the compulsory purchase: paras 22, 50 and 73; and it was this feature which the losing developer criticised. There was some discussion of the possibility that the rival developers might have been invited to enter a bidding match in terms of the price to be paid: para 41, per Lord Hope, para 62, per Lord Rodger and paras 72–73, per Lord Brown. In paras 41 and 72, Lord Hope and Lord Brown both expressed their difficulty in understanding how such a bidding match would work.

104 At most, one might read into the discussion in the *Standard Commercial Property* case a tacit assumption that such a bidding match might have been permissible if possible, but that does not make the case authority on a point which was evidently not argued in that case, any more than it was in fact argued on the present appeal. The focus in the *Standard Commercial Property* case was on whether the terms on which the Glasgow City Council was proposing to dispose of the property, once compulsorily acquired, met the requirements of section 191(3) of the Town and Country Planning (Scotland) Act 1997. Section 191(1) provided that any land acquired and held for planning purposes could be disposed of to such person, in such manner and subject to such conditions as might appear expedient to secure purposes mentioned in section 191(2), viz the best use of that or other land, etc. Section 191(3) provided that any land so disposed of should only be disposed of "at the best price or on the best terms that can reasonably be obtained". The requirements of section 191(1) and (2) on the one hand and of section 191(3) on the other were, as Lord Hope said, at para 34, "separate and distinct". The issue before the House was, as Lord Hope made clear throughout paras 31–42, simply whether the proposed terms of disposal fell within section 191(3).

105 It is material to think about the consequences if the *Standard Commercial Property* case were to be treated as any sort of authority that a planning authority may, when deciding whether compulsorily to acquire property belonging to one landowner ("A"), have regard to the price offered for the land by potential developer ("B"). There would seem to be no logical reason to limit these consequences to situations where A and B are in competition, or to situations where the potential development extends beyond A's property and includes some property already owned by B. If, in any situation, B were to offer to repurchase A's property from the planning authority on terms giving the planning authority a profit, once the planning authority acquired it by compulsory purchase from A, why would that be illegitimate? Yet A would have little or no means of countering such an inducement. A could not offer any corresponding profit in respect of land which it already owned. And it could not be legitimate for A to offer the local authority a share in the profit it hoped to make from developing its own land, in order to induce the local authority to refrain from compulsorily purchasing its land for the benefit of B. That would amount to buying a local authority's exercise of its discretion. It might be suggested that if, as here, B owned some land which it was desired to include in an overall development, then A might counter B's offer in respect of A's land, by offering the planning authority a profit on the resale of B's land, if it were

compulsorily to acquire that land rather than A's. Apart from the evident inappropriateness of any such bidding war, B's relevant land holding might (as here) be much smaller in area, and, unless it is supposed that A could legitimately offer a ludicrously high price for B's land, the financial attraction for the planning authority of A's offer could not match that of B's. So far, I have spoken only in terms of a bidding match relating to the price to be paid by the developer for the property to be compulsorily purchased. That was the only situation to which any discussion at all was addressed in the *Standard Commercial Property* case. The present case concerns the further question whether a proposed developer could influence the exercise by a planning authority of a discretion (viz whose property compulsorily to purchase and for the benefit of which of two potential developers) by offering some benefit wholly unconnected with any property the subject of the proposed development. In this context, it seems to me even clearer that the *Standard Commercial Property* case cannot lend support to Tesco's case on this appeal.

106 For these reasons, I do not regard the *Standard Commercial Property* case as justifying a conclusion that, as soon as rival developers are competing to develop a single site, part owned by each, considerations become material which would be immaterial if the whole site had been owned by one of them or by a third party. If the discussion in the judgments in that case lends any support to Tesco's case, the point did not arise for decision and was not argued there, any more than it was on the appeal in the present case. As a matter of principle, in my opinion, there is no basis on which the fact that Sainsbury and Tesco were, in a broad sense, rival developers in respect of the same overall site, can or should alter fundamentally the considerations admissible when the city council came to consider which development it should prefer, and which property it should, therefore, compulsorily acquire to facilitate such development. Any such decision fell to be made by reference, and only by reference, to considerations having some connection with the proposed development, and not by reference to any entirely unconnected inducement which might be held out by one of the rival developers. Like Lord Collins, Lord Walker and Baroness Hale JJSC, I would therefore allow Sainsbury's appeal.

LORD PHILLIPS OF WORTH MATRAVERS PSC

Introduction

107 The facts of this appeal are set out in detail in the judgment of Lord Collins of Mapesbury JSC. In essence they are simple. The issue that they raise is not. As every shopper knows Sainsbury and Tesco are rivals. Each owns a chain of supermarkets. Each is anxious to open a supermarket on a site at Wolverhampton ("the site"). To this end Sainsbury has acquired 86% of the site and Tesco has acquired 14%. These figures ignore, as shall I for it has no materiality, the fact that Wolverhampton City Council ("the council") owns a very small part of the site. Sainsbury and Tesco have each prepared a development plan for the site. The plans are very similar. Tesco has obtained planning permission for its plan and Sainsbury is in a position to do the same. The council is anxious that one or other development plan should be implemented, for it will be likely to contribute to the well-being of the

area. The problem is that neither of the rivals is prepared to give way, and in so doing to sell its portion of the site to the other.

108 To resolve this impasse the council is prepared to use its powers of compulsory purchase to buy the land of one of the rivals and sell it to the other. Those powers are conferred by the following sections of the Town and Country Planning Act 1990, as amended:

> "226 *Compulsory acquisition of land for development and other planning purposes*
>
> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land or; (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."
>
> "233 *Disposal by local authorities of land held for planning purposes*
>
> "(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order— (a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority . . .
>
> "(3) The consent of the Secretary of State is . . . required where the disposal is to be for a consideration less than the best that can reasonably be obtained . . ."

109 It is common ground, and rightly so, that the statutory requirements of section 226 are satisfied, so that the council has statutory power compulsorily to purchase the land owned by either of the rivals. There is little, if anything, to choose between the rival development plans. The council has, however, decided to prefer Tesco. Its intention is compulsorily to purchase Sainsbury's land and to sell this to Tesco. Its reason for this decision is as follows. Tesco own another site in Wolverhampton, the Royal Hospital site ("RHS"). This is run down and crying out for regeneration. The council wishes Tesco to redevelop this in a way which Tesco contends is uneconomic. Tesco has, however, agreed to enter into an obligation to redevelop the RHS in accordance with the council's wishes provided only that the council prefers Tesco in the competition for the development of the site. This obligation has been described as involving a "cross-subsidy" of the RHS redevelopment from the

A site development. The council has regarded this obligation as decisive in preferring Tesco to Sainsbury in the competition for the development of the site.

110 The issue raised by this appeal is whether Tesco's undertaking to develop the RHS in accordance with the council's wishes is a matter to which the council can properly have regard when deciding upon a scheme for developing the site that involves the compulsory purchase of Sainsbury's land.

B

RHS redevelopment

111 The RHS is about half a mile away from the site, on the other side of the city centre. When Tesco applied for planning permission for the development of the site, it sought initially to link this with the redevelopment of the RHS. It was, however, unable to demonstrate any connection between the two, and ultimately accepted that there was no linkage for the planning committee to consider. The reality is that there is no connection between the development of the site and the RHS development other than Tesco's agreement to proceed with the latter if granted the former.

C

D

The "cross-subsidy"

112 I am puzzled by the nature of the so-called "cross-subsidy". Under what is commonly described as a "back-to-back agreement" Tesco has agreed to indemnify the council in relation to the cost to the council of compulsorily purchasing Sainsbury's 86% of the site. Tesco has further agreed to redevelop the RHS at what Tesco contends will be a commercial loss. Tesco states that it will be able to afford this because of the cross-subsidy that will be available if it is permitted to develop the site. It is thus implicit that Tesco anticipates that development of the site will result in an economic benefit that will enable it to entertain a loss-making venture. That economic benefit should, however, be reflected in the price that Tesco, as a willing buyer, would be prepared to pay to Sainsbury, as a willing seller, if Sainsbury's land were to be sold directly to Tesco in an open market transaction. That, as I understand the position, is precisely the amount to which Sainsbury will be entitled from the council as compensation for the compulsory acquisition of their land: see *Waters v Welsh Development Agency* [2004] 1 WLR 1304, paras 17 and 18. If Tesco has to pay the council this amount under the back-to-back agreement it is not easy to see how there will remain to Tesco any surplus economic benefit to fund a loss-making venture at the RHS. Be this as it may, that is precisely what Tesco has agreed to do. Accordingly I approach this appeal on the basis that the compulsory purchase of Sainsbury's land will procure for the council the benefit, not merely of the development of the site, but of the redevelopment of the RHS under the obligation that Tesco has agreed to assume. I shall describe this, by way of shorthand, as "the RHS benefit".

E

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G

H

An analysis of the issues

113 The basic issue raised by this appeal is whether the RHS benefit is a legitimate, or material, consideration to which the council can have regard when deciding whether to acquire Sainsbury's land by compulsory purchase

in the particular context of the competition that exists between Sainsbury and Tesco for this development. This basic issue subdivides into two separate questions: (i) Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury was not competing for the development? (ii) Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco? If the first question is answered in the affirmative, the second question must necessarily also be answered in the affirmative. A negative answer to the first question will not, however, necessarily require a negative answer to the second.

Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury were not competing for the development?

114 The statutory power of compulsory purchase can only lawfully be used for the purpose for which the power has been conferred. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43 Lord Cranworth LC said:

> "The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers."

115 Section 226(1)(a) and 226(1A) confers the power compulsorily to purchase land, but to justify the exercise of that power the council must be able to show that this is clearly in the public interest: "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament *and the public interest decisively so demands*" (my emphasis), per Lord Denning MR in *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198. In this case it is common ground that the requirements of section 226 are satisfied and that if (i) there was no competing scheme and (ii) Tesco was not prepared to provide the RHS benefit, the public interest would none the less justify the compulsory purchase of Sainsbury's land in order to enable Tesco to carry out the development. If, however, this were not the case, would the offer by Tesco of the RHS benefit be a material consideration to which the council could have regard when deciding whether the exercise of their power of compulsory purchase was justified?

The ambit of section 226(1A)

116 Section 226(1A) of the Act sets out preconditions to the exercise of the power of compulsory purchase. The development facilitated by the compulsory purchase must be likely to contribute to the improvement of the economic, social or environmental well-being of the area. The Court of Appeal held that because the compulsory purchase of Sainsbury's land would result in the RHS benefit which, in its turn, would contribute to the economic, social or well-being of the area, this, of itself, satisfied section 226(1A).

It necessarily followed that the RHS benefit was a material consideration to which the council could have regard when considering the compulsory purchase of Sainsbury's land.

117 This finding differed from that of Elias J at first instance. I consider that Elias J was correct and the Court of Appeal wrong. The reasoning of the Court of Appeal appears from the following passages of the only reasoned judgment, which was delivered by Sullivan LJ [2009] 3 EGLR 94, paras 26–29:

> "26. Though convoluted, subsection 226(1A) is expressed in deliberately broad terms: 'likely to contribute to the achievement of . . . [the well-being] . . . objects'. It is not prescriptive as to the manner in which the carrying out of redevelopment upon a CPO site might make a contribution to such wider benefits. Mr Lockhart-Mummery accepted that one of the more obvious ways in which the carrying out of redevelopment on a CPO site might, at least in principle, be capable of bringing economic/social/environmental benefits to a wider area would be if the redevelopment was likely to act as the catalyst for the development or redevelopment of some other site or sites within the authority's area.
>
> "27. Such a catalytic effect might be direct, e g because redeveloping the CPO site would be likely to enable the occupier of another, run down site in the authority's area to relocate onto the CPO site, thus enabling the run down site to be redeveloped. Or it might be indirect, e g because the increased attractiveness after redevelopment of a hitherto run down CPO site was likely to make other sites in the area more attractive for development or redevelopment. It was common ground that such catalytic effects were capable of falling within the scope of section 226(1A).
>
> "28. In the present case the report makes it plain that the defendant was satisfied that facilitating the carrying out of the interested party's scheme for the redevelopment of the Raglan Street site would, by reason of the proposed cross-subsidy, act as the catalyst for the redevelopment of the RHS site in a manner which would contribute to the economic social and environmental well-being of its area . . .
>
> "29. In my judgment subsection 226(1A) is concerned with all of the consequences that are likely to flow from the process of the carrying out of redevelopment on the CPO site, and these are not confined to what might be described as the impact of there being new 'bricks and mortar' on the redeveloped site. Thus, disturbance during the redevelopment process and the need to relocate existing occupiers on the one hand, and the job opportunities that would be created during the carrying out of the redevelopment on the other, would both be capable of being relevant (the one negative, the other positive) for the purposes of section 226(1A)."

118 In these passages Sullivan LJ equates "the development" in section 226 (1A) with "the process of the carrying out of redevelopment". I think that this is questionable. He describes the site development as acting "as a catalyst" for the RHS redevelopment, by reason of the cross-subsidy. This is a misuse of language. Section 226(1A) focuses primarily, if not exclusively, on whether the development will be likely to enhance the economic, social or environmental well-being of the area once it is completed. The subsection cannot be satisfied by an agreement by a

developer to fund a second development that has no physical, geographical or other connection with the development that the compulsory purchase is designed to facilitate.

119 This conclusion gives effect to the natural meaning of the language of section 226(1A). In the Court of Appeal Mr Lockhart-Mummery QC for Sainsbury submitted that the same conclusion should be reached by applying, by analogy, decisions on what constitute "material considerations" in the context of planning applications. Sullivan LJ held that these decisions could not be so applied, at least directly, and Mr King QC for the council and Mr Katkowski QC for Tesco have supported his approach. Both Lord Brown of Eaton-under-Heywood and Lord Collins of Mapesbury JJSC have relied on decisions in relation to planning applications in reaching their conclusions, albeit that they have differed as to their effect. Is the analogy between compulsory purchase and planning permission in the present context a fair one?

The analogy between compulsory purchase and planning permission

120 I agree with Lord Brown and Lord Collins JJSC that it is appropriate in this case to draw an analogy, when considering whether the RHS benefit is a material consideration, with certain decisions relating to the grant of planning permission. The issue in this case is whether it is legitimate, when considering the benefits that will flow from a development that is the object of compulsory purchase, to have regard to a particular benefit offered by the developer. The relevant planning cases deal with the question of when it is legitimate, when considering a planning application, to have regard to benefits offered by the developer. Each case raises the question of what can legitimately be considered when assessing how the public interest is affected by the development of land. The analogy is obvious. There is a further point.

121 Section 226 of the Act was amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, which inserted subsection (1A). In its previous form it included, by section 226(2)(c), a requirement that a local authority, when considering whether land was suitable for development, redevelopment or improvement, should have regard to "any other considerations which would be material for the purpose of determining an application for planning permission for development on the land". While this provision was deleted by the 2004 Act it none the less illustrates the fact that the test of materiality in relation to planning permission can also be relevant in the context of compulsory purchase.

122 The planning obligation offered by Tesco in the present case is the RHS benefit. Could that have constituted a material consideration on Tesco's application for planning permission, notwithstanding that it had no other connection with the proposed development of the site?

Considerations that are material to the grant of planning permission

123 The history of planning permission shows an ambivalence on the part of the legislature, the executive and the judiciary in respect of the extent to which it is legitimate for a local authority to exact planning gain from a developer as a condition of the grant of planning permission. Lord Hoffmann traced this history in some detail at pp 771–777 of his speech in

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759. I shall attempt a rather shorter summary, at least in relation to the earlier part of the history.

124 At the beginning of the 20th century, apart from some public health legislation, there were no planning controls over the use that an individual could make of his own land. A comprehensive system of planning control over the use of land was first introduced by the Town and Country Planning Act 1947. Since then there have been a series of legislative changes seeking, inter alia, to balance the private rights of owners of land against the public interest in the control of the environment, culminating with the Planning Act 2008, which allows for a new Community Infrastructure Levy. A particular problem has been the extent to which it is legitimate to require developers to take responsibility for the "off-site" consequences of their developments.

125 For present purposes, the most significant provision in force is section 70 of the Town and Country Planning Act 1990. This provides:

> "*Determination of applications: general considerations*
>
> "(1) Where an application is made to a local planning authority for planning permission— (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission.
>
> "(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

126 Some of the relevant authorities deal with the criteria of the "material considerations" to which subsection (2) requires the local authority to have regard. Others relate to the scope of the power to impose conditions. In relation to each of these, the following observations of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 are relevant:

> "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Hoffmann observed in the *Tesco* case, at p 772, "As a general statement, this formulation has never been challenged".

127 A decision that is particularly relevant in relation to "material considerations" is *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. The facts of that case have been set out and analysed by Lord Collins JSC at paras 51–59 of his judgment. In short the Court of Appeal held that it was a material consideration, when considering a composite development, that one part of it, which was undesirable having regard to relevant planning considerations, would provide a necessary cross-subsidy for the development of the other part, which was highly desirable. Lord Collins JSC in his analysis at para 58, identifies the fact that the case concerned "composite or related developments" as a relevant part of the

Court of Appeal's reasoning. At para 70 he identifies the need for such a connection or relationship as being a requirement of law. Lord Brown JSC, in para 176 of his judgment, disagrees. He comments that it was expressly recognised that no discernable legal principle would have supported the need for such a connection.

128 I align myself with Lord Collins JSC's analysis. The passage from the judgment of Nicholls LJ, quoted by Lord Brown and Lord Collins JJSC at paras 169 and 56 of their respective judgments, and the passage from the judgment of Staughton LJ quoted by Lord Collins JSC at para 57, demonstrate that each of those judges saw the need for a relationship between the undesirable and the desirable developments other than the simple fact that the one would subsidise the other. The suggestion by Kerr LJ, at p 117, that the significance of the distance between developments involved "considerations of fact and degree rather than of principle" does not withstand analysis. If the distance matters, then the reason why it matters must be a matter of principle. The relevant principle appears to me to be that a cross-subsidy between two developments cannot be considered unless there is some independent reason for considering the two developments together.

129 Whether that is a rational principle is another matter. If it is acceptable that an undesirable development should be permitted in order to subsidise a desirable development it is not easy to see why there should be an inflexible requirement that one should be in proximity to, or have some other nexus with, the other.

130 A close nexus between the subject matter of a planning condition and the development in relation to which it is imposed has been required by the courts. Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 772 referred to the triple requirement for a valid planning condition laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578: (i) it must be for a planning purpose and not for any ulterior one; (ii) it must fairly and reasonably relate to the permitted development; (iii) it must not be *Wednesbury* unreasonable: [1948] 1 KB 233. Lord Hoffmann went on to refer to *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 as illustrating the very strict way that the courts gave effect to these requirements, so that conditions requiring contribution to the "external costs" generated by a development were not permitted. As Lord Hoffmann explained, this gave rise to the introduction of "planning agreements", which were replaced in their turn by "planning obligations".

131 Section 106 of the Act, as substituted by section 12(1) of the Planning and Compensation Act 1991, provides:

> "*Planning obligations*
>
> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3)—
> (a) restricting the development or use of the land in any specified way; (b) requiring specified operations or activities to be carried out in, on, under or over the land; (c) requiring the land to be used in any specified way; or (d) requiring a sum or sums to be paid to the authority . . ."

A This section is in very general terms and, in particular, no express restriction or qualification is placed on the undertaking to pay money to the authority. In these circumstances two separate questions arise. The first is whether, and if so what, implicit restrictions exist as to the nature of planning obligations that can lawfully be incurred. The second is the extent to which planning obligations that have been undertaken are material considerations to which the authority must have regard under section 70 of the Act. There B are two relevant decisions that relate to the latter question.

132 The first is *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78. Lord Brown JSC has set out the facts of this case at para 170 of his judgment. The issue was whether generous planning obligations ("benefits") offered by Tesco and Sainsbury, there as here rival applicants for a development, were material C considerations to which the planning authority could have regard, notwithstanding that they went well beyond anything that the authority would have been able properly to require by way of planning conditions as being "necessary". The Court of Appeal applied the *Newbury* triple requirement, but held that there was no requirement that the benefits should be necessary, albeit that they had, fairly and reasonably, to relate to the D development. As to that requirement, this was satisfied in the case of financial contributions to works off-site designed to accommodate demands generated by the development.

133 In that case Lord Hoffmann remarked, at p 90:

> "Materiality is an entirely different matter, because there is a public interest in not allowing planning permissions to be sold in exchange for E benefits which are not planning considerations or do not relate to the proposed development."

He was subsequently in the *Tesco* case [1995] 1 WLR 759, 778 to say that the parallel between the *Newbury* triple requirement and the materiality of planning obligations was "by no means exact".

134 This brings me to the *Tesco* case, which is the most important F decision in the context of this appeal. Once again the material facts have been summarised by Lord Brown and Lord Collins JJSC at paras 173 and 63–66 of their respective judgments. What the *Tesco* case established was that the second test in the *Newbury* case does not apply to planning obligations. These, to constitute material considerations, do not have "fairly and reasonably" to relate to the relevant development. It is enough if G they have a connection to it that is not de minimis. The requirement for such a connection none the less remains. Lord Brown JSC has concluded, at para 174 of his judgment, that this connection is satisfied by an offer to cross-subsidise another development that is otherwise unconnected with the development for which planning permission is sought. He comments that such an offer could not sensibly be regarded as "an attempt to buy planning permission", a phrase he takes from the judgment of Lord Keith of Kinkel, H at p 770. Lord Brown JSC differs from Lord Collins JSC, who concludes at para 70 that the authorities, and the *Tesco* case in particular, establish that there "must be a real connection" between benefits undertaken by a planning obligation and the development to which the planning application relates.

135 Here I align myself once again with Lord Collins JSC. Lord Brown JSC's conclusions are at odds with the passage in Lord Keith's judgment from which he has borrowed a phrase. The full passage reads:

> "An offered planning obligation which has nothing to do with the proposed development, *apart from the fact that it is offered by the developer*, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission." (Emphasis mine.)

All members of the committee agreed with the judgment of Lord Keith.

136 Lord Brown JSC has quoted a passage from the judgment of Lord Hoffmann, at p 779C–D, in which he says that section 106 does not require that the planning obligation should relate to any particular development, and Lord Keith made a similar observation, at p 769B. These observations related, however, to the legality, not the materiality, of planning obligations.

137 My conclusion in relation to the effect of the authorities is as follows. When considering the merits of an application for planning permission for a development it is material for the planning authority to consider the impact on the community and the environment of every aspect of the development and of any benefits that have some relevance to that impact that is not de minimis that the developer is prepared to provide. An offer of benefits that have no relation to or connection with the development is not material, for it is no more than an attempt to buy planning permission, which is able in principle. Tesco was right, on its application for planning permission, to drop any attempt to link the development of the site with the RHS development.

138 These principles can properly be applied, by analogy, to a simple case where a local authority is considering whether the public interest justifies the compulsory purchase of land for the purpose of facilitating a development. The development itself must be justified in the public interest and it would be wrong in principle for the local authority to be influenced by the offer by the chosen developer to provide some collateral benefit that has no connection of any kind with the development in question. Thus if, in this case, Sainsbury was not a rival seeking to develop the site but simply an owner who was unwilling to sell his land, it would not be right to treat Tesco's offer of the RHS benefit as a consideration that was material to the decision of whether or not to purchase Sainsbury's land.

Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco?

139 The principle that permits a planning authority to have regard to planning gain that has some connection with a proposed development, but not to planning gain that has no such connection, is not entirely rational. It becomes less rational in a situation where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both. That was believed to be the position in the *Plymouth* case 67 P & CR 78, although ultimately planning permission was granted to both the rivals, being once again Sainsbury and Tesco. In the *Plymouth* case each of the rivals was anxious to be permitted to build a supermarket. In competing for planning permission each offered to embellish its development with an array of expensive "add-ons",

described by Lord Brown JSC at para 170 of his judgment. These no doubt enhanced the attraction of each of the rival schemes from the viewpoint of the public and the local authority. But the possibility must exist that the cost of these embellishments might have been spent to better advantage in providing alternative planning gain in the local authority's area that had no connection with the proposed development. The reality is that the rivals were, to use a description adopted by Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 782, competing for the development as in an auction. If an auction is to be permissible there might be something to be said for permitting the local authority to identify, for consideration by the rival bidders, its most urgent planning needs, whether or not connected with the development. I make this observation only by way of a stepping stone to considering the more complicated issue raised by the facts of this case.

140 The council's decision involves the exercise of two statutory powers. The first is the power of compulsory purchase conferred by section 226 of the Act. The second is the power to sell the land compulsorily purchased, which is conferred by section 233. The purposes of the sale of the land described in section 233 differ from the purposes of the purchase described in section 226. Had the site been in the ownership of a third party who was unwilling to sell it, and had Tesco and Sainsbury been competing to develop it, the council would have had two separate decisions to make. First whether compulsorily to purchase the land. Secondly to which of the two rivals to sell it for the purpose of the development. The law that I have analysed suggests that, when making the first decision under section 226, the council would have been bound to disregard benefits that might be obtainable from either of the developers that were unconnected to the development. But in choosing to which of the two rivals to sell the land for development under section 233 the council would have been entitled, and perhaps bound, to negotiate the best deal available. The terms of section 233 would seem wide enough to have permitted the council to treat as material Tesco's offer to throw into the bargain the RHS benefit.

141 These conclusions receive some support from *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33. Lord Collins JSC has set out some of the complicated facts of this case at para 40 of his judgment. That case had these features in common with the present. Glasgow City Council wished to develop a run down area of the city, parts of which were owned by rival developers. The council had decided compulsorily to purchase the entire site and to sell it on back-to-back terms to one of the rival developers. The other developer challenged the deal on the basis that back-to-back terms did not represent the best deal. This the council were bound to achieve under section 191 of the Scottish Act, which closely resembles section 233 of the Act. Lord Collins JSC rightly remarks that there was in that case no offer of benefits unconnected to the development, but I do not think that this robs it of all relevance. Of significance is that in that case, as in this, the council first decided in principle that the facts justified the use of its powers of compulsory purchase, before turning to choose between the rival developers. It is also significant that the House of Lords held that, at the stage of choosing the developer, the council was not simply concerned with achieving the object of the compulsory purchase, but was also entitled to have regard to purely commercial considerations. Lord Hope of Craighead described the position as follows, at para 34:

"section 191 seeks to do two things. On the one hand it seeks to regulate those aspects of the transaction which are intended to secure the purposes set out in subsection (2). These purposes are to secure the best use of the land and the proper planning of the area. On the other it seeks in addition to protect the public purse in the manner indicated by subsection (3). These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority. It is to the best commercial terms for the disposal of the land, not to what is best designed to achieve the overall planning purpose, that the authority must direct its attention at this stage. But the words 'best terms' permit disposal for a consideration which is not the 'best price'. So terms that will produce planning benefits and gains of value to the authority can be taken into account as well as terms resulting in cash benefits."

142 I can summarise the position as follows. (1) In deciding whether to exercise its powers of compulsory purchase for the purpose of development the council is not permitted to have regard to unconnected benefit that it may derive from the carrying out of the development, but (2) in deciding who shall carry out the development and, thus, to whom the land will be sold for that purpose, the council is entitled, and perhaps bound, to have regard to unconnected benefit offered by the developer. The problem is how to have regard to these principles in a case such as the present where the rival developers each owns part of the site needed for the development.

143 I have concluded that the proper approach should be as follows. The council should first decide, in the case of each of the rivals, whether compulsory purchase of his land would be approved to enable the development to proceed, disregarding any unconnected benefit that might accrue and on the premise that he was simply an unwilling seller rather than a rival developer. In the result of an affirmative answer being given in each case, the council should then decide which developer to prefer having regard to all considerations material to that choice, including the amount of the site already owned by each developer and any benefits offered by either developer, whether or not connected to the development. The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently able.

144 In the present case this is what the council did. The council was not influenced by the RHS benefit when deciding in principle to use its power of compulsory purchase. In deciding to purchase whatever land was necessary for the development of the site the council had regard only to the proper objects of compulsory purchase. The choice of developers necessarily also determined which land would be compulsorily purchased, but the decision had already been taken to purchase whatever land would be necessary having regard to the choice of developer.

145 To summarise, the RHS benefit was not a consideration that was material to the decision to use the power of compulsory purchase, but it was very material to the decision which developer to select, and this in its turn determined whose land was to be compulsorily purchased. In these circumstances I have reached the conclusion that the RHS benefit was a

consideration that was material to the decision that determined simultaneously the developer and the land to be purchased. It cannot be said that the decision compulsorily to purchase Sainsbury's land was influenced by a consideration that was not material.

146 The decision that I have reached at laborious length was felicitously stated by Elias J in a single paragraph (para 38) and I propose to conclude my judgment by quoting this:

> "In my judgment when deciding which development should receive their support, the council could have regard to all the benefits accruing from the proposed development, including any off-site benefits achieved by way of a section 106 agreement. It seems to me that there are really two stages in the process. First, can a CPO lawfully be made in favour of a particular development? That must be determined by focusing solely on the benefits flowing from the development itself and the RHS benefits could not be taken into account at that stage. Second, if the power can lawfully be exercised, but there is more than one potential party in whose favour it could be exercised, to which development should the council lend its support? At that stage I can see no reason why the council should not have regard to its wider interests. It has established that there is in principle a proper basis in law for interfering with the rights of either of two (or more) owners of land on the site by compulsorily purchasing their interests; I see no reason why it should not select which landowner should be so affected by considering the overall benefits to the council which the respective developments would provide."

147 The reality in this case is that the real issue is which developer should be preferred by the council, which is in the position of being able to choose between the two. The fact that the compulsory purchase of land owned by one or the other is involved is really peripheral. Each purchased its land in the hope of being able to use it for the purpose of the development. Each shares the intention that its land should be used for the development. In resisting the compulsory purchase of its land each is motivated by commercial rivalry, not by any to the land being used for the proposed development. It would be unfortunate if the rigid application by analogy or principles of planning law were to rob the local community of the additional benefit of the redevelopment of the RHS. I have not found it necessary to reach such a result.

148 For these reasons I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD DPSC

149 Reduced to its essentials, this case is about two decisions that the council took to facilitate the development at Raglan Street. The first was whether they should exercise their powers of compulsory acquisition to enable the development. The second was as to the choice of developer. The first decision was taken in the exercise of the powers conferred on the council by section 226 of the Town and Country Planning Act 1990, as amended. The second, as Lord Phillips of Worth Matravers PSC has said (see para 140, above), was about the exercise of two statutory powers. I put it in this way, as I think Lord Phillips PSC does too, simply to indicate the context in which each of these powers was being exercised. The cart and the

horse—if I may adopt Baroness Hale of Richmond JSC's analogy (see para 91)—go together, like a horse and carriage, at this stage of the exercise.

150 The site was not in the sole ownership, or under the sole control, of either developer. They were in competition with each other for its development, so the exercise of compulsory powers to acquire the interest in the land vested in one or other of them was inevitable. Just as inevitable is the fact that the purpose of the exercise of those powers was to enable the council to dispose of the interest that was to be acquired to the preferred developer. Section 226 is concerned with the acquisition of the interest in the land, not its disposal. The power to dispose of land that has been acquired or appropriated is set out in section 233 of the 1990 Act.

151 The compulsory acquisition of land can only be permitted if it is within the powers of the statute. Great care must be taken to see that those powers are not resorted to unless the statute permits this and that the acquisition is necessary for the purpose that the statute contemplates. The issue on this part of the case is whether the council were entitled to take into account, in discharging their duty under section 226(1A) to consider the well-being benefits for the area, Tesco's commitment to secure by way of cross-subsidy the development of the Royal Hospital site. For the reasons that Lord Phillips PSC and Lord Collins JSC give, I would hold that they were not entitled to do so. Section 226(1)(a) provides that the authority have power to acquire land compulsorily if they think that it will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. The reference to "the land" in this paragraph is to the land which is to be the subject of the compulsory purchase order. Section 226(1A) places a limitation on the exercise of the power under section 226(1)(a). These two provisions must be read together. The contribution by the development, redevelopment or improvement that section 226(1A) refers to must be on the land that the authority is proposing to acquire compulsorily.

152 The situation in this case is that there was no physical connection of any kind between the two sites. Development of the Royal Hospital site could not contribute anything to the carrying out of development on the Raglan Street site in any real sense at all. They were not part of the same land. There is no doubt that the development of the Royal Hospital site would bring well-being benefits to the council's area of the kind that section 226(1A) refers to. But to fall within that subsection they had to be benefits that flowed from the Raglan Street development, not anywhere else. It follows that the council were not entitled to conclude that the work which Tesco were willing to undertake on the Royal Hospital site would contribute to the well-being of the area resulting from its development of the site at Raglan Street for the purposes of section 226(1A).

153 At first sight that might seem to be the end of the case. The report which was presented to the council's cabinet on 30 January 2008 stated that the Tesco and Sainsbury's schemes for the Raglan Street site would both fulfil the purpose referred to in section 226(1)(a). Addressing itself to the choice that had to be made between the two schemes, it went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco and to refer to the decisive advantage which Tesco enjoyed over Sainsbury's if the development of that site was taken into account. It concluded by recommending that there was a compelling case in the public interest to make a compulsory purchase order to enable the Tesco scheme to go ahead.

As regards the exercise of the power to acquire the land compulsorily, if looked at in isolation, this was to stray into forbidden territory.

154 In my opinion however it would be unrealistic to stop there. The legality of the use of compulsory powers to enable the Raglan Street development to proceed has not been called into question. As the report said, both schemes satisfied the requirements of section 226(1)(a), and it has never been doubted that the carrying out of either of them on that site would contribute to the achievement of the well-being of the area. If the land had been in the ownership of a third party, there would have been no need to say more. The reason why the report went further was the council had to make a choice between the two developers. Although the report did not say so in terms, it is plain that the assumption on which it was proceeding was that, having acquired the land, the council would dispose of it to the preferred developer. The surrounding circumstances show that it was never the council's intention to develop the land themselves or to retain it in their ownership. This part of the report was as much concerned with the exercise of the power to dispose of the land as with the exercise of the power to acquire it.

155 The power of disposal under section 233 confers a wide discretion on the local authority. They may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient to secure the best use of that or other land or the proper planning of their area. Like section 191 of the Town and Country Planning (Scotland) Act 1997 which is in very similar terms, that is its primary objective: see *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, para 32. It was held in that case that the council, when considering whether to use compulsory powers in conjunction with a sale of the land under a back-to-back agreement to the preferred developer, were entitled to have regard to the wider benefits that were expected to flow from the contribution that the preferred developer would make to the redevelopment, the proposals for which were to contain a strong element of planning gain. There was to be a requirement to include improvements to other areas of the urban block within which the site to be acquired compulsorily was situated: see paras 38, 39. The value of the planning gain was something that the council was entitled to take into account in its assessment of whether the disposal was achieved on the best commercial terms.

156 The focus in that case was on the terms on which the council proposed to make the assembled site available to the preferred developer. Its facts differ from those in the present case, so I am not to be taken as suggesting that it provides direct authority for the view which I take here. But it does illustrate the extent of the power of disposal that is conferred by this section on the local authority, and it shows how the authority may legitimately have regard to the way the land will be disposed of before it decides to acquire it compulsorily: taking them both together, like the horse and carriage to which I referred earlier. The council decided to use its compulsory powers to purchase the site with a view to its disposal by means of a back-to-back agreement to achieve the development. The site was part of an urban block within which properties owned by the first petitioners and the second respondents were situated. Each had their own interests and their own agendas which were in competition with each other and, as in this case,

their proposals had to be evaluated. The preferred developer was expected to achieve a scheme that would enhance the wider area within which the site itself was situated. Regard was to be had to benefits which it would provide that were extraneous to the site itself, and extraneous too to each of the properties that were to be acquired compulsorily. Among other things, it was to commit itself to supporting an order for regulating traffic on adjacent streets and to provide details of a financial commitment to the area's environmental enhancement. The whole thing was seen as a single package. The acquisition of the properties and their disposal to a developer who would achieve these benefits were each part of the same exercise: for a more complete account of the facts, see 2005 SLT 144, paras 1–16.

157 I would take from that case the proposition that it is legitimate for the acquiring and disposing authority which has to choose between competing proposals for development to have regard to planning benefits that lie outside the perimeter of the site itself. It has not been suggested that it would have been an improper use of the section 233 power for the council to take account of Tesco's commitment to develop the Royal Hospital site in the assessment as to whether a disposal of the land to Tesco was preferable to disposing of it to Sainsbury's. I can see no reason why that should be so if the land was already in the council's ownership and they were faced with a competition between two or more developers who had no interest in the land at all.

158 It was not possible in this case for the council to take these two decisions separately, each without reference to the other. The choice as to whose land to acquire was inevitably linked to the choice of the developer to whom the land was to be disposed of when it was acquired. Section 226 does not concern itself with choices of that kind. To say that it prohibits them would be to read a limitation into the section which is not there. It would unduly inhibit the exercise of the power of compulsory acquisition in a case such as this, where a site that is in need of development is in divided ownership, the owners are in competition with each other for its development and there are sound planning reasons beyond those that section 226(1A) refers to for regarding the proposal of one developer as preferable to that of the other. I would not regard the opportunity that this particular situation gives for achieving planning gain in the wider public interest as transgressing the rule that the power of compulsory purchase can only be used for the purpose for which the power has been conferred. The contrary view risks making it impossible for projects for urban renewal which can only be achieved by using compulsory powers to assemble the site for redevelopment to include measures for improvements in the public interest which lie outside the site's perimeter. As Lord Phillips PSC says (see para 147), it would be unfortunate if a rigid application of the compulsory purchase principles to proposals of that kind were to rob the community of such benefits.

159 For these reasons, and those of Lord Phillips PSC with which I agree and in respectful agreement too with what Elias J said at first instance [2009] EWHC 134 at [38], I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

160 Are a local planning authority, when deciding how to exercise their compulsory purchase powers, precluded in all circumstances, as a matter of

A law, from taking into account public planning benefits (however substantial and obvious) which would result, not directly from the development to be facilitated by the proposed land acquisition, but rather from a contractual obligation attaching to that development? That, crucially, is the issue arising on this appeal.

161 Take the facts of this very case, already fully recounted in the judgment of Lord Collins of Mapesbury JSC, but which may conveniently B and sufficiently be summarised as follows. Two rival supermarket chains, Sainsbury's and Tesco, each own part of a site which is ripe for development ("the site"). Each wishes to develop the site as a supermarket and each has (or is about to obtain) planning permission for such development. There is really nothing to choose between their respective proposals. Neither is willing to sell its share of the site to the other. In these circumstances it is C agreed by all that the local planning authority ("Wolverhampton") must inevitably exercise their compulsory purchase powers under section 226 of the Town and Country Planning Act 1990 (as amended). The question then becomes: who should be chosen to carry out the development of the site and whose land, therefore, should be compulsorily acquired for the purpose? Should Sainsbury's land be acquired so that Tesco may develop the site or vice versa? The issue more particularly arising is whether, in deciding to D choose Tesco as the developer, Wolverhampton acted unlawfully in taking into account Tesco's commitment, if chosen, to redevelop the Royal Hospital site, another site in Wolverhampton's area some half a mile away ("the RHS"), redevelopment which Wolverhampton are anxious to promote but which Tesco would not be prepared to undertake save by way of cross-subsidy?

E **162** It so happens that one of the two rival chains (Sainsbury's) owns 86% of the site, the other (Tesco) 14%. But it is not suggested that this disparity between their respective interests affects the question of law at issue. The same question would arise even if each owned exactly half the site. Plainly the disparity is itself a material consideration and one, indeed, which ultimately could prove decisive in Sainsbury's favour. For present F purposes, however, as Mr Lockhart-Mummery QC for Sainsbury's expressly acknowledged, it can be ignored.

163 Section 226 of the 1990 Act provides so far as material:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the G acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land . . .
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion H or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

164 For present purposes the effect of those provisions in combination can be summarised quite simply as follows: A local authority can (subject to confirmation by the Secretary of State) compulsorily acquire land if they

think, first, that this will facilitate its development (section 226(1)(a)) and, secondly, that this development is likely to contribute to the economic and/or social and/or environmental well-being of their area (section 226(1A)).

165 In the present case it seems to me self-evident that both of these pre-conditions are fully satisfied in respect of each proposed development scheme so that Wolverhampton have a discretion to make whichever CPO they regard to be appropriate, whether of Sainsbury's land or of Tesco's land. The question, I repeat, is whether, in choosing whose land to acquire, Wolverhampton can take into account the additional benefit to their area which would result from Tesco's commitment, if they are enabled to develop the site, also to develop the RHS.

166 It was the Court of Appeal's conclusion below that Wolverhampton were indeed legally entitled to take account of the proposed cross-subsidy which would enable (and commit) Tesco to redevelop the RHS and that this entitlement arose directly under section 226(1A). This subsection, the Court of Appeal held [2009] 3 EGLR 94, para 33, imposes on local planning authorities an express obligation to have regard to such "off-site, or 'external' benefits". Elias J at first instance had held to the contrary [2009] EWHC 134 (Admin) at [35] that, to fall within section 226(1A), well-being benefits had to be generated by the development of the site itself, not by some contractually linked external development. In the only reasoned judgment in the Court of Appeal, Sullivan LJ (at paras 42 and 44) agreed with Elias J that,

> "to fall within section 226(1A) the benefits in question must flow from the redevelopment of [the site]. However . . . [t]he likelihood of the redevelopment of a CPO site leading, whether because of cross-subsidy or for any other reason, to the development or redevelopment of other sites in the authority's area is precisely the kind of wider benefit that subsection (1A) requires the authority to consider."
>
> "[Section 226(1A)] ensures that wider 'well-being' benefits are not ignored, but are always treated as material considerations . . ."

167 I have to say that on this particular issue, in common with the majority of this court, I prefer Elias J's view to that of the Court of Appeal. That, however, does not seem to me the real issue in the case. Section 226(1A), I repeat, does no more than specify a precondition (additional to that in section 226(1)(a)) which has to be satisfied before any power of compulsory acquisition can be exercised. No one doubts that it was satisfied here. Wolverhampton accordingly had a discretion under the section. The critical question then arising is whether the further public benefit which Tesco was offering was or was not a material consideration which Wolverhampton could take into account when deciding how to exercise that discretion. Elias J held that it was. The Court of Appeal, having concluded (wrongly as I believe) that this further benefit had to be regarded as material by virtue of section 226(1A), chose not to deal with the question whether the benefit would in any event have been a material consideration, section 226(1A) apart. As to this Sullivan LJ merely observed, at para 44, that section 226(1A) "does not purport to cut down the considerations that are capable of being material under subsection 226(1)(a)". And that at least must be right: to stipulate, as section 226(1A) does, that the authority must

not exercise their compulsory purchase powers unless they think that the development itself is likely to contribute to the well-being of their area (whether because it will act as a catalyst for other development or provide employment or stimulate other beneficial activity in the area or whatever else) is by no means to stipulate that, the condition being satisfied, this exhausts all the considerations to which the authority can have regard and they must shut their mind to all other possible external benefits which the exercise of their compulsory purchase powers would bring.

168 In addressing the question whether such external benefits are capable of being material considerations in the exercise of compulsory purchase powers under section 226(1)(a), it seems to me helpful to begin by examining what the position would be in the broadly analogous situation of a planning authority considering rival applications for planning permission. Suppose that the competition between the rival supermarket chains was not, as here, as to which should be preferred as developers of a single site by reference to the exercise of the authority's powers of compulsory purchase, but rather as to which should be granted planning permission assuming that each owned a suitable site but there was room in the area only for one supermarket—the very situation which arose in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (between, as it happens, the same competing developers as here). Would an offer such as that made here by Tesco to develop the RHS (probably by way of a planning obligation under section 106 of the 1990 Act) be a "material consideration" within the meaning of section 70(2) of the 1990 Act? If it would, then it is difficult to see why it should not be material also for section 226(1)(a) purposes. If, on the other hand, it would not, then the court would need to be persuaded that wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications.

169 Before going to the House of Lords decision in the *Tesco* case itself it is instructive to take note of two earlier Court of Appeal authorities—*R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78—the essential backdrop to the speeches in the *Tesco* case. Lord Collins JSC having dealt with these at some length, I content myself with the briefest summary of each. *Ex p Monahan* was the Royal Opera House case in which the planning authority were held entitled to have granted permission for an office development notwithstanding that it involved a major departure from the development plan because that would cross-subsidise the refurbishment of the listed opera house. Nicholls LJ recorded (p 121) that counsel for the planning authority (Mr Sullivan QC)

> "frankly accepted that he could discern no legal principle which distinguished between (a) what happens within one building, (b) what happens on two adjoining sites and (c) what happens on two sites which are miles away from each other"

but continued:

> "All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to

> the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites . . . and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme."

As to what the position would have been had the proposed office block been in Victoria, Kerr LJ similarly suggested, at p 117, that "all such cases would . . . involve considerations of fact and degree rather than of principle".

170 The *Plymouth* case (like the *Tesco* case which followed it) involved competitive planning applications by Sainsbury's and Tesco, the council's original intention having been to allow one store only to be built. Each company was therefore invited to say why it should be preferred and both were told that the council would take into account any community benefits offered (provided they were "justifiable in land use planning terms"—the council's published policy). Sainsbury's offer included the construction of a tourist information centre on the site, an art gallery display facility, a work of art in the car park, a bird-watching hide overlooking the river, an £800,000 contribution to the establishment of a park and ride facility in the neighbourhood, and up to £1m for infrastructure works to make a different site suitable for industrial use. Tesco offered financial contribution to a crèche, a wildlife habitat, a water sculpture, and in addition it offered to sell the council a site for a park and ride facility. Both offers were by way of section 106 agreements. In the event, both applications were granted, doubtless to the satisfaction of Sainsbury's and Tesco but not that of the Co-operative Society who promptly challenged both planning permissions on the ground that the council had taken into account immaterial considerations.

171 The Co-operative Society argued that not merely must a community benefit offered under a section 106 agreement satisfy the three tests laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (following *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554) by which the legality of a section 70 condition is to be judged—namely (i) that it has a planning purpose, (ii) that it fairly and reasonably relates to the permitted development and (iii) that it is not *Wednesbury* unreasonable—but it must also be necessary in the sense of overcoming what would otherwise have been a planning to the development. In the leading judgment rejecting this argument and stating that "the only question is whether [the section 106 agreement] fairly and reasonably related to the development", Hoffmann LJ said (p 90) that the only benefits which gave pause for thought were the two substantial sums offered by Sainsbury's as a contribution to work to be done away from the site. The park and ride facility, however, would tend to reduce both traffic heading for the store and use of Sainsbury's own car park by people not actually shopping there. As for the £1m offer, this "was not simply to pay the council £1 million. It was to contribute up to £1m to the actual cost of infrastructure works undertaken by the council within a period of two years at a specific site": p 91.

172 As we shall shortly see, the supposed requirement that section 106 offers, like imposed section 70 conditions, have to "fairly and reasonably

relate to the permitted development" (a requirement held satisfied in the *Plymouth* case) did not survive the decision of the House of Lords in the *Tesco* case [1995] 1 WLR 759 to which I now come.

173 The *Tesco* case (like the *Plymouth* case at the initial stage) concerned rival applications by Sainsbury's and Tesco to develop their respective sites (Sainsbury's in conjunction with Tarmac), there being room in Witney for one store only. Notwithstanding that Tesco's application included an offer of £6·6m to fund in its entirety a new link road, the Secretary of State (who had to decide which of the two proposals to allow) chose to grant Sainsbury's application. Tesco appealed on the ground that the Secretary of State had failed to take account of a material consideration, namely their £6·6m offer. Albeit the appeal failed, it did so not on the basis that the offer was an immaterial consideration but rather because, although material, the Secretary of State had been entitled to give it little or no weight and to prefer Sainsbury's proposal because the Secretary of State thought its site "marginally more suitable": Lord Hoffmann, p 783. The following features of the *Tesco* case seem to me of particular importance: (1) The £6·6m offer was held to be a material consideration notwithstanding that the Secretary of State shared his inspector's view that the relationship between the proposed new development and the funding of the link road was "tenuous" (the development being likely to result only in "slight worsening of traffic conditions"). (2) The only reasoned speeches were given by Lord Keith of Kinkel (with whom the other members of the committee agreed) and Lord Hoffmann. Both of them recognised that, contrary to the Court of Appeal's assumption in the *Plymouth* case, the second *Newbury* test has no application to section 106 agreements. As Lord Hoffmann observed, at p 779:

> "section 70(2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v Epping Forest District Council* [1994] 1 WLR 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable."

Nevertheless, for a planning obligation to be a material consideration which can legitimately be taken into account in granting planning permission, it has to have "some connection with the proposed development which is not de minimis" (Lord Keith, p 770B); it cannot be "quite unconnected with the proposed development": Lord Hoffmann, p 782D. (3) Were it otherwise, said Lord Keith (p 770A), it "could be regarded only as an attempt to buy planning permission". Lord Hoffmann put it rather differently: p 782C–E. The metaphor of "bargain and sale", he suggested, although "vivid":

> "is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the

planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits."

(4) In the *Tesco* case itself, Lord Hoffmann then observed, (p 782G–H), the Secretary of State had in substance accepted the argument that Tesco's "offer to pay for the whole road was wholly disproportionate and it would be quite unfair if [Sainsbury's] was disadvantaged because it was unwilling to match this offer". That, said Lord Hoffmann, "is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers". However, Lord Hoffmann continued (p 783), so too was Tesco's argument (that only if they offered the whole cost of the link road would it be constructed) a perfectly respectable one. Importantly, he then said:

"the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts."

(5) Lord Hoffmann had earlier (p 780) emphasised the distinction to be made between materiality and weight:

"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process."

174 Let me in the light of those authorities return to the question I posed at para 168: would an offer such as Tesco made to Wolverhampton, had it been made in a planning context have been, as a matter of law, a material consideration? To my mind the correct answer to that question should be yes, although plainly the weight (if any) to be given to it would be entirely for the planning authority. And the reason the answer should be yes is quite simply because such an offer could not sensibly have been regarded as "an attempt to buy planning permission" (Lord Keith, at p 770A); on the contrary, it would in my view have had "a sufficient connection" with the proposed development (Lord Hoffmann, at p 782D), "not de minimis": Lord Keith, at p 770A.

175 The proposition that planning consent cannot be bought or sold, although stated nearly a quarter of a century ago to be "axiomatic"

(by Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55, 64), needs to be understood for what it is, essentially a prohibition against the grant of a planning permission for what would otherwise be unacceptable development induced by the offer of some entirely unrelated benefit. What it is *not* is a prohibition against, for example, the grant of permission for a development which is contrary to local planning policy on the basis that it needs to be economically viable to ensure that the site does not remain derelict—see *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806, where, indeed, Woolf J held that no Secretary of State could reasonably have regarded the economic factor in that case as irrelevant. Nor, of course, did the principle prevent office development being permitted in *Ex p Monahan* [1990] 1 QB 87 essentially because the proposed refurbishment of the opera house was financially dependant upon it.

176 *Ex p Monahan*, it must be noted, is *not* authority for the proposition that, but for the development there "forming part of one composite development project" (p 121), the office building would not have been permitted. As was expressly recognised, no discernible legal principle would have supported such a view. In any event *Ex p Monahan* is not binding on this court. That aside, the *Tesco* case [1995] 1 WLR 759 later established that offers such as that in *Ex p Monahan* to refurbish the opera house do not have to "fairly and reasonably relate to the permitted development" (as at the time of *Ex p Monahan* would have been supposed). Had Tesco in the present case offered (uneconomically) to redevelop the RHS to the benefit of the public in consideration of some planning advantage elsewhere in Wolverhampton's area, it is difficult to see why Wolverhampton would have been legally obliged to refuse.

177 Still less does the principle prevent rival developers, in competitive situations such as arose in the *Plymouth* and *Tesco* cases, seeking to outbid each other as to the external benefits their proposals would bring with them—as both those cases amply demonstrate. It is surely one thing to say that you cannot buy a planning permission (itself, as I have sought to show, only in a narrow sense an absolute principle); quite another to say that in deciding as between two competing developers, each of whose proposals is entirely acceptable on planning grounds, you must completely ignore other planning benefits on offer in your area.

178 Let it be assumed, however, contrary to my view but as I understand every other member of this court to have concluded, that, had the present issue arisen in the context of rival applications for planning permission, Tesco's offered redevelopment of the RHS would have had to be characterised as a wholly unconnected planning benefit and so not a material consideration under section 70. That majority view, as Lord Phillips of Worth Matravers PSC himself points out, at para 139, is "not entirely rational" even in a non-competitive planning context; "less rational" still "where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both".

179 Is that approach none the less to apply equally in the present context or, as I contemplated at para 168, is the position that "wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications"?

180 The Court of Appeal thought that the case for regarding Tesco's RHS offer as a material consideration was stronger in the CPO context than had it been made in a planning context. They thought this, first, because of the wide (to my mind over-wide) construction they put upon section 226(1A) itself (para 33); secondly, because they regarded financial viability as yet more important in the CPO context than in the planning context (paras 34–40); and, thirdly, because, whereas planning authorities (subject only to the Secretary of State's call-in powers) are free to grant any planning permissions they wish, CPOs must be confirmed by the Secretary of State (who can therefore prevent any misuse of the local authority's compulsory acquisition powers): para 41. Whilst I have difficulty with that reasoning, I nevertheless agree with Lord Phillips PSC and Lord Hope of Craighead DPSC that, even assuming that Tesco's RHS offer would not have been a material consideration had Wolverhampton been determining a planning application, it was none the less material in the context of the decisions the council were in fact required to take here. These were, first, whether Wolverhampton should compulsorily acquire land to facilitate the development of the site (for which both rival developers had the requisite planning permission) and, if so, second, whose land should be acquired—should it be Tesco's land to enable Sainsburys to develop the site or vice versa (i e who should be the preferred developer)?

181 I understand all of us to agree that Wolverhampton were amply entitled to exercise their section 226 power of compulsory acquisition here: as I noted at paras 164 and 165 above, self-evidently both the section 226(1)(a) and the section 226(1A) conditions were satisfied and the development of the site was only going to take place if Wolverhampton did indeed exercise this power. As Lord Hope DPSC observes, however, this power could not be exercised until Wolverhampton had also decided the second question before them: which of the two developers to choose. There seems to me no basis in authority or reason for holding that in reaching this second decision Wolverhampton were required to ignore the off-site benefit (unconnected though I am now assuming it to be) on offer from Tesco. I would on the contrary hold it to be a material consideration for the purposes of deciding which of the rival developers to prefer and whose land, therefore, should be the subject of compulsory purchase under section 226. That is precisely what was held at first instance here and I can but echo Lord Phillips PSC's plaudits for the passage in Elias J's judgment which he quotes in full at para 146.

182 It is essentially on this basis, rather than by reference to Wolverhampton's power of disposal of acquired land under section 233, that for my part I would hold Tesco's offer to have been a material consideration (even assuming that it would not have been so in the planning context). I think it difficult for Tesco to invoke section 233 here. True, section 233 would to my mind plainly entitle a planning authority to have regard to an off-site benefit such as Tesco offered here in deciding how to exercise their section 233 power. (Although, as Baroness Hale of Richmond and Lord Mance JJSC point out, no wholly extraneous benefits were offered or considered in *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get what I called there (para 68) "the best overall deal available"—that, by the same token as a cash bidding match would have been

possible, so too would have been an offer of other benefits, however extraneous. Why ever not? I do not regard this as inconsistent with what I said at para 75 of my judgment in the *Standard Commercial* case—quoted by Lord Walker of Gestingthorpe JSC at para 85: my quarrel there was with the disappointed developer's submission that the planning authority should itself have initiated a bidding war. It is quite another thing to say that they are precluded by law from accepting offers of money or other extraneous benefits when they come to dispose of a compulsorily acquired development site.)

183 My difficulty with section 233, however, is, as Baroness Hale JSC points out, that it puts the cart before the horse. Unless and until the Secretary of State confirms a section 226 compulsory purchase order, the local authority has no land to dispose of. I do not see the council here, therefore, as entitled to have regard to their section 233 powers when exercising their section 226 powers. I would be concerned also that on this approach the council might be statutorily *obliged* to accept Tesco's offer in order to obtain "the best overall deal available"—instead of merely being required to regard it as a material consideration, it being a matter for the council (and, in subsequent confirmation proceedings, the Secretary of State) to give it such weight, if any, as they thought right. (Indeed, as I observed earlier (at para 162), it might be that the Secretary of State, unlike Wolverhampton, will regard Sainsbury's substantial larger interest in the site as the determining factor here—rather as the Secretary of State in the *Tesco* case [1995] 1 WLR 759, thought it only fair to Sainsbury's to give no weight to Tesco's "wholly disproportionate" £6·6m offer to fund the link road: see para 173(4) above. That, however, in this case as in that, would be entirely a matter for the planning authorities, not for this court.)

184 All that said, I do not regard section 233 as central to either Lord Phillips PSC's or Lord Hope DPSC's reasoning in this case. Still less did it colour Elias J's approach; indeed, section 233 finds no mention whatever in his judgment.

185 Really what it all comes to is this. It is irrational and unsatisfactory that (in the view of the majority) Tesco's offer here would have had to be ignored in a competitive planning context. It is quite unnecessary and (as Lord Phillips PSC and Lord Hope DPSC observe) would be unfortunate if this irrationality were carried over into the compulsory purchase context within which the present issue arises.

186 In the result I would answer the question I posed in para 160: no, not even if the benefits are wholly unconnected with the proposed development, and dismiss this appeal. As indicated, I would do so essentially for the reasons given by Elias J at first instance rather than those given by the Court of Appeal.

Appeal allowed.
Declaration accordingly.

JILL SUTHERLAND, Barrister

The Queen on the application of Save Stonehenge World Heritage Site Limited v Secretary of State for Transport v Highways England, Historic Buildings and Monuments Commission for England ("Historic England")

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
30 July 2021

Case No: C0/4844/2020

High Court of Justice Queen's Bench Division Planning Court

[2021] EWHC 2161 (Admin), 2021 WL 03276048

Before: The Hon. Mr Justice Holgate

Date: 30/07/2021

Hearing dates: 23rd, 24th and 25th June 2021

Representation

David Wolfe QC and Victoria Hutton (instructed by Leigh Day) for the Claimant.
James Strachan QC and Rose Grogan (instructed by The Government Legal Department) for the Defendant.
Reuben Taylor QC (instructed by Pinsent Masons) for the First Interested Party.
Richard Harwood QC and Christiaan Zwart (instructed by Shoosmiths) for the Second Interested Party.

Approved Judgment

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Mr Justice Holgate:

Introduction

1. The claimant, Save Stonehenge World Heritage Site Limited, seeks to challenge by judicial review the decision dated 12 November 2020 of the defendant, the Secretary of State for Transport (”SST”), to grant a development consent order (”DCO”) under s.114 of the Planning Act 2008 (”the PA 2008”) for the construction of a new route 13 km long for the A303 between Amesbury and Berwick Down which would replace the existing surface route. The new road would have a dual instead of a single carriageway and would run in a tunnel 3.3 km long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site (”WHS”).

2. The application for the order was made by the first interested party, Highways England (”IP1”), a strategic highways company established under the Infrastructure Act 2015 (” IA 2015 “).

3. The second interested party, Historic England (”IP2”), was a statutory consultee in relation to the application and is the government’s statutory advisor on the historic environment. IP2 has long been involved in the management of Stonehenge and since 2014 with the current road proposals.

4. The claimant is a company formed by the supporters of the Stonehenge Alliance, which is an unincorporated, umbrella campaign group, which co-ordinated the objections of many of its supporters before the statutory examination into the application.

5. On 16 November 1972 the General Conference of UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (”the World Heritage Convention” or “ the Convention “). The UK ratified the Convention on 29 May 1984. In 1986 the World Heritage Committee (”WHC”) inscribed Stonehenge and Avebury as a WHS having “Outstanding Universal Value” (”OUV”) under article 11(2).

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6. In June 2013 the WHC adopted a statement of the OUV for the WHS which included the following:-

> ”The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses, Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. At Avebury, they include Windmill Hill, the West Kennet Long Barrow, the Sanctuary, Silbury Hill, the West Kennet and Beckhampton Avenues, the West Kennet Palisade Enclosures, and important barrows.”

The WHS is said to be of OUV for qualities which include the following:-

> • Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.
>
> • There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age.”

The phrase “landscapes without parallel” has featured prominently in the material before the court.

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7. The Stonehenge part of the WHS occupies about 25 sq. km and contains over 700 known archaeological features of which 415 are protected as parts of 175 scheduled ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979 (see para. 6.11.1 of the Environmental Statement ("ES") for the project). For the assessment of impacts on heritage assets, either directly or upon their setting, the ES relied upon a primary study area up to 500m from the boundary of the proposed development. To address impacts on the setting of other high value assets a secondary study area was used extending to 2 km from that boundary. There are 255 scheduled monuments within the 2 km area, of which 167 fall entirely or partly within the WHS. Within that area there are also:-

> 6 Grade I listed buildings
>
> 14 Grade II* listed buildings
>
> 209 Grade II listed buildings
>
> 8 conservation areas.

8. There are 1142 known, non-designated heritage assets within the 500m study area, of which 11 would be directly impacted by the scheme. These 11 are relevant to ground 1(i) of the challenge.

9. Paragraphs 11.1.14 to 11.1.17 of the World Heritage Site Management Plan adopted on 18 May 2015 describe the background to the problem concerning the existing A303. Paragraph 11.1.14 states:-

> "….. the A303 continues to have a major impact on the integrity of the wider WHS, the setting of its monuments and the ability of visitors to explore the southern part of the Site. The A303 divides the Stonehenge part of the WHS landscape into northern and southern sections diminishing its integrity and severing links between monuments in the

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> two parts. It has significant impacts on the setting of Stonehenge and its Avenue as well as many other monuments that are attributes of OUV including a number of barrow cemeteries. The road and traffic represent visual and aural intrusion and have a major impact on the tranquillity of the WHS. Access to the southern part of the WHS is made both difficult and potentially dangerous by the road. In addition to its impacts on the WHS, reports indicate that the heavy congestion at certain times has a negative impact on the economy in the South West and locally and on the amenity of local residents."

10. Proposals to improve the A303 date back to the 1990s when the process of identifying alternative routes began. In 2002 the then Highways Agency proposed a dual carriageway scheme with a tunnel 2.1 km long running past Stonehenge. A public inquiry was held in 2004 (para. 11.1.15). The Inspector's report in 2005 recommended in favour of the scheme proceeding. But in view of increased tunnelling costs, the government decided to review whether the scheme still represented the best option for improving the A303 and the setting of Stonehenge, as well as value for money. The government concluded that, because of significant environmental constraints across the whole of the WHS, there were no acceptable alternatives to the 2.1 km tunnel, but the scheme costs could not be justified at that time. The need to find a solution for the negative impacts of the A303 remained a key challenge (para. 11.1.16). In 2014 the SST adopted a Road Investment Strategy ("RIS") for the purposes of the IA 2015 which identified the A303 corridor for improvements (para. 11.1.17). This included the scheme which became the subject of the application for the DCO.

11. In summary, IP1's scheme comprises the following components, running from west to east:-

- A northern bypass of Winterbourne Stoke
- A new grade-separated junction with twin roundabouts between the A303 and A360 to the west of, and outside, the WHS replacing the existing Longbarrow roundabout
- "The western cutting" – a new dual carriageway within the WHS in a cutting 1 km long connecting with the western portals of the tunnel
- A tunnel 3.3 km long running past Stonehenge
- A new dual carriageway from the eastern tunnel portals to join the existing A303 at a new grade-separated junction (with a flyover) between the A303 and A345 at the Countess roundabout, of which 1 km would be in cutting ("the eastern cutting").

The scheme includes a number of "green bridges." One bridge (150 m in width) over the

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western cutting would be located 150 m inside the western boundary of the WHS (which follows the line of the A360).

12. The proposals for the western cutting, western tunnel portals and the Longbarrow junction have attracted much opposition. In the current design, the cutting is about 1 km long, 7-11m deep, about 35m wide between retaining walls and 60m wide between the edges of sloping grass embankments (PR 2.2.14 and 5.7.221).

13. In 2017 the WHC expressed concerns that the proposed tunnel (then 2.9 km long) and cuttings would adversely affect the OUV and asked the UK to consider a non-tunnel bypass to the south of the WHS (”route F10”) or a longer tunnel (approximately 5 km in length) which would remove the need for cuttings within the WHS. In 2019 the WHC commended the increase in the length of the tunnel to 3.3 km and the green bridge over the western cutting. However, it still expressed concerns about the exposed dual carriageways within the WHS, particularly the western cutting. The WHC urged the UK to pursue a longer tunnel “so that the western portal is located outside” the WHS. But it no longer asked the UK to pursue the F10 option.

14. The application for a DCO was the subject of a statutory examination before a panel of five inspectors between 2 April and 2 October 2019. The report of the Panel was submitted to the Department (”DfT”) on 2 January 2020.

15. During the Examination the option of a longer tunnel of 4.5 km was considered. This would omit the western cutting.

16. In its report the Panel made the following observation about the western cutting at PR 5.7.225, in contrast to the removal of a surface road such as the existing A303:-

> ”On the other hand, the current proposal for a cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible.”

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17. The Panel recommended that the DCO should not be granted (PR 7.5.25). In its final conclusions the Panel said that the scheme would have a "significantly adverse effect" on the OUV of the WHS, including its integrity and authenticity. Taking this together with it impact upon the "significance of heritage assets through development within their settings", the scheme would result in "substantial harm" (PR 7.5.11). The Panel considered that the benefits of the scheme would not be substantial and, in any event, would not outweigh the harm to the WHS (PR 7.5.21). In addition, the totality of the adverse impacts of the proposed scheme would strongly outweigh its overall benefits (PR 7.5.22). Those impacts included "considerable harm to both landscape character and visual amenity" (PR 7.5.12). Nonetheless, in PR 7.5.26 the Panel said this:-

> "….. the ExA recognises that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the Examination." ("ExA" referring to the Examining Authority or Panel)

The Panel acknowledged that the SST might reach a different conclusion on adverse impacts, or the weight to be attached to planning benefits, and consequently on the overall planning balance, which might result in a DCO being granted.

18. In his decision letter the SST preferred the views of IP2 on the level of harm to the spatial, visual relations and settings of designated assets, namely that the harm would be "less than substantial" rather than "substantial" (DL 34). In DL 43 the SST specifically noted the concerns raised by interested parties and the Panel about the adverse impacts from the western cutting and portals, the Longbarrow junction and, to a lesser extent, the eastern approach. However, on balance, and taking into account the views of IP2 and Wiltshire Council, the SST concluded that any harm caused to the WHS as a whole would be less than substantial. In DL 80 the SST accepted advice from IP2 that the harm to "heritage assets, including the OUV," would be less than substantial. In DL 81 the SST disagreed with the Panel's views that the level of harm to the landscape would conflict with the National Policy Statement for National Networks ("NPSNN") and concluded that that harm would be outweighed by beneficial impacts throughout most of the scheme, so that landscape and visual impacts had a neutral effect rather than "considerable" negative weight, as the Panel had found. Ultimately, after weighing all the other considerations, the SST decided that the need for the scheme,

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together with its other benefits outweighed any harm (DL 87).

19. Plainly, this is a scheme about which strongly divergent opinions are held. It is therefore necessary to refer to what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2021] PTSR 553 at [6]* :-

> ”It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully.”

20. The present judgment can only decide whether the decision to grant the DCO was lawful or unlawful. It would therefore be wrong for the outcome of this judgment to be treated as either approving or disapproving the project. That is not the court’s function.

21. I would like to express my gratitude to counsel for their helpful written and oral submissions and to the legal teams for the assistance they have given. In particular, the parties are to be commended for having produced a very helpful and comprehensive statement of common ground (”SOCG”).

22. The claimant raises 5 grounds of challenge which it has summarised in paragraph 7 of its

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skeleton:-

> Ground 1 : By considering the impact on the 'historic environment' as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the Secretary of State has unlawfully failed to comply with and apply the NPSNN and the applicable local development plan policies. The Secretary of State has, in any event, unlawfully failed to give adequate and intelligible reasons as to (1) the significance of each of the affected heritage assets (2) the impact upon each asset and (3) the weight to be given to that impact.
>
> Ground 2: The Secretary of State disagreed with the assessment of his Expert Panel, without - unlawfully - there being any proper evidential basis for so doing. That happened in part because the Secretary of State misconstrued the advice of Historic England. In any event, the Secretary of State's reasons for disagreeing with the advice of his Expert Panel were unlawfully inadequate and unintelligible.
>
> Ground 3: The Secretary of State adopted an unlawful approach to the consideration of heritage harm under paragraphs 5.131-5.134 of the NPSNN.
>
> Ground 4: The Secretary of State's approach to the World Heritage Convention was unlawful.
>
> Ground 5: The Secretary of State failed to consider mandatory material considerations, namely: (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative.

23. On 16 February 2021 I ordered that the application for permission to apply for judicial review be adjourned to a "rolled up" hearing at which both the question of permission and substantive legal issues would be considered. A case management hearing took place on 23 February 2021 at which the parties successfully co-operated in putting forward directions to enable the court to handle the issues, and the potentially large amount of material, fairly and efficiently.

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24. On 7 April 2020 the claimant made an application for permission to amend the Statement of Facts and Grounds to add ground 6, which alleged that the decision to grant the DCO had been vitiated by actual or apparent pre-determination and for an order for disclosure in relation to that ground. The application was opposed and on 18 May 2021 Waksman J refused it on the papers. The claimant renewed its application to an oral hearing and the matter came before me on 10 June 2021. Like Waksman J, I found the proposed new ground to be wholly unarguable and so dismissed the application. The judgment is at *[2021] EWHC 1642 (Admin)* .

25. The remainder of this judgment is set out under the following headings:-

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(i) Failure to take into account local policies	225-231
(ii) Whether the business case ought to have taken	232-241
into account the findings on heritage harm	
(iii) Alternatives to the proposed western cutting and	242-290
portals	
Conclusions	291-294
Appendix 1: Legal principles agreed between the parties	
Appendix 2: paragraphs 25 to 43 and 50 of the decision letter	

Planning legislation for nationally significant infrastructure projects

26. The proposed development is a nationally significant infrastructure project for the purposes of the PA 2008 . Accordingly, development consent is required under that legislation (s.31). The requirements to obtain other approvals such as planning permission and scheduled ancient monument consent are disapplied by s.33.

27. The statutory framework for the designation of national policy statements and for obtaining a DCO has been summarised in a number of recent cases and need not be repeated here (see e.g. *R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787 at [5]-[8]* ; *R (Spurrier) v Secretary of State for Transport* at [21]-[40] and [91]-[112]; *R (Client Earth) v Secretary of State for Business, Energy and Industrial*

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Strategy [2020] PTSR 1709 at [26]-[52] and [105]- [116]; *[2021] EWCA Civ 43 at [67-68] and [104 - 105]*); *R (Friends of the Earth Limited) v Secretary of State for Transport [2021] PTSR 190 at [19]-[38]*). None of the analysis in those passages was in dispute here.

28. Section 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply to the determination of applications for a DCO. But instead regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 (SI 2010 No. 305) ("the 2010 Regulations") provides:-

> "(1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

29. The project constituted EIA development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the EIA Regulations 2017 ") applied.

30. Regulation 4(2) prohibits the granting of a DCO "unless an EIA has been carried out in respect of that application." Regulation 5(1) defines EIA as a process consisting of (a) the preparation of an ES, (b) compliance with publicity, notification and consultation requirements in the EIA Regulations 2017 on the application and the ES, and (c) compliance

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in this case with regulation 21.

31. Regulation 21(1) imposed the following obligations on the Secretary of State:-

> ”When deciding whether to make an order granting development consent for EIA development the Secretary of State *must* —
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.”

”Environmental information” is defined by regulation 3(1) as including the ES, any further information added to the ES, and representations made by consultees or other persons about the effects of the development on the environment.

32. The EIA “must identify, describe and assess in an appropriate manner” “the direct and indirect significant effects of the proposed development” on *inter alia* “cultural heritage” (regulation 5(2)).

33. Regulation 14 defines what must be contained in an ES, including “the likely significant effect of the proposed development on the environment” (regulations 14(2)(b) and also:-

> ”a description of the reasonable alternatives studied by the applicant,

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> which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment" (regulation 14(2)(d))

This is repeated in paragraph 2 of schedule 4 (linked to regulation 14(2)(f)). Paragraph 3 of schedule 4 requires the ES to contain a description of the relevant aspects of the current state of the environment, the "baseline scenario." As we shall see, the effects of the current A303 on the environment, including heritage assets, formed an important part of the assessment of the changes in environmental impact resulting from the proposed scheme.

34. Regulation 5(5) provides

> "The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

This provision acknowledges that a Minister or relevant authority may not themselves have "sufficient expertise" to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has "access" to sufficient expertise for that purpose. That expertise will include the officials within the Minister's department and also the Panel of Inspectors reporting on its assessment of the environmental information and of the statutory examination of the application for a DCO.

35. Because in this case an NPS had taken effect, s.104 of the PA 2008 was applicable. Accordingly, by s.104(2) the SST was required to have regard to *inter alia* the NPSNN. Section 104(3) required the SST to "decide the application in accordance with" the NPSNN "except to the extent that one or more of subsections (4) to (8) applies." Section 104(4) to (8) provides:-

> ”(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.”

The legal issues in this case are particularly concerned with s.104(3), (4) and (7) . It is common ground that the World Heritage Convention was an “international obligation” falling within s.104(4) .

36. Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO.

National Policy Statement for National Networks

37. The NPSNN was published on 17 December 2014 and formally designated under s.5 of the PA 2008 on 14 January 2015 following consideration by Parliament in accordance with ss.5(4) and 9 .

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38. Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:-

> ”Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act , there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act .”

39. Paragraph 4.3 provides:-

> ”4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:
>
> • its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
>
> • its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts.”

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40. Paragraph 4.5 lays down a requirement for a business case:-

> ”Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department’s Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State’s consideration of the adverse impacts and benefits of a proposed development….”

This paragraph is relevant to ground 5(ii).

41. Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:-

> ”4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:
>
> • The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant’s choice, taking into account the environmental effects.
>
> • There may also be other specific legal

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> requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives.
>
> • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).

> 4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

42. Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of "heritage asset" and "significance":-

> "Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called 'heritage assets'. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset's

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> physical presence, but also from its setting."

43. The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (para. 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:-

> "Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance."

This paragraph is relevant to ground 1(i).

44. Paragraphs 5.128 and 5.129 state that the Secretary of State should seek to identify and assess the significance of any heritage asset which, or the setting of which, may be affected by a proposed development, including the nature of that significance and the value of the asset. Paragraph 5.129 says:-

> "In considering the impact of a proposed development on any heritage assets, the Secretary of State should take into account the particular nature of the significance of the heritage asset and the value that they hold for this and future generations. This understanding should be used to avoid or minimise conflict between their conservation and any aspect of the proposal"

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45. Para.5.130 states:-

> ”The Secretary of State should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution that their conservation can make to sustainable communities – including their economic vitality…..”

46. Paragraphs 5.131 and 5.132 set out the following general principles:-

> ”5.131 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset’s conservation. The more important the asset, the greater the weight should be. Once lost, heritage assets cannot be replaced and their loss has a cultural, environmental, economic and social impact. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. Given that heritage assets are irreplaceable, harm or loss affecting any designated heritage asset should require clear and convincing justification. Substantial harm to or loss of a grade II Listed Building or a grade II Registered Park or Garden should be exceptional. Substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, Scheduled Monuments, grade I and II* Listed Buildings, Registered Battlefields, and grade I and II* Registered Parks and Gardens should be wholly exceptional.
>
> 5.132 Any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification that will be needed for any loss.”

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47. Paragraphs 5.133 and 5.134 lie at the heart of much of the claimant's case under grounds 1 to 3. They set out what was described in argument as a "fork in the road" in the decision-making process. The policy test to be applied is more strict where a proposal would cause "substantial harm" to, or total loss of, the significance of a designated heritage asset, as opposed to "less than substantial harm." In the former case,

> "substantial public benefits" are required to outweigh the heritage loss or harm, which must also be shown to be necessary in order to deliver those benefits. In the latter case, the policy simply requires the heritage harm to be weighed against "public benefits":-
>
> > "5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, …
> >
> > 5.134 Where the proposed development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

48. It is common ground for the purposes of this claim that there is no material difference

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between paragraphs 5.133 and 5.134 of the NPSNN and their counterparts in paragraphs 195 and 196 of the National Planning Policy Framework (”NPPF”) (SOCG at paras. 63-4).

Development plan and other policies

Wiltshire Core Strategy

49. Wiltshire Council adopted the Wiltshire Core Strategy in January 2015 as part of the statutory development plan.

50. Core Policy 6 states:-

> ”Stonehenge
>
> The World Heritage Site and its setting will be protected so as to sustain its Outstanding Universal Value in accordance with Core Policy 59. “

51. Core Policy 58 states:-

> ” Ensuring the conservation of the historic environment Development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance, including:
>
> i. nationally significant archaeological remains
>
> ii. World Heritage Sites within and adjacent to

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> Wiltshire
>
> iii. buildings and structures of special architectural or historic interest
>
> iv. the special character or appearance of conservation areas
>
> v. historic parks and gardens
>
> vi. important landscapes, including registered battlefields and townscapes.

> Distinctive elements of Wiltshire's historic environment, including non-designated heritage assets, which contribute to a sense of local character and identity will be conserved, and where possible enhanced. The potential contribution of these heritage assets towards wider social, cultural, economic and environmental benefits will also be utilised where this can be delivered in a sensitive and appropriate manner in accordance with Core Policy 57 (Ensuring High Quality Design and Place Shaping) "

52. Core Policy 59 states:-

> "The Stonehenge, Avebury and associated sites World Heritage Site
>
> The Outstanding Universal Value (OUV) of the World Heritage Site will be sustained by:
>
> i. giving precedence to the protection of the

> World Heritage Site and its setting
>
> ii. development not adversely affecting the World Heritage Site and its attributes of OUV. This includes the physical fabric, character, appearance, setting or views into or out of the World Heritage Site
>
> iii. seeking opportunities to support and maintain the positive management of the World Heritage Site through development that delivers improved conservation, presentation and interpretation and reduces the negative impacts of roads, traffic and visitor pressure
>
> iv. requiring developments to demonstrate that full account has been taken of their impact upon the World Heritage Site and its setting. Proposals will need to demonstrate that the development will have no individual, cumulative or consequential adverse effect upon the site and its OUV. Consideration of opportunities for enhancing the World Heritage Site and sustaining its OUV should also be demonstrated. This will include proposals for climate change mitigation and renewable energy schemes."

The Stonehenge World Heritage Site Management Plan

53. This document contains a number of detailed policies. Policy 1d states:- "Development which would impact adversely on the WHS, its setting and its attributes of OUV should not be permitted"

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54. Policy 3c states:-

> ”Maintain and enhance the setting of monuments and sites in the landscape and their interrelationships and astronomical alignments with particular attention given to achieving an appropriate landscape setting for the monuments and the WHS itself.”

55. Policy 6a states:-

> ”Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS.”

The World Heritage Convention

56. Article 1 defines “cultural heritage” in terms of monuments (including elements or structures of an archaeological nature), groups of buildings and sites which are of “outstanding universal value.”

57. Article 3 provides that it is for each State Party to the Convention to identify properties within its territory falling within *inter alia* Article 1. Each State Party must submit to the WHC an inventory of all such properties (article 11(1)). From that inventory the WHC compiles and publishes a list of those properties which “it considers as having outstanding universal value” (article 11(2)).

58. Articles 4 and 5 lie at the heart of the claimant’s ground 4. They state:-

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”Article 4

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this

Convention shall endeavour, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.”

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59. The WHC has issued "Operational Guidelines for the Implementation of the World Heritage Convention" (July 2019). Paragraphs 77 – 78 set out criteria for identifying whether an asset has OUV to merit inscription as a WHS. Paragraph 78 states that a property "must also meet the conditions of *integrity* and *authenticity* and must have an adequate protection and management system to ensure its safeguarding". The concepts of authenticity and integrity are explained respectively in paragraphs 79 to 86 and 87 to 95. Authenticity is concerned with the ability to understand the value attributable to a heritage asset (para. 80). Properties meet the conditions of authenticity if "their cultural values …. are truthfully and credibly expressed through a variety of attributes …." which include location and setting (para. 82). Integrity is "a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes" (para. 88). Paragraph 96 states that "Protection and management of World Heritage properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time." The Panel summarised the concepts of integrity and authenticity in its report at PR 5.7.314 and 5.7.317-8.

Legal principles

60. The parties have helpfully agreed in the SOCG a number of legal principles which it is appropriate to record in Appendix 1 to this judgment.

61. With regard to paragraph 1e of the Appendix and the law on "obviously material considerations", *ClientEarth [2020] PTSR 1709 at [99]* has been approved by the Court of Appeal in *R (Oxton Farm) v Harrogate Borough Council [2020] EWCA Civ 805 at [8]* . The principles have been set out more fully by the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport [2021] PTSR 190 at [116-121]* .

62. On the issue of whether as a matter of fact a Minister did take into account a particular factor, it is well-established that a Minister only has regard to matters of which he knows or

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which are drawn to his attention, for example in briefing material or by a precis (see *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26-38]* and *Revenue and Customs Commissioners v Tooth* [2021] 1WLR 2811 at [70]).

63. However, the mere fact that a Minister did not know about, or have his attention drawn to, a relevant consideration is insufficient by itself to vitiate his decision. A claimant needs to go further and demonstrate that relevant legislation mandated, expressly or by implication, that the consideration be taken into account. Otherwise, he must show that the consideration was so "obviously material" that a failure to take it into account would be irrational; it would not accord with the intention of the legislation. This is the familiar irrationality test in *Wednesbury* (see *National Association of Health Stores* at [62-3] and [73-5]; *Oxton Farm* at [8]; *Friends of the Earth* at [116-9]).

64. In *National Association of Health Stores* the Court of Appeal approved the following passages from the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; *(1986) 162 CLR 24*):- Gibbs CJ held at [3]:-

> "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law. "

Brennan J held at [18]:-

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which

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> give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.

and at [27]:-

> The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision."

65. It is plain from these authorities that in considering the legal adequacy of the briefing provided to a Minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a precis of material which the Minister is

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"bound to have regard to." To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application (see e.g. *R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) at [91]-[94]*).

66. Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a Minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of Inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a Minister to inform him of all the matters which he is legally obliged to take into account.

67. In the present case it is common ground that the relevant briefing materials before the SST comprised the Panel's report and the draft decision letter prepared by officials, as well as the briefing notes they submitted from time to time. Mr Strachan QC said on instructions that there was no material difference between the draft decision letter which accompanied the final briefing note and the formal decision issued on 12 November 2020 following final Ministerial approval on 5 November. The claimant did not ask the court to require the draft to be produced and did not take issue with that position. In effect, the parties have been content to proceed on the basis that Mr Strachan's statement is correct.

The Environmental Statement

68. As the Panel reported (PR 5.7.18.) chapter 6 of the ES with its appendices, assessed the effect of the proposed development on the significance of designated and non- designated heritage assets (including the WHS) within the two study areas, either through physical impact or by affecting their setting. A separate Heritage Impact Assessment ("HIA") was provided to deal with the impact of the scheme on the OUV of the WHS. It addressed both designated and non-designated assets, both within and without the WHS, relevant to its OUV, together with impacts on the character of the setting of the WHS (PR 5.7.22) in accordance with Guidance issued by the International Council on Monuments and Sites ("ICOMOS") (see ES paras. 6.3.1 to 6.3.2).

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69. Chapter 3 of the ES dealt with IP1's assessment of alternative options to the proposed scheme.

70. The ES described in a conventional manner the significance of the scheme's effects on assets, using criteria to assess the significance or value of the asset, the "setting contribution" and the magnitude of the impact, whether adverse or beneficial (PR 5.7.20).

71. Paragraph 6.6.59 of the ES explains that for the assessment in the ES and HIA of both the baseline scenario (with the existing A303) and the impacts of the proposed scheme, the analysis identified some 39 "asset groupings" to reflect the disposition and significance of some of the monuments within the WHS and wider landscape. This was said to be an established approach endorsed in a joint mission report by the WHS and ICOMOS in 2015. IP2 agreed with this approach in the present case. "The consideration of related assets as part of groups allows for the potential of different levels and types of impact on individual components of individual asset groups extending over large areas to be assessed" (paras. 6.10.6 to 6.10.8 of IP2's representations to the Panel in May 2019). In addition, the ES and HIA made assessments of the impacts on certain individual assets and their settings.

72. The ES arrived at a range of impacts on different assets from different parts of the scheme, some adverse, some neutral and some beneficial. In particular, this was not a proposal for an entirely new road. The scheme would *remove* the existing A303 which, it is generally accepted, has its own detrimental impacts on heritage assets. Accordingly, it was unavoidable that in assessing the impacts of the proposal on any particular asset or grouping of assets, the judgments expressed in the ES and HIA had to compare the effects of the existing A303 as part of the baseline. To do otherwise would have been unrealistic. That approach was not criticised during the hearing. In some instances the ES state that the proposed scheme would improve the existing position by reducing the level of net harm or producing a net benefit, in others the end result is assessed as harmful *per se* .

73. IP1's overall assessment was that the proposed development would not cause substantial harm to any designated heritage asset, and for many the effects would be beneficial. It was then said that the substantial benefits of the scheme would outweigh the less than substantial harm caused to the significance of some heritage assets (PR 5.7.21).

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74. The HIA assessed the proposed scheme in relation to the 7 attributes of the OUV of the WHS:-

> ”(1) Stonehenge itself as a globally famous and iconic monument.
>
> (2) The physical remains of the Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (3) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (4) The design of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the skies and astronomy.
>
> (5) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other.
>
> (6) The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel.
>
> (7) The influence of the remains of the Neolithic and Bronze Age funerary and ceremonial monuments and their landscape setting on architects, artists, historians, archaeologists and others.”

The HIA also assessed the effect of the development on the “authenticity” and the “integrity” of the WHS.

75. IP1 concluded that the scheme would have a slightly adverse effect on two OUV attributes but a beneficial effect on the remaining five. They also judged that the proposal would have a slightly beneficial effect on the authenticity and integrity of the WHS and thus, viewed overall, a slightly beneficial effect on all three criteria, OUV attributes, authenticity and integrity (PR 5.7.25).

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76. Many of the impacts of the proposed development do not involve direct loss of assets. They are the subject of mitigation measures in the Outline Environmental Management Plan (”OEMP”) and the Detailed Archaeological Mitigation Strategy (”DAMS”). The former effectively provides a code of construction practice and the latter a detailed framework for the preparation, approval and implementation of plans for site-specific investigation and archaeological method statements (PR 5.7.33). The OEMP and DAMS are themselves important documents which gave rise to significant issues during the Examination (see the Panel's "second main issue" at PR 5.7.151-5.7.205).

77. The Panel summarised IP1's case on the *overall* heritage benefits of the scheme at PR 5.7.29:-

> ”• The removal of the A303 and its traffic will greatly improve the setting of the stone circle and numerous monuments and monument groups across the central part of the WHS. Visitors will be able to appreciate the stone circle and interrelationships with numerous monuments and monument groups without the sight and sound of traffic intruding on their experience. This will help to conserve and enhance the WHS and sustain its OUV.
> • The Scheme will also remove the intrusion of vehicles and vehicle lights upon the mid-winter sunset solstitial alignment and restore the relationship between the stone circle and the Sun Barrow. It will also allow the removal of the lit junction at Longbarrow Roundabout, which currently results in night-time light spill and light pollution on the western edge of the WHS, contributing to improvements in the experience of dark skies.
> • The removal of the A303 will reconnect the Avenue where it is currently severed by the existing road.
> • The existing road as it passes through the WHS will be altered for use by NMUs allowing safer exploration of the WHS east to west.
> • The Scheme would afford safer NMU connections using north- south Public Rights of Way, currently severed by the existing surface A303.
> • Removal of Longbarrow Roundabout and the conversion of the A303 and part of the A360 to NMU routes, immediately adjacent to the Winterbourne Stoke Crossroads complex of burial mounds, will allow improvements to the immediate landscape context and setting of this important barrow group.
> • The construction of the Scheme will improve visitor's enjoyment and experience of the WHS landscape as a whole and provide opportunities for improved interpretation and presentation of the WHS.
> • The construction of the Scheme will require advanced archaeological works to record archaeological remains in advance of Proposed Development construction. This will present educational and community outreach opportunities working sensitively and in close collaboration with key heritage stakeholders."

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Views of parties at the Examination

78. A number of parties strongly opposed the proposal. The claimant comprised a group of five NGOs, which included the British Archaeological Trust. They criticised the ES and HIA and supported the objections of the Consortium of Archaeologists (”COA”) and the Council for British Archaeology (”CBA”) (see e.g. PR at 5.7.105-5.7.128). The concerns and objections of the WHC and ICOMOS were summarised at, for example, PR 5.7.73-5.7.79 and 5.7.84-5.7.98.

79. Wiltshire Council, as the local planning authority, provided a local impact report under s.60 of the PA 2008 , addressing the impact of the scheme on the authority’s area. The Council considered that the removal of the existing A303 would be beneficial to the setting of Stonehenge and many groups of monuments contributing to its OUV. The removal of the existing Longbarrow roundabout would also bring benefits to the Winterbourne Stoke group of barrows.

80. The Council considered that the most significant negative impact would be from the dual carriageway, cutting and portals in the western part of the WHS. There would be harmful visual effects, impacts on the settings of key monument groups expressing attributes of the OUV and spatial severance, which would be difficult to avoid with the length of tunnel proposed. The Council accepted that the principles and commitments in the OEMP would enable the detailed design to accord with the aims and objectives of the WHS Management Plan and sustain the OUV. But the Council remained concerned about the visual impact on monuments and their settings at the western end of the scheme. Although harm could be mitigated to some extent by the use of green infrastructure and other design solutions, the failure to reduce the impact by providing additional cover to the western cutting was a missed opportunity (PR 5.7.55-5.7.61).

81. A statement of common ground agreed between the Council and IP1 noted that there was general agreement as to the likely extent of the impacts of the scheme and that the Council agreed that there are no aspects which are likely to reach the level of “substantial harm” (DL 43). The Council considered the proposal to be “in accordance with the large majority of policies” in the development plan, subject to appropriate mitigation being carried out by IP1 of potential harmful effects identified in the ES. By the end of the Examination, the Council and IP1 agreed that there were no outstanding policy issues (PR 4.5.6 and 4.5.8).

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82. The National Trust owns and manages 850 hectares of the Stonehenge landscape within the WHS. It welcomed the government's intention to invest in a bored tunnel to remove a large part of the existing A303. If well designed and delivered with the utmost care for archaeology and the landscape, it could provide an overall benefit to the WHS. The Trust was satisfied that design and delivery controls had been developed through the DAMS and OEMP to provide necessary reassurance and that other concerns had been overcome (PR 5.7.70-5.7.71).

83. The English Heritage Trust manages over 400 historic buildings, monuments and sites across the country, including the Stonehenge monument itself. In a statement of common ground agreed with IP1, the Trust said that it was supportive of the project, because it has the potential to transform the Stonehenge area of the WHS and make significant improvements to the setting of the Stonehenge monument (see SOCG in these proceedings at paras. 34-35).

84. The position of IP2 at the Examination has been summarised in paragraphs 24 to 27 of the SOCG agreed between the parties and by the Panel at PR 5.7.62 to 5.7.69.

85. In addition, I note that in its representations in May 2019, IP2 stated that it was supportive of the objectives of the scheme. It had been instrumental in securing the government's commitment to invest in a bored tunnel at least 2.9 km long. But a number of matters needed to be addressed to ensure the delivery of those objectives and potential benefits for the OUV of the WHS (paras 1.16 to 1.17, 4.9.2, 6.10.12 *et seq* and 8.11). IP2 focused primarily on the WHS and on those scheduled monuments affected by the scheme, whether contributing to the OUV or not, and whether inside or outside the WHS (para.3.9). But it had considered all parts of the ES relevant to cultural heritage as well as the HIA (paras. 3.10 and 6.3). In November 2017 IP2 had specifically identified the need for the ES to address non-designated heritage assets (para 4.10.4). IP2's representations to the Examination identified those specific areas where it had concerns or further information was needed.

86. In PR 5.7.329 the Panel pinpointed the key difference between its overall assessment on the effect of the scheme on cultural-heritage and that of IP2, namely it considered the harm to be substantial whereas the latter considered it to be less than substantial. The Panel's explanation for this was the weight it placed on the effects of the western cutting and the

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Longbarrow junction (see PR 5.7.330).

The Panel's report

87. The Panel's report is over 500 pages long covering many topics and issues. However, the court was asked to focus primarily on sections dealing with heritage impact and the overall balance. Even so, the section dealing with heritage impact alone runs to over 50 pages. The Panel's conclusions on heritage matters occupy some 30 pages, running from PR 5.7.129 to 5.7.333. But it is only necessary for this judgment to focus on certain of the issues which affect the claimant's grounds of challenge.

88. At the outset of its assessment the Panel identified five "main issues":-
(1) Whether the analysis and assessment methodology is appropriate;
(2) Whether the mitigation strategy, and its effectiveness in the protection of WHS archaeology, is appropriate;
(3) The effects of the proposed development on spatial relations, visual relations, and settings;
(4) Cumulative and in-combination effects;
(5) Effects on WHS OUV and the historic environment as a whole.

89. It is primarily the Panel's conclusions on the third and fifth main issues which are relevant to grounds 1 to 3 of this challenge. However, it is convenient to summarise the Panel's conclusions on the other main issues first.

90. On the first main issue the Panel concluded at PR 5.7.150:-

> "The ExA considers the analysis and assessment methodology appropriate subject to the points of criticism set out. It does not necessarily agree with the Applicant's assessments. Particular points will be examined in the remainder of this section of the Report."

Although the second sentence in that paragraph is ambiguous, the defendant and IP1 say that

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the third sentence shows that the Panel accepted the analysis in the ES and HIA, save for where the contrary is expressly stated. The position taken in those documents was that the scheme would not cause "substantial harm" to any designated asset (see e.g. PR 5.7.21).

91. Under the first main issue, the Panel considered that, subject to a number of concerns identified in its report, the HIA was generally comprehensive and provided a sufficient level of detail (para 5.7.138). But the Panel said that the HIA should have given more consideration to the effect of the Longbarrow junction on the setting of the WHS as a whole (para.5.7.139). Furthermore, the assessment of impact on settings had largely been concerned with "static views" rather than "the less tangible aspects of setting that relate to the WHS as a whole", including the overall significance of the site and "the succession of impressions which lead cumulatively to an overall sensory and intellectual construct of the site" which is important (paras.5.7.143 to 5.7.145). This last point was linked to a paper by D Roberts *et al* (2018) on the distribution of long barrows within the Stonehenge landscape (PR 5.7.144). The Panel substantially relied upon the thinking in this paper when it came to express its conclusions on the third main issue (see below).

92. In relation to the second main issue, the Panel judged the proposed mitigation strategy to be adequate, provided that issues relating to the sampling strategy for the investigation of archaeological features together with other identified concerns were resolved. Such matters were addressed in post-examination consultation carried out by the SST as the Panel had envisaged at PR 5.7.328. There is no legal challenge that the SST failed to address those matters properly.

93. On the fourth main issue, and leaving to one side its criticisms under the third and fifth main issues, the Panel agreed with the ES's overall conclusions on cumulative and in-combination effects (para.5.7.305).

94. On the third main issue, part of the Panel's analysis was concerned with the effect of the proposal on listed buildings and conservation areas. The Panel concluded that the effects of the proposed development on the settings of assets lying beyond "three main elements" would be acceptable (PR 5.7.296). Those matters are not relevant, therefore, to the difference between the Panel and the SST as to whether the proposal would cause "substantial" or "less than substantial harm" to the heritage assets.

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95. The “three main elements” were identified in PR 5.7.207 as:-
(1) the western approach, cutting and portals;
(2) the proposed Longbarrow junction;
(3) “and to a lesser extent, the eastern approach and portal.”
It will be recalled that it was the first two elements upon which the Panel relied when expressing its disagreement with IP2 that the harm would be “less than substantial” (PR 5.7.329-5.7.330).

96. In relation to each of these three elements the Panel set out its conclusions on its effects on the OUV of the WHS and on the settings of heritage assets. But before embarking upon that exercise, the Panel returned in PR 5.7.212 to 5.7.215 to the paper by D Roberts *et al* . The landscape setting of long barrows is important to such matters as their alignment, intervisibility, relationship with other Early Neolithic monuments and evidence of routes for movement. The Panel subsequently referred to this very specific landscape concept as “the landscape settings of monuments” (similarly the reference to “an unparalleled historic landscape”), which should not be confused with the typical assessment of landscape and visual impact as part of a general planning appraisal.

97. Dealing with the western cutting and portals, the Panel concluded that, in particular, attributes (3), (5), and (6) of the OUV of the WHS would be greatly harmed or would suffer major harm (PR 5.7.226-5.7.230). In relation to settings, the Panel emphasised the need to consider not only visual aspects, but also contextual relationships, including the presence of archaeological features in the landscape; these aspects being similar to those considered when assessing the effect on the OUV of the WHS. Having regard to its earlier findings, the Panel considered that the western cutting and portals would cause “substantial harm” to the settings of designated assets (PR 5.7.233 to 5.7.236). Much of the Panel’s reasoning concerned the visual effects of this part of the scheme and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.219 to 5.7.224, 5.7.227, 5.7.229 and 5.7.232 to 5.7.234).

98. The Panel described the second element, the new Longbarrow junction, as being of motorway scale, albeit sunk into the ground with substantial earthworks. The pattern of the junction’s landform would be at odds with the surrounding smaller scale morphology of small rectilinear fields and small groupings of traditional buildings. The junction, together with the western cutting and portals, would represent a single, very large, and continuous civil engineering work spanning the western boundary of the WHS. The effects of the junction on

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the OUV of the WHS would be similar to those of the western cutting and portal (PR 5.7.242 to 5.7.245). As with that first element, a good deal of the Panel's reasoning concerned the visual impacts of the junction and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.243 to 5.7.245 and 5.7.247). At PR 5.7.247 the Panel concluded:-

> "….. Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible."

They also found that the proposal would cause substantial harm as regards the OUV and settings (PR 5.7.248).

99. The Panel considered that the effect of the eastern cutting would be very much less severe than the western cutting (PR 5.7.254 to 5.7.255). The Panel found that there would be harm to the landscape values of the OUV, but neutral or slightly positive effects for attribute (3) and for attribute (6) (PR 5.7.256 to 5.7.257). At PR 5.7.258 to 5.7.279 the Panel assessed harm caused to a number of heritage assets, ranging from negligible, slight or small to moderate in one instance (PR 5.7.259) and great harm from the flyover at the Countess Road junction (PR 5.7.274). The overall conclusion for the eastern approaches, including the Countess Road junction, was given at PR 5.7.280:-

> "The effects of this element of the Proposed Development on OUV would be neutral or slightly positive. The effects on settings, taken as a whole, would be moderately adverse. Overall, a small degree of harm would arise."

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100. It is therefore plain that the Panel's conclusion under the third main issue that "substantial harm" would be caused related solely to the western cutting and portals and to the Longbarrow junction. This is borne out by the Panel's overall conclusion at PR 5.7.297 read in context:-

> "The ExA concludes overall on this issue that substantial harm would arise with regard to the effects of the Proposed Development on spatial relations, visual relations and settings. This is despite the assessment of more moderate effects with regard to the eastern approaches and settings of assets beyond the main three elements considered."

101. The Panel addressed the fifth main issue at PR 5.7.306 to 5.7.326. First, it found that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV (PR 5.7.306 to PR 5.7.313). Under the third main issue the Panel had found that the western cutting and Longbarrow junction would only harm attributes (3), (5) and (6) (see [97-98] above). So it is plain that the judgment here was based upon the Panel's assessment of the scheme as a whole, and was not driven simply by the effects of the works in the western section. For example, PR 5.7.308 referred to the tunnel and the potentially serious loss of assets through excavation works and PR 5.7.313 referred to the profound and irreversible aesthetic and spiritual damage that would be caused, even after allowing for the removal of the existing A303. By contrast, IP1's HIA had claimed a large or very large beneficial effect for attributes (1) and (4), slight beneficial effects for attributes (5), (6) and (7) and only slight adverse effects for attributes (2) and (3).

102. The Panel then concluded that the scheme would substantially and permanently harm the integrity of the WHS, pointing to the impacts of the Longbarrow junction and the western cutting (PR 5.7.315 to PR 5.7.316). The Panel reached the view that the development would seriously harm the authenticity of the WHS (PR 5.7.317 to PR 5.7.320).

103. The Panel's overall conclusion on the fifth main issue was that the benefits *to the OUV* resulting from the scheme were outweighed by the harm caused and so "the overall effect on the WHS OUV would be significantly adverse" (PR 5.7.321). Because of this impact, the

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proposal did not accord with Core Policies 58 and 59 of the Wiltshire Core Strategy nor with Policy 1d of the WHS Management Plan (PR 5.7.324 to PR 5.7.325). It is important to note the Panel's overall conclusion at PR 5.7.326:-

> "The ExA concludes that the effects of the Proposed Development on WHS OUV and the historic environment as a whole would be significantly adverse. *Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List* ." (emphasis added)

As IP2 has explained (paragraph 42 of skeleton), the assessment in an HIA of impact on a WHS is not expressed using NPSNN terminology of "substantial" or "less than substantial harm".

104. At PR 5.7.327 to PR 5.7.332 the Panel summarised its conclusions on the five main heritage issues. It said that it regarded the views of ICOMOS and the WHC as important, but not of such weight as to be determinative in themselves (PR 5.7.331). The Panel then summarised its view, in terms of paragraph 5.133 of the NPSNN, that the effect of the scheme on the OUV of the WHS and on "the significance of heritage assets through development within their settings," taken as whole, would lead to "substantial harm" for the purposes of the "fork in the road" decision (PR 5.7.333 and see also PR 7.2.33). However, the Panel left the application of that policy test to its overall conclusions later on in the report.

105. In the light of a submission in relation to ground 2 made by Mr James Strachan QC (who together with Ms Rose Grogan appeared on behalf of the defendant), it is necessary to summarise how the Panel dealt separately with landscape and visual impacts in section 5.12 of its report. They did so from a general planning perspective. Paragraph 5.12.1 explains:

> "The integrity of the cultural heritage landscape was examined in a previous section of the Report. This section covers the potential impacts of the Proposed Development on existing landscape features and landscape and townscape character, together with potential impacts on visual receptors, including residents, visitors, and users of [public rights

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of way]"

As is common for a general assessment of this kind, the method used by IP1 was based on the Guidelines for Landscape and Visual Impact Assessment (3rd Edition) published by the Landscape Institute and the Institute of Environmental Management and Assessment (PR 5.12.14).

106. The Panel dealt with the landscape and visual impacts of the western cutting and Longbarrow junction once completed at PR 5.12.112 to 5.12.119. The assessment in this part of the report focused on the effects of the proposal on landscape character and visual amenity, and not on cultural heritage which had already been dealt with in section 5.7 of the report. The overall impact of this part of the scheme was described as being "significantly harmful". These paragraphs formed but a small part of the assessment made by the Panel of each part of the scheme in paragraphs 5.12.79 to 5.12.147. The assessment took into account broader planning considerations including effects on tranquillity, connectivity, light pollution and the night sky.

107. The Panel set out its overall conclusions on the impact of the whole scheme on landscape and visual amenity at PR 5.12.148 to 5.12.152. They concluded that it "would cause considerable harm in the ways identified, and therefore it conflicts with the aims of the NPSNN".

108. At PR 5.17.121 to 5.17.128 the Panel set out its overall conclusions on traffic and transport which, in summary were:-

(i) Public transport would be incapable of delivering a decisive shift from private car transport for the majority of trips in the corridor;

(ii) The development would contribute to meeting the government's objective of a high quality route between the southeast and the southwest, meeting also the future needs of traffic;

(iii) Journey times would be reduced, with the benefits being greater in the summer months and other times of high demand;

(iv) The road would be safer helping to reduce collisions and casualties;

(v) There would be a significant reduction in traffic through rural settlements helping to relieve traffic and related environmental issues;

(vi) Transportation costs for users and businesses would be reduced;

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(vii) The scheme would help to enable growth in jobs and housing.

109. In section 7.2 of its report the Panel summarised its findings on the matters for and against the proposal which would be taken into account in the overall balance. As part of its conclusions on cultural heritage issues the Panel said at paragraphs 7.2.32 to 7.2.33:-

> ”7.2.32. The ExA recognises that the Proposed Development would benefit the OUV in certain valuable respects. However, it considers that the effects of the Proposed Development would substantially and permanently harm the integrity of the WHS. In addition, it would seriously harm the authenticity of the WHS. The ExA finds that permanent, irreversible harm, critical to the OUV would occur, affecting not only our own, but future generations. The fundamental nature of that harm would be such that it would not be offset by the benefits to the OUV. The overall effect on the WHS OUV would be significantly adverse. The Proposed Development would not therefore accord with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan.
>
> 7.2.33. Assessed in accordance with the NPSNN, the effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to substantial harm. This harmful impact on the significance of the WHS designated heritage asset shall be weighed against the public benefits in the ExA’s overall conclusions.”

110. It is important to note the careful distinction drawn by the Panel between these two paragraphs. PR 7.2.33 expressly made the “fork in the road” decision applying paragraph 5.133 of the NPSNN. PR 7.2.32 dealt separately with the Panel’s conclusion about the effect on the OUV of the WHS. In that paragraph the Panel reiterated that the integrity of the WHS would be permanently and substantially harmed and its authenticity would be seriously harmed and that the benefits of the proposal to the OUV would not outweigh the harm caused. The Panel weighed the benefits of the proposal to the OUV for the specific purpose of deciding what the net heritage effect would be on the WHS as a designated asset itself, just as they had previously done in PR 5.7.321 (see [103] above). This should not be confused with

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the separate exercise carried out under paragraph 5.133 or paragraph 5.134 of the NPSNN.

111. The Panel considered landscape and visual impacts from a general planning perspective separately at PR 7.2.53 to 7.2.55.

112. At PR 7.3.1 to 7.3.43 of its report the Panel considered whether the proposed scheme would result in a breach of the Convention and thus engage s.104(4) of PA 2008 , so as to displace the requirement in s.104(3) to decide the application for the DCO in accordance with the NPSNN. The argument during the Examination centred on articles 4 and 5 and is the subject of ground 4 in this challenge. Certain parties contended at the Examination that "any harm" to a WHS could breach those provisions. Others, including IP1 and IP2, argued that if a scheme complies with the policy tests in paras.5.132 to 5.134 of the NPSNN there would be no breach of the Convention . The Panel followed the latter approach (PR 7.3.40 to 7.3.43).

113. At PR 7.3.65 the Panel concluded that the ES was fully compliant with the EIA Regulations 2017 . The SST accepted that conclusion at DL 67. There is no challenge to that part of the decision. But, by definition, it was impossible for the Panel to deal with the separate issue of whether the SST subsequently complied with regulation 21(1) of the EIA Regulations 2017 at the decision-making stage.

114. The Panel struck the overall balance in section 7.5 of its report. The Panel first set out its views on the benefits of the proposal (PR 7.5.5 to PR 7.5.9). It then did the same for the scheme's adverse impacts (PR 7.5.10 to 7.5.17).

115. The Panel regarded a number of factors as having limited or very limited weight, that is agriculture, the loss of a view of the Stones for people passing on the A303 (moderate weight), impact on users of byways open to all traffic, and impacts on businesses and individuals (PR 7.5.13 to 7.5.17).

116. The Panel gave substantial or considerable weight to only two sets of adverse impact (PR 7.5.11 to 7.5.12):-

(1) Substantial weight for the effects of the proposal on the WHS OUV and on the

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significance of heritage assets through development within their settings (drawn from section 5.7 of the report); and

(2) Considerable weight to the considerable harm to both landscape character and visual amenity (drawn from section 5.12 of the report).

117. On impact to the cultural heritage the Panel said at PR 7.5.11:-

> ”The ExA considers that the effects of the Proposed Development would substantially and permanently harm the *integrity* of the WHS, now and in the future. In addition, it would seriously harm the *authenticity* of the WHS. The overall effect on the WHS OUV would be *significantly adverse.* The effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to *substantial harm* . The Proposed Development would not therefore be in accordance with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan. This is a factor to which substantial weight can be attributed.” (emphasis added)

This reflects the approach taken by the Panel in its conclusions in 7.2.32 to 7.2.33 (see [109-110] above).

118. On impact to landscape and visual impact the Panel said at PR7.5.12:-

> ”In addition, there would be considerable harm to both landscape character and visual amenity, notwithstanding the mitigation proposed. There would therefore be conflict with the Wiltshire Core Strategy, Core Policy 51. The harms to landscape character and visual amenity are factors to which considerable weight can be attributed.”

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119. The Panel's striking of the overall planning balance was set out in PR 7.5.19 to 7.5.22:-

> "7.5.19. Since the ExA has identified that there would be substantial harm to the WHS, paragraph 5.131 of the NPSNN applies to the determination of the application. This requires the SoS to give great weight to the conservation of a designated heritage asset. Furthermore, substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional.
>
> 7.5.20. In addition, paragraph 5.133 of the NPSNN provides that where the proposed development would lead to substantial harm to the significance of a designated heritage asset, the SoS should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.
>
> 7.5.21. The ExA disagrees with the Applicant as to the extent of the public benefits that would be delivered. In totality, it does not consider that substantial public benefit would result from the Proposed Development. In reaching that view, the ExA has had regard to all potential benefits including any long-term or wider benefits. In any event, those public benefits which have been identified, even if they could be regarded as substantial, would not outweigh the substantial harm to the designated heritage asset. In the light of NPSNN, paragraph 5.133, the substantial harm that would result to the WHS cannot therefore be justified.
>
> 7.5.22. In applying the NPSNN, paragraph 4.3, the ExA concludes that the totality of the adverse impacts of the Proposed Development would strongly outweigh its overall benefits. S104(7) PA 2008 applies and the NPSNN presumption in favour of the grant of development consent cannot therefore be sustained."

120. Thus, in PR 7.5.19 to 7.5.21 the Panel concluded that the proposal failed to meet the test in paragraph 5.133 of the NPSNN simply on the basis that the benefits of the scheme, even if

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assumed to be substantial, did not outweigh its harm. They did not go any further and apply the necessity test. It is to be noted that in striking the balance required by paragraph 5.133 of the NPSNN the Panel did not, of course, put into the disbenefits side of the balance any harm other than harm to cultural heritage. For example, harm to landscape and visual amenity was rightly not taken into account until the separate *overall* balance was struck in PR 7.5.22.

121. In Section 10 of its report the Panel summarised its overall findings and conclusions. In PR 10.2.6 the Panel summarised its separate conclusions on impacts to cultural heritage and to landscape and visual amenity. In PR 10.2.10 to 10.2.12 it repeated the separate balancing exercises carried out under paragraph 5.133 of the NPSNN and under paragraph 4.3 of the NPSNN and s.104 of the PA 2008 . The Panel recommended that the SST should not make an order granting development consent for the application. On the other hand if the SST were to disagree and to grant a DCO, the Panel recommended that he should seek clarification on a number of additional points, mainly relating to the OEMP and DAMS as set out in Appendix E to the report.

The Secretary of State's decision letter

The process leading to the decision letter

122. The process has been described by Mr David Buttery, the senior official responsible for the handling of the application in the department.

123. On 27 March 2020 officials submitted a briefing note to the SST and the relevant Minister responsible for determining the application for a DCO. Officials said that there were two options. First, the SST could accept the Panel's recommendation and refuse the application for a DCO. Second, officials could explore whether there was evidence to support the case for rejecting the recommendation and granting a DCO, on the basis, for example, that the development would result in less than substantial harm to the heritage assets. Officials drew attention to the Panel's statement that its views on cultural heritage, landscape and visual impacts were matters of judgment and were not shared by all consultees. Consequently, it might be possible to take a different view on the weight to be attached to the benefits and disbenefits of the scheme if there was sufficient justification to do so. Officials said that at that stage they had not yet identified sufficient evidence to justify an approval. In that context, they said that they would assess in detail the evidence provided by bodies such as IP2 to see whether it contained sufficient evidence to conclude that less than substantial harm would be

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caused. They also advised that if this second option were to be chosen, a consultation letter should be sent on the points raised in Appendix E to the Panel's report (see [119] above).

124. The SST and the Minister chose the second option. The consultation letter was sent on 4 May 2020.

125. On 6 July 2020 officials submitted a further memorandum to the Ministers recommending that a further consultation be carried out on a recent archaeological find at the WHS. Ministers agreed and a consultation letter was sent on 16 July 2020. A third and final consultation letter dated 20 August 2020 was sent allowing representations on the responses which had been received by the DfT.

126. On 28 October 2020 officials provided a further briefing note to the SST and the Minister advising that they considered that there was sufficient evidence to justify a decision that a DCO be granted and attaching a draft decision letter to that effect.

127. On 5 November 2020 the Ministers responded that they approved the grant of a DCO. The decision letter was issued on 12 November 2020.

128. I note that at paragraph 78 of its skeleton the claimant said that none of the consultation responses provided any material which could have supported the defendant's decision to reject the Panel's recommendation and to grant the DCO. This is one of several points that were not pursued, but for the record I note that it is not strictly correct. The responses to the consultation letter dated 4 May 2020 provided clarification on the issues set out in Appendix E to the Panel's report, which arose from its second main heritage issue, to do with the mitigation strategy, and were relied upon by the SST. He accepted the views of IP2 on the important subject of "artefact sampling" and concluded that the updated OEMP and DAMS submitted on 18 May 2020 "would help minimise harm to the WHS" (DL 39, 48, 50 and 80).

The decision letter

129. DL 10 explained the approach taken in the decision letter to the Panel's report:-

> "Where not otherwise stated, the Secretary of State can be taken to agree with the ExA's findings, conclusions and recommendations as set out in

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> the ExA's Report and the reasons given for the Secretary of State's decision are those given by the ExA in support of the conclusions and recommendations."

130. At DL 12 to DL 22 the SST addressed the need for the scheme and the benefits it would bring, either in isolation or in conjunction with other improvements to the A303 corridor. The SST said that he was satisfied that there was a clear need case for the proposed development and that the benefits weighed significantly in its favour.

131. Turning to the adverse impacts of the scheme, the SST agreed with the Panel's views on issues relating to agriculture, views from the existing A303, public rights of way and harm to businesses and individuals (DL 23-24 and 57-60). He also agreed with the Panel that climate change was not a matter weighing in the balance against the proposal (DL 61) and that the matters listed in DL 63 were of neutral weight. He agreed with the Panel's assessment that granting consent by applying the heritage policies in the NPSNN would not involve a breach of the World Heritage Convention and would not engage s.104(4) (see DL 64-66).

132. The two issues on which the SST disagreed with the Panel were (a) landscape and visual impact and (b) cultural heritage impact (DL 25 to 56).

133. In relation to landscape and visual effects the SST noted the identification of various benefits and disbenefits by the Panel (DL 53) and adverse impacts by some interested parties (DL 54). He noted the views of Wiltshire Council on the permanent beneficial effects of the scheme for landscape and visual amenity and that overall it would deliver "beneficial effects through the reconnection of the landscape within the WHS and avoiding the severance of communities" (DL 54.) He then referred to the positive effects of the proposal identified by IP2 (significant reduction in sight and sound of traffic benefiting the experience of the Stonehenge monument and wider access to the landscape), English Heritage Trust and National Trust (DL 55). Drawing on that material, the SST considered that the design of the scheme accorded with principles in the NPSNN and that "the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations." Disagreeing with the Panel's judgment, the SST considered the landscape and visual impacts to be of neutral weight in the overall planning balance (DL 56). It is plain that the SST's treatment of this subject, like that of the Panel, did not address the landscape setting of monuments, or the historic landscape, which had so influenced the Panel when dealing with the impact on cultural heritage.

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134. DL 25 to DL 43 and DL 50 dealing with heritage issues are annexed to this judgment in Appendix 2.

135. The SST began his consideration of heritage issues by referring to the Panel's assessment together with the differing views of a number of different parties at the Examination (DL 25).

136. At DL 26 the SST recognised the importance of the Panel's conclusion that the proposal would cause "substantial harm" to the OUV of WHS, how that would lead to the application of the test in paragraph 5.133 of the NPSNN and that substantial harm to a WHS should be "wholly exceptional."

137. The structure of the relevant part of the SST's reasoning is as follows:-

(i) In DL 28 the SST summarised the views of the Panel on its fifth main issue, namely the effects of the scheme on the OUV of the WHS. There would be "permanent irreversible harm, critical to the OUV" affecting not only present but future generations. The benefits of the scheme to the OUV would be incapable of offsetting this harm and the overall effect would be "significantly adverse";

(ii) In DL 29 the Secretary of State summarised the views of the Panel on the first and second main issues;

(iii) The SST then referred at DL 30 to the third main issue, effects on spatial relations, visual relations and settings. He took into account the Panel's judgment that the proposal would cause substantial harm, and their recognition that that view differed from IP2 (PR 5.7.329). He identified the great weight placed by the Panel on the effects of the spatial division of the western cutting in combination with the Longbarrow junction, on the physical connectivity between monuments and the significance they derive from their settings (PR 5.7.330);

(iv) At DL 32 the SST summarised the Panel's conclusion on the fourth main issue;

(v) At DL 33 the SST summarised the Panel's overall conclusion (in PR 5.7.333) applying the NSPNN, that is the effects of the scheme on the OUV of the WHS *and* on "the significance of heritage assets through development within their settings". The Panel's judgment, drawing on what they had already concluded under the third main issue (see DL 30), was that taken as a whole there would be "substantial harm";

(vi) The SST then relied in DL 33 upon the Panel's acceptance that this was a matter of judgment upon which differing and informed opinions and evidence had been given to the Examination;

(vii) Still in DL 33, the SST drew upon the views of IP1, IP2, Wiltshire Council, the National Trust, English Heritage Trust and DCMS placing greater weight on the benefits of the scheme to the WHS from the removal of the existing A303 compared to any harmful effects of the scheme elsewhere in the WHS. Those bodies did not

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agree that the level of harm would be substantial. Some said that there would or could be scope for a net benefit overall to the WHS (see e.g. the cross-references to PR 5.7.70, 5.7.72 and 5.7.83);

(viii) In DL 34 the SST referred to the third main issue again. He preferred the view of IP2 on the effect of the scheme on spatial and visual relations and settings, judging that it would be less than substantial rather than substantial;

(ix) The SST then drew upon the views of a number of parties at the Examination who, to varying degrees, were supportive of the proposal: IP2, National Trust, English Heritage Trust and Wiltshire Council (DL 35 to DL 42);

(x) In DL 43 the SST said that he had carefully considered the Panel's concerns and those of other interested parties, including ICOMOS-UK, the claimant, the COA and the CBA in relation to both the effects of the proposal on the OUV of the WHS and also the cultural heritage and the historic environment of the wider area. He took into account, in particular, the concerns expressed by some interested parties and the Panel regarding the adverse impact from the western cutting and portal, the Longbarrow junction and, to a lesser extent, the eastern approach and portal. He accepted that there would be adverse impacts from those parts of the development. But the SST concluded on balance, taking into account the views of IP2 and Wiltshire Council, that any harm to the WHS as a whole would be less than substantial.

138. The judgments expressed at DL 34 and DL 43 involved the SST taking the "fork in the road" decision with the consequence that paragraph 5.134 of the NPSNN applied, rather than, as the Panel had concluded, paragraph 5.133.

139. In DL 50 the SST stated that he had placed great importance on the views of IP2. He agreed with IP2 that the harm caused would not be substantial and accepted its view that the proposed approach to artefact sampling was acceptable, disagreeing with the judgment of the Panel on those matters. It is plain from DL 34, DL *43, DL 50* and DL 80 that the SST understood IP2 to have said that there would be "less than substantial" harm and he agreed with that view. It follows that the SST did not agree with those interested parties who had gone further by suggesting that the scheme would result in a net *benefit* to the OUV of the WHS. Accordingly, the SST did not depart from the Panel's view that the benefits of the scheme to the OUV of the WHS did not outweigh the harm that would be caused to OUV attributes, the integrity and the authenticity of the WHS (see [101 to 103] above).

140. In DL 80-87 the SST summarised his overall conclusions on the application for a DCO. He dealt with heritage issues and visual and landscape impacts at DL 80-81:-

"80. For the reasons above, the Secretary of State is satisfied that there is

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a clear need for the Development and considers that there are a number of benefits that weigh significantly in favour of the Development (paragraphs 12-22). He considers that the harm that would arise to agriculture should be given limited weight in the overall planning balance (paragraphs 23-24). In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the NPSNN, he must give great weight to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. He accepts there will be harm as a result of the Development in relation to cultural heritage and the historic environment and that this should carry great weight. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, on balance the Secretary of State accepts the advice from his statutory advisor, Historic England, and is satisfied that the harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS (paragraphs 25-51).

81. The Secretary of State accepts there will be adverse and beneficial visual and landscape impacts resulting from the Development and recognises that the extent of landscape and visual effects is also a matter of planning judgment. He is satisfied the Development has been designed to accord with the NPSNN and that reasonable mitigation has been included to minimise harm to the landscape. He disagrees that the level of harm on landscape impacts conflicts with the aims of the NPSNN. Whilst he recognises the adverse harm caused, he considers that the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations and therefore considers that there is no conflict with the aims of the NPSNN. For these reasons, he considers landscape and visual effects to be of neutral weight in the overall planning balance (paragraphs 52-56).”

141. In DL 87 the SST concluded that the need case for the development together with the other identified benefits outweighed any harm.

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142. One potential issue was whether the SST's disagreement with the Panel that there would be substantial harm to heritage assets meant that he was also disagreeing with its specific findings on the impacts of the scheme upon which that conclusion had been based. Mr Strachan QC put it neatly in his oral submissions: the SST did not disagree with the Panel's findings on specific impacts on heritage assets but he did disagree with the Panel's categorisation of those impacts as involving substantial harm. I accept that submission.

143. In my judgment there is nothing in the decision letter to indicate that the SST dissented from any of the Panel's specific findings on impact. The Panel's view that there would be substantial harm to designated assets related only to the effects of the western cutting and portals together with the Longbarrow junction. The SST's decision letter simply decided that that level of harm would be lower without expressing any disagreement or doubts about the more detailed assessments made by the Panel (see eg. PR 5.7.229 to 5.7.330 and DL 34, 43 and 50). It has to be borne in mind that the SST did not have the ES or HIA and he did not have any detailed briefing from officials about impacts on individual assets or groupings of assets. The Panel's report of IP2's views did not provide that information because IP2 had stated that they were not setting out for the Examination an assessment of that nature, albeit that they disagreed with IP1's appraisal of some impacts (which were not identified). Indeed, if it had been submitted by the defendant, IP1 or IP2 that the decision letter should be read as if the SST had disagreed with the Panel's specific findings, and that submission had been arguable, I would have decided that the reasons given in the letter on such an important matter were legally inadequate and quashed the decision on that ground.

144. For similar reasons, I do not consider that the SST disagreed with the Panel on its conclusions that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV, as well as the integrity and authenticity of the WHS, or the specific findings on impact from which the Panel drew those conclusions. Similarly, he did not disagree with its view that benefits to the OUV of the WHS would not outweigh harm to OUV attributes, authenticity and integrity of the WHS. There is simply no reasoning in the decision letter to indicate that the SST took that course. On an issue of such importance, both nationally and internationally, the SST would have been legally obliged to state clearly that those were his conclusions. As in paragraph [143] above, if it had been submitted that the decision letter should be read as if the SST had rejected those specific findings, and that submission had been arguable, I would have decided that the reasoning was legally inadequate. The SST simply dealt with the question posed by the NPSNN of "substantial" or "less than substantial" harm which, as both he and the Panel made clear, was a judgment bringing together the overall effect of the proposal on designated assets as well as the WHS (see e.g. PR 5.7.333, PR 7.2.33 and DL 33 to 34 and 50).

Ground 1

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145. The claimant raises 4 issues under ground 1 which it is convenient to take in the following order:-

(i) The SST failed to apply paragraph 5.124 of the NPSNN (see [43] above) to 11 non-designated heritage assets;

(ii) The SST failed to consider the effect of the proposal on 14 scheduled ancient monuments (i.e. designated heritage assets);

(iii) The SST failed to consider the effect of the proposal on the setting of the heritage assets, as opposed to its effect on the OUV of the WHS as a whole;

(iv) The SST's judgment that the proposal would cause less than substantial harm improperly involved the application of a "blanket discount" to the harm caused to individual heritage assets.

146. Underlying much of the claimant's case under ground 1 was the proposition that a decision-maker is obliged to consider in respect of *each* heritage asset its significance, the impact of the proposal and the weight to be given to that impact (see e.g. paras. 93 to 121 of the claimant's skeleton). The claimant relies upon regulation 3 of the 2010 Regulations (see [27] above), paragraphs 5.128 to 5.133 of the NPSNN (see [41] to [43] above) and the decision of the Court of Appeal in *City and Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320* , in particular the passage in the judgment of Lindblom LJ where he stated at [79] that in the overall balancing exercise:-

> "….. every element of harm and benefit must be given due weight by the decision-maker as material considerations…."

147. However, the court also added that the decision-maker has to adopt "a sensible approach" ([80]). The legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent ([72]). The same applies to policies in the NPSNN subject, of course, to applying any specific policy test which is relevant. Requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" are matters left to the planning judgment of the decision-maker to resolve ([73]). The same applies to the application of the tests in paragraphs 195-6 of the NPPF and paragraphs 5.133-5.134 of the NPSNN. The policies do not direct the decision-maker to adopt any specific approach as to *how* harm should be assessed or what should be taken into account or excluded in that exercise. "There is no one approach." (see ([74]).

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148. In the present case, the ES upon which the planning assessments by the Panel and ultimately the SST were based, had to address a large number of heritage assets over a substantial area. The assessment for some individual assets was expressed separately for each one. But in addition a number of assets were collected together in groupings, an approach endorsed by the WHC, ICOMOS and IP2 (see [71] above). The Panel made no criticism of that approach in its report. Indeed, it adopted it at various points in its reasoning, and the same is true of the decision letter. The presentation of an assessment by the use of groupings does not mean that assets have not been individually assessed. Instead, the technique enables such assessments to be collected together and expressed in relation to an appropriate grouping. Mr. David Wolfe QC, who together with Ms. Victoria Hutton appeared on behalf of the claimant, confirmed that the claimant makes no criticism of this approach.

(i) The 11 non-designated heritage assets

149. The claimant accepts that an assessment was made of the 11 non-designated heritage assets in the western section of the scheme. They are listed in table 6.11 of chapter 6 of the ES. They are not located in the WHS. Some of the assets would be lost because of the scheme. But others would not. For example, it was said that one asset might suffer damage from compression by overlaying of material. Another could not be found when a survey was carried out, or had ceased to exist because of plough-damage.

150. The point taken by the claimant is that the Panel and the SST failed to apply paragraph 5.124 of the NPSNN by considering whether these 11 assets should be treated as having equivalent significance to scheduled ancient monuments, so that policies such as paragraphs 5.133 to 5.134 of the NPSNN might be applied.

151. With respect, there is nothing in this point. Mr. James Strachan QC, supported by Mr. Reuben Taylor QC for IP1 and Mr. Richard Harwood QC for IP2, pointed to the test which has to be satisfied for paragraph 5.124 to apply. A non-designated asset must be "demonstrably of equivalent significance to Scheduled Monuments." Accordingly, such a monument must be considered to be of national importance (s. 1(3) of the Ancient Monuments and Archaeological Areas Act 1979). Decisions on national importance are guided by Principles of Selection laid down by the Secretary of State for Digital, Culture, Media and Sport. IP2 has published a number of scheduling selection guides on eligibility under s.1(3) .

152. Table 6.1 of the ES stated that paragraph 5.124 of the NPSNN had been applied in the work carried out and cross-referred to table 6.2. The latter set out the criteria applied in the ES

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for determining the value of a heritage asset. A non-designated asset contributing to *regional* research objectives was assessed as having a "medium" value. A non- designated asset of comparable quality to a scheduled monument, that is one of *national* importance, was assessed as having a "high" value. None of the non-designated assets in Table 6.11 were given a high value. All were treated as having a medium value. They were therefore treated by IP1 as not falling within para. 5.124 of the NPSNN. Appendix 6.3 to the ES gave detailed references to the source material, including surveys, relied upon for this evaluation. I therefore accept the defendant's submission that this exercise was carried out transparently and in such a way that any interested party who wished to disagree, by demonstrating that any asset should be treated as equivalent to a scheduled monument, could do so.

153. The short point is that no objecting party attempted to carry out any such exercise. Accordingly, this was not an issue in the Examination, let alone a "principal important controversial issue", which the Panel was required to address in its report to the SST, or which had to be addressed in the decision letter (*South Bucks District Council v Secretary of State [2004] 1 WLR 1953 at [36]*). I should also add that the Panel's report refers to paragraph 5.124 of the NPSNN and shows that it was applied to other assets, where judged appropriate (see PR 5.7.28 and 5.7.49). The Panel approved of the approach taken in the ES, save for where it explicitly identified any disagreement (see [90] above). It did not criticise the handling of this part of the NPSNN.

154. The claimant relied upon some very brief passages in representations made to the Examination about non-designated heritage assets. These passages were of a generalised nature. They did not pick out any item from Table 6.11 of the ES to attempt to demonstrate that such a feature is of national importance, applying relevant criteria and drawing upon any source material.

155. The criticism made under ground 1(i) must be rejected.

(ii) Failure to consider 14 scheduled ancient monuments

156. Originally the claimant suggested in its "First Reply" that the impact on 15 scheduled monuments had not been assessed by the Panel in its report and likewise had not been assessed by the SST in his decision letter. During oral argument the number of assets was said to be 14. It was submitted that the effect of the proposal on the *setting* of these assets had not been addressed. The HIA had simply considered the effect on the OUV of the WHS. Ms. Hutton told the court that these assets are located in the vicinity of the proposed Longbarrow Junction.

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157. However, as Mr. Strachan QC pointed out, the 14 designated assets were also dealt with in the "Setting Assessment", Appendix 6.9 to the ES. There the effect on the settings of each of the assets was addressed. The defendant provided a detailed schedule showing where each asset was considered in the documentation. This has not been disputed by the claimant. The ES assessed the effects of the scheme on the settings as ranging from neutral, through slight beneficial to moderate beneficial. In no case did the ES identify any substantial harm.

158. Here again, the claimant has relied upon a few brief passages from representations made in the Examination. These passages do not contain anything like the level of detail or referencing contained in the ES or HIA, although it would appear that the document would have been prepared by expert archaeologists. The claimant has not shown that they gave rise to a principal important controversial issue which has not been addressed by the Panel in its report, for example, in its criticisms of the Longbarrow junction and its continuation of the western cutting.

159. Under its third main issue the Panel expressed its concern about the adverse impact of the western cutting and portals on the Wilsford/Normanton dry valley and the relationship between monuments on either side (see PR 5.7.227 and 5.7.229) which formed part of its finding of "substantial harm". In relation to the proposed Longbarrow junction, the Panel noted its effect on *inter alia* the Winterbourne Stoke Downs barrows, two individual scheduled monuments on Winterbourne Stoke Down and the Diamond Group (PR 5.7.239). The SST agreed with the Panel's report on these matters (see DL 10).

160. Accordingly, the criticisms made under ground 1(ii) must be rejected.

(iii) Failure to consider effect on the settings of heritage assets

161. It is plain from the review carried out above that the ES and HIA considered the effects of the scheme on both the OUV of the WHS and on the settings of heritage assets. It is also plain from its report that the Panel addressed under its third and fifth main issues the effect of the proposal on spatial relations, visual relations and settings in relation to the WHS and also heritage assets ([88] and [96-100] above). It then went on to consider effects on the OUV of the WHS and the historic environment as a whole.

162. However, the claimant submits that in his decision letter the SST failed to consider the effect of the proposal on the settings of heritage assets as well as on the WHS overall. It is said that he only considered the latter issue.

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163. This criticism is untenable. It comes from a misreading of the decision letter and to some extent the Panel's report. The third and fifth main issues were not treated by the Panel as being in hermetically sealed compartments. Conclusions drawn under the third main issue on the project's effects upon the settings of assets, and upon the landscape containing these assets, also influenced the Panel's reasoning on the fifth main issue. This is plain not only from the Panel's report but also the decision letter (see [137] above). Mr. Wolfe QC is incorrect to suggest that DL 34 did not refer to the third main issue and only considered the effect on the OUV as a whole. The language of DL 34 cannot be read in that way, particularly when it is considered in the context of the preceding parts of the decision letter and the Panel's report to which it responds.

164. There is equally no merit in the submission that IP2 had only addressed the impact of the proposal on the OUV of the WHS and, therefore, because DL 34 relied upon the opinion of IP2 that paragraph must be read as addressing only the WHS and not heritage assets. DL 30 had already referred to PR 5.7.329 to 5.7.330. From those paragraphs it was clear to the SST that the Panel understood IP2 to disagree with its view on substantial harm, in the context of the third main issue, which dealt with the effect of the development on spatial and visual relations and settings of *heritage assets* .

165. The decision letter was prepared by officials for consideration by the SST following their review of the representations which had been made in the Examination by IP2 and others. DL 33 reflects that exercise. IP2's representations in May 2019 (paras. 3.9 to 3.10 and 6.3) made it plain that it had addressed scheduled monuments (and other assets), whether contributing to the OUV or not, and whether inside the WHS or not, and had considered all parts of the ES relating to cultural heritage issues as well as the HIA (see [85] above).

166. Accordingly, the criticisms made under ground 1(iii) must be rejected.

(iv) Whether the Secretary of State took into account the impacts on all heritage assets

167. This is a challenge to the SST's judgment that the harm identified by the Panel as substantial should be treated as less than substantial. It has been put in more than one way.

168. First, it is said that that reduction in the level of harm was an improper "blanket discount" because the judgment is said to have been applied to a "significant number of designated and undesignated heritage assets" and yet the impact of the scheme was not the same for all the assets affected. Mr. Wolfe QC also described the error of law here as a

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"composite approach," whereas, in accordance with *Bramshill* [79] and the NPSNN (paragraph 5.129), a separate assessment of the impact on each individual heritage asset was required.

169. To some extent, the argument has moved on since the claimant's pleadings and skeleton were prepared. The claimant accepts that the requirement for individual assessment can properly be addressed by an approach based on groupings (see [129] above).

170. But what appears clearly from paragraph 76 of the Statement of Common Ground, is that, by whatever means he employs, the decision-maker must ensure that he has taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

171. Mr Strachan QC submitted, supported by IP1 and IP2, that the SST complied with the principle in [170] above. This is because, first, the ES addressed all relevant heritage assets. Second, the Panel identified in its report those impacts where it disagreed with the assessment in IP1's ES and must be taken as having agreed with the remainder (PR 5.7.150). Third, the SST stated in DL 10 that he is to be taken as having agreed with the findings and conclusions in the Panel's report save for where the contrary is stated. It is submitted that the SST must therefore be treated as having agreed with those parts of the ES and HIA with which the Panel did not expressly disagree.

172. The defendant's argument essentially relies upon the starting point that all relevant assets were assessed in the ES (and HIA). So the question arises whether the defendant's analysis is correct, given that neither the ES nor the HIA were before the SST at any stage. In this context, regulation 21(1) of the EIA Regulations 2017 is relevant (see [31] above). The SST was obliged to take into account the environmental information for the proposal, which included the ES and DL11 states that he did this.

173. The ES concluded that no part of the scheme would result in substantial harm to any designated heritage asset. The Panel disagreed with that view in relation to the effects of the western cutting and portals and the Longbarrow junction. Nonetheless, the Panel recognised that that was a matter of judgment on which the SST might differ and that there had been differing opinions submitted to the Examination, not least that of IP 2 (PR 7.5.26).

174. As I have said in [137] above, the SST disagreed with the Panel's judgment that "substantial harm" would be caused by those parts of the scheme. It follows that he disagreed

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with the conclusions in PR 5.7.236, 5.7.248, 5.7.297, 5.7.329, 5.7.333, 7.5.11, 7.5.19, 7.5.21 and 10.2.10 that that level of harm would be substantial. However, the SST did not disagree with the more specific findings of the Panel upon which its "substantial harm" conclusion was based. The effect of DL 10 is that he agreed with those findings (see [142 to 144] above).

175. The agreed principle in [170] above does not lay down a rubric as to how an assessment should be made or how reasoning should be expressed. It does not indicate that something akin to the analysis in an environmental statement is required. It is open to a decision-maker to accept the findings of an Inspector or Panel about the specific impacts that would be caused by a proposed development, or a part thereof, and then to say as a matter of judgment that those effects should be treated as less than substantial harm rather than substantial harm, particularly where that view is supported by the evidence and opinion of a specialist adviser such as IP2 in this case. It was not suggested that the judgment in the present case should be treated as irrational. That is hardly surprising given what the Panel had said at PR 5.7.26. So that part of ground 1(iv) which seeks to attack what is described as a "blanket discount" does not assist the claimant.

176. But the real issue remains whether the principle in [170] above has been satisfied in the decision letter in the light of the explanation of the decision-making process given in [171].

177. Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL11, the defendant's legal team informed the court that the ES and HIA were not before Ministers when they were considering the Panel's report and the determination of the application for development consent. It is said that "the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website". However, as is clear from the case law cited in [62] to [65] above, what was within the knowledge of officials is not to be treated on that account as having been within the Minister's knowledge, unless it was drawn to his attention in a briefing or precis.

178. That same case law suggests that in the real world a Minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But nevertheless, an adequate precis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a Panel or an Inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement *to take into account* the impact on the significance of each

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relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision- maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset.

179. Here, the SST did receive a precis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a precis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a precis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe QC is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement.

180. In my judgment this involved a material error of law. The precise number of assets involved has not been given, but it is undoubtedly large. Mr Wolfe QC pointed to some significant matters. To take one example, IP1 assessed some of the impacts on assets and asset groupings not mentioned by the Panel as slight adverse and others as neutral or beneficial. We have no evidence as to what officials thought about those assessments. More pertinently, the decision letter drafted by officials (which was not materially different from the final document – see [67] above) was completely silent about those assessments. The draft decision letter did not say that they had been considered and were accepted, or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally sufficient material to be able lawfully to carry out the “heritage” balancing exercise required by paragraph 5.134 of the NPSNN and the overall balancing exercise required by s.104 of the PA 2008 . In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one.

181. Accordingly, I uphold ground 1(iv) of the challenge.

Conclusion

182. For these reasons, I uphold ground 1(iv) of the challenge and reject grounds 1(i), (ii) and (iii).

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Ground 2 – lack of evidence to support disagreement with the Panel

183. The claimant submits that the SST disagreed with the Panel on the substantial harm issue without there being any proper evidential basis for doing so. Mr. Wolfe QC advances this ground by reference to the SST's acceptance of the views of IP2 in DL 34, 43, 50 and 80. He submitted that IP2's representations did not provide the SST with evidence to support his disagreement with the Panel on "substantial harm" in two respects. First, he said that HE only addressed the spatial aspect of the third main issue and did not address harm to individual assets or groups of assets. Second, he submitted that SST had misunderstood IP2's position: it had never said that the harm would be less than substantial.

184. It should be noted that although the claimant had raised other more detailed criticisms, Mr. Wolfe QC did not pursue them in oral submissions or invite the court to deal with them. No doubt he considered that ground 2 should stand or fall on the points that he chose to advance as set out above.

185. The short answer is to be found in PR 5.7.329 to 5.7.330. The Panel understood that IP2 took the view that no substantial harm would be caused to any asset and that the reasons for the difference of view between the Panel and IP2 were concerned with the effects of the western cutting and portals and the new Longbarrow junction. Those passages would have reflected what took place during the hearings in which IP2 took part, as well as its written representations. IP2 has confirmed that the Panel's report at PR 5.7.329 to 5.7.330 accurately set out its position in the Examination (para. 28 of Detailed Grounds of Defence). There is no proper basis for the court to go behind what was said by the Panel in its report on this subject. The SST was plainly entitled to rely upon that part of the report.

186. It is also apparent from PR 5.7.329 to 5.7.330 that the Panel was dealing with its overall finding of substantial harm under the third main issue. The claimant's attempt to confine the effect of those passages to effects on "spatial relations, visual relations and settings" overlooks the fact that PR 5.7.329 simply repeated the heading given for the third main issue when it was introduced in PR 5.7.129. It is plain from the section of the report devoted to the third main issue that the Panel considered both the spatial aspect and the harm to heritage assets and their setting. There is no reason to think that the shorthand they used in PR 5.7.329 was meant to suggest that IP2 had only considered the spatial aspect. This is a forensic, excessively legalistic argument of the kind which should not be advanced in the Planning Court.

187. In any event, on a fair reading of IP2's representations, it is plain that it did consider

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those parts of the ES and HIA which assessed impacts on individual heritage assets or groups of assets.

188. For these reasons, ground 2 must be rejected.

189. For completeness, I would add that I do not accept the submission of Mr Strachan QC that the SST's disagreement on the level of harm resulting from the western section of the scheme was supported by his conclusions in DL 52 to 56 on landscape and visual amenity impacts from a general planning perspective. Both the Panel and the SST treated those issues separately from the historic landscape matters which arose under the cultural heritage sections of their respective assessments. However, Mr Strachan's submission is not necessary for the court to reject ground 2.

Ground 3 – double-counting of heritage benefits

190. The claimant submits that the SST not only took into account the heritage benefits of the scheme as part of the overall balancing exercise required by para. 5.134 of the NPSNN, but also took those matters into account as tempering the level of heritage disbenefit. It is said that this was impermissible double-counting because those heritage benefits were placed in both scales of the same balance.

191. But the claimant also made a further submission which is rather different. It was said that the SST relied upon heritage benefits in DL 34 and DL 43 as reducing the level of heritage harm when deciding whether less than substantial harm would be caused (ie. whether paragraph 5.133 or 5.134 of the NPSNN should be applied), and then also took those heritage benefits into account when deciding whether the balance pointed in favour or against the scheme.

192. It is necessary to be clear about how the policies in the NPSNN operate, the process which was followed in the ES and HIA, and the chain of reasoning in the decision letter.

193. Paragraphs 5.133 and 5.134 of the NPSNN lay down the criteria which determine which of the policy tests is to be applied for dealing with harm to heritage assets (the "fork in the road decision" - see [47] above). In the light of *Bramshill* at [71] it is common ground that in reaching this judgment, the decision-maker *may* take into account benefits to the heritage asset itself (referred to as an "internal balance") but he is not obliged to do so (and see [74]).

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194. In *Bramshill* at [78] Lindblom LJ stated:-

> ”Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no “harm” of the kind envisaged in paragraph 196 [of the NPPF]. There might be benefits to other heritage assets that would not prevent “harm” being sustained by the heritage asset in question but are enough to outweigh that “harm” when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with.”

For the purposes of the present case, two points may be drawn from that passage.

195. First, when assessing the impact of a project on a heritage asset it is permissible to combine both the beneficial and the adverse effects *on that asset* . That is not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole and not partially. That approach was followed in the ES in this case. It was necessary to take into account the A303 as part of the existing baseline and to take into account the beneficial impact on an individual asset of removing that road as well as any harmful impact on that asset from the new scheme. The net outcome might be positive, neutral or negative.

196. Second, if a scheme would cause harm to one asset and benefit to another, that does not alter the judgment that the first asset will be harmed. Instead, the benefit to the other is a matter to be weighed in whichever balance falls to be applied under the NPSNN, or indeed paragraphs 195 or 196 of the NPPF. Here again we see the distinction between deciding which of the two policy tests in those paragraphs is to be applied and the carrying out of the balancing exercise itself.

197. There is a tendency to use the term “double-counting” imprecisely as if to say that it is necessarily objectionable whenever a particular factor is taken into account in a decision on a planning application more than once. That is too sweeping a proposition. Well-known planning policies contain examples where legitimately the same factor may have to be taken into account more than once. For example, in Green Belt policy some types of development are regarded as inappropriate if they would harm the openness of the Green Belt and/or

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conflict with the purposes of including land within it (paras. 145 and 146 of the NPPF). In those circumstances, the application of the "very special circumstances test" will also require that harm to the Green Belt to be included in the overall planning balance. There is no improper double-counting. The same factor is being assessed twice for two different and permissible purposes.

198. Paragraph 11(d) of the NPPF provides another example. If, for example the presumption in favour of granting permission is engaged (e.g. because the supply of housing land is less than 5 years) the "tilted balance" in sub-paragraph (ii) may be applicable. If so, the extent to which the proposal complies with or breaches development plan policies may be taken into account in the balance required to be struck under paragraph 11(d)(ii). But it is also necessary to take into account those polices when striking the balance required by s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") . Those two balances may either be struck separately or taken together. Either way, there is no impermissible double-counting. Taking into account the same factor more than once is simply the consequence of having to apply more than one test (see *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 104 at [62]-[67]* and *[2020] PTSR 993 at [110]*). The same considerations may apply where paragraph 11(d)(i) falls to be applied.

199. The policies in paragraphs 5.133 to 5.134 of the NPSNN are similar in nature to the first of those examples. These paragraphs determine which of the two tests for decision- making on heritage policy are to be applied, before arriving at the overall planning balance. A beneficial impact on a heritage asset may appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test is engaged, and then again in the balancing exercise required by that test when *all* public benefits are weighed against all harm to heritage assets. The same factor is taken into account at two different stages for different and permissible purposes. There is no question of improper double-counting. Ultimately, in his reply Mr. Wolfe QC accepted this analysis.

200. Accordingly, the real issue under ground 3 has come down to whether the SST, when striking the balance, put the same benefits in both scales, for and against the proposal (see [190] above).

201. The ES and HIA assessed the impacts of the proposal on individual assets and groups of assets and arrived at the conclusion that no asset would be substantially harmed. On that basis the test in paragraph 5.134 would fall to be applied. I accept the submission of the defendant and IP1 that that series of separate judgments did not involve any off- setting of net benefit to one asset against net harm to another. The claimant did not identify any material to the

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contrary.

202. The Panel disagreed with that assessment in relation to the impacts of two elements of the scheme, the western cutting and portals and the Longbarrow junction. They judged that there would be substantial harm to assets or groups of assets and to the OUV of the WHS in certain locations (see e.g. PR 5.7.219, 5.7.224, 5.7.228 to 5.7.229, 5.7.231 to 5.7.232, 5.7.239, 5.7.241, 5.7.245 and 5.7.247). The Panel's judgment was based upon its assessment of the scale and design of the civil engineering works together with the mitigation proposed, and their effect upon the setting of assets and the landscape in which they feature. In reaching its judgments the Panel appropriately took into account the removal of the A303 because that in itself affects the impact on relevant assets, as well as the mitigation proposed for those elements of the scheme (see e.g. PR 5.7.236 and 5.7.248). There is no evidence that when it made its judgment on the "fork in the road" between paragraphs 5.133 and 5.134 of the NSPSNN, the Panel introduced off- setting between different assets or had regard to the broader (or generic) heritage benefits of the entire scheme (e.g. as set out in PR 5.7.29 – see [70] above). The Panel performed the overall balancing exercise separately in section 7.5 .

203. In DL 34 and DL 43 the SST set out his conclusion on which of the policy tests in paragraph 5.133 or paragraph 5.134 of the NPSNN should be applied. Having decided in favour of paragraph 5.134, the SST then applied that test in DL 51. There, the SST simply weighed benefits from the overall scheme ("the public benefits") against the harm he had already identified. They included the overall or generic scheme benefits for cultural heritage identified at PR 5.7.29. The benefits in PR 5.7.29 were put into the correct scale. There is no indication that the SST put the positive effects on each *individual* asset or asset grouping attributable to the western section of the proposed scheme in both sides of the balance.

204. In DL 80 the SST drew upon his earlier conclusions in DL 34 and DL 43 that the proposal would cause less than substantial harm, but there is no suggestion in DL 80 that that judgment was tainted by improperly taking into account heritage benefits from the scheme overall rather than the way in which the contentious elements of the western section of the scheme affected relevant assets. That judgment had previously been reached in DL 34 and DL 43.

205. Ultimately, ground 3 came down to an attack on the way in which the SST reached his conclusions on less than substantial harm in DL 34 and DL 43. In my judgment, they contain no indication that the SST took into account *overall* benefits of the scheme rather than effects of the scheme on *individual* relevant assets, so that this resulted in improper double-counting either in DL 51 or in DL 80 to DL 87.

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206. The claimant's submission was also advanced on the basis that the SST had relied upon the views of IP2 and that the latter had taken that broader approach. I reject that submission. In PR 5.7.229 to 5.7.330 the Panel stated that IP2 had taken the view that less than substantial harm would be caused to assets affected by the western cutting and Longbarrow junction. The Panel gave no indication that that involved a different and broader approach to the assessment of that harm, one which took into account overall or generic scheme benefits, as compared with its own approach. Instead, the Panel said that it was simply a difference of professional judgment on the evidence. The claimant's submission on this point is not supported by any of the documents shown to the court

207. The claimant sought to criticise the relationship between DL 33 and DL 34 in order to suggest that impermissible double-counting was introduced into DL 34. I disagree. Part of DL 33 addressed the Panel's conclusion on the effect of the overall scheme on the WHS. It was in that context that the SST referred to the views of IP2 and others that greater weight should be given to the beneficial effects of removing the existing A303 from the WHS rather than the harmful effects of part of the new scheme on part of the WHS. Indeed, some contended that there would be a net benefit overall. This approach was entirely proper because, it was necessary to consider the WHS as a whole and, correctly, it involved treating the WHS as a designated heritage asset in itself. Thus the benefits relevant to that asset would necessarily relate to the scheme as a whole. That approach is entirely consistent with the second and third sentences of [78] in *Bramshill* (see [194 to 196] above).

208. But in DL 34 the SST also brought in the third main issue and did so in the context of what he had already said in DL 30. The difference between IP2 and the Panel related to the effect of the western cutting and the Longbarrow junction on heritage assets and also the OUV of the WHS. Here, there is no reason to think that the SST, relying upon the views of IP2, took into account a wider range of heritage benefits than was permissible for the purposes of deciding whether paragraph 5.133 or 5.134 of the NPSNN applied (see [206] above).

209. For these reasons, ground 3 must be rejected.

Ground 4 – whether the proposal breached the World Heritage Convention

210. The claimant contends that the SST's acceptance that the scheme would cause harm, that is less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention and therefore the SST erred in law in concluding that s.104(4) of PA 2008 was not engaged. It was engaged and so, it is submitted, the presumption in s.104(3) should not

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have been applied in the decision letter.

211. The claimant's case as set out in its skeleton (see e.g. para. 242) appeared to be that any harm, or at least any significant harm, to the WHS would, if allowed, involve a breach of articles 4 and 5 of the Convention , irrespective of whether the benefits of the scheme were judged to have greater weight. That appears to have been the case presented in the Examination and which IP1 successfully persuaded the Panel to reject. In his oral submissions Mr. Wolfe QC shifted the case significantly. He accepted that the Convention allows for a balance to be struck between harm to the WHS and benefits, but contended that only heritage benefits, in particular benefits to the WHS, its OUV and attributes, could be taken into account in that balance. Thus, he submitted, the balance required to be struck by either paragraph 5.133 or paragraph 5.134 of the NPSNN conflicts with the Convention .

212. The first issue is whether the Convention has been incorporated into UK law, or the law applicable in England and Wales, so that its construction is a matter of law directly for this court. Although the Convention had been ratified by the UK, it is common ground that it has not been incorporated into our domestic law by legislation. Instead, Mr. Wolfe QC submitted that an international treaty may be treated by the court "as for all practical purposes as incorporated into domestic law," citing Lord Steyn in *R (European Roma Rights) v Prague Immigration Officer [2005] 2 AC 1 at [40]* et seq. However, that decision does not assist the claimant. Lord Steyn was not prepared to treat a provision in the Immigration Rules not requiring any action to be taken contrary to the Refugee Convention as incorporating that Convention into English law. The Rules were insufficient for that purpose. But because the same principle was later enacted in primary legislation, it was that measure which was held to have been sufficient to achieve incorporation (see [41] to [42]).

213. In the present case the claimant merely points to s.104(4) of the PA 2008 . But that refers to international obligations generally and not specifically to the World Heritage Convention. As Mr. Taylor QC pointed out, on the claimant's argument s.104(4) would have the effect of incorporating *any* international obligation into our domestic law, but *only* for the purposes of determining an application for a DCO. There is nothing in the language used by Parliament to indicate that it intended to achieve such a strange result.

214. Instead, all that s.104(4) does is to make a breach of an international obligation one of the grounds for not applying s.104(3) . But as Mr. Wolfe QC accepted, where s.104(4) is met, that does not automatically result in the refusal of an application for a DCO. Accordingly, Mr. Wolfe QC accepted that the highest that he could put the incorporation argument is that s.104(4) treats the issue of whether a proposal would comply with the Convention as a mandatory material consideration, and not that Parliament requires a proposal to comply with

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the Convention as a matter of law.

215. I am not persuaded that Mr Wolfe's revised analysis provides a sufficient justification for concluding that an international obligation has been incorporated into domestic law. Mr. Wolfe QC has not shown the court any authority where that has been accepted. Indeed, if the Convention is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgment for the decision- maker, subject to review on the grounds of irrationality. That is especially so given the very broad, open-textured nature of the language used in articles 4 and 5. The position would not be materially different from the second authority cited by Mr. Wolfe QC, *R v Secretary of State for the Home Department ex parte Launder* [1997] 1WLR 839, where the Secretary of State took the ECHR into account and the grounds of challenge were dealt with under the law on irrationality (see pp.867E to 869B).

216. On the basis that the Convention has not been incorporated into domestic law, the relevant principles on the interpretation of that instrument were set out by Lord Brown in *R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756 at [67] to [68]* . The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable." This approach allows for the possibility that, so far as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable." The issue is simply whether the decision-maker has adopted an interpretation falling within that range.

217. I have no hesitation in concluding that the SST was entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention . That is a tenable view. If I had to decide the point of construction for myself, I would still conclude that those policies are compliant with the Convention .

218. Although Articles 4 and 5 refer to matters of great importance, they are expressed in very broad terms. By article 4 each State Party has recognised that the duty of protecting and conserving a WHS belongs primarily to that State, which "will do all it can to this end, to the utmost of its own resources." Resources are, of course, finite and they are the subject of competing social, economic and environmental needs. The Convention does not further explain the meaning and scope of the language used in article 4. This must be a matter left to individual Party States.

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219. In any event, article 4 has to be read in conjunction with the slightly more specific provisions in Article 5, and not in isolation. There the obligation on each State is to endeavour "as far as possible", and "as appropriate" for that country, to comply with paragraphs (a) to (e). They include the taking of the "appropriate" legal measures necessary to protect and conserve the heritage referred to in articles 1 and 2.

220. The broad language of these Articles is compatible with a State adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter. The Convention does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case. Nor does the Convention use language which would limit such other factors to heritage benefits or benefits for the WHS in question. I also note that in its Guidance on Heritage Impact Assessments for Cultural World Heritage Properties, ICOMOS accepts that a balance may be drawn between the "public benefit" of a proposed change and adverse impacts on a WHS (para. 2-1-5).

221. The Australian authorities cited (*Commonwealth of Australia v State of Tasmania* (1983) 46 ALR 625; *Australian* Convention Foundation Incorporated v Minister for the Environment [2016] FCA 1042) need to be read carefully. Those cases were concerned with circumstances in which the Convention had been incorporated into Australian law by legislation and any observations on interpretation should be understood in the context to which the decisions were addressed. Having said that, I do not see my conclusion as conflicting with any of the observations in those decisions. They do not lend any support for the interpretation which Mr. Wolfe QC said must be given to the Convention . Indeed, the observations in the High Court of Australia in the Tasmanian Dam case upon which Mr Wolfe QC principally relied, emphasise the discretion left to individual State Parties as to the steps each will take and the resources it will commit (see e.g. Brennan J at p.776).

222. For these reasons, ground 4 must be rejected.

223. Although it is not necessary for my decision on ground 4, I would add one further point. As I have noted, it is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 (PPS5) was to the same effect and contained a statement that the government considered the policies it contained to be consistent with the UK's obligations under the Convention . No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which is incorrect *on any tenable view* . A legal challenge to the NPSNN would now be precluded by s.13(1) of the PA 2008 . Under s.106(1) a representation relating to the merits of a policy set out in a NPS may be disregarded by the SST (see also *Spurrier* and *ClientEarth*).

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Ground 5

224. The claimant raises three contentions under ground 5:-

(i) The SST failed to take into account any conflict with Core Policies 58 and 59 of the Wiltshire Plan and with policy 1d of the WHS Management Plan;

(ii) The SST failed to take into account the effect of his conclusion that the proposal would cause less than substantial harm to heritage assets on the business case advanced for the scheme;

(iii) The SST failed to consider alternative schemes in accordance with the World Heritage Convention and common law.

(i) Failure to take into account local policies

225. It is plain from, for example, DL11 and DL27 that the SST had regard to the Wiltshire Core Strategy and the WHS Management Plan.

226. In PR 5.7.322 to 5.7.325 of its report the Panel stated in a section devoted to its fifth main issue that in view of its conclusions on the impact of the scheme on the OUV of the WHS, the proposal would not accord with Core Policies 58 and 59 of the Core Strategy, nor with policy 1d of the WHS Management Plan. The Panel clearly thought that the language used in PR 5.7.324 was apt to cover impact upon the settings of designated heritage assets, the subject of Core Policy 58. The Panel carried that conclusion regarding conflict with those three policies through to its summary of the adverse impacts of the scheme within section 7.2 dealing with the planning balance. At PR 7.2.32 the Panel restated the conflict they perceived with the three local policies in terms of harm to the WHS and its OUV. There is no reason to think that in that paragraph the Panel excluded the broader consideration addressed in PR 7.2.33. In any event, at PR 7.5.11 the Panel restated its conclusion on breach of the three policies in terms of both harm to the OUV of the WHS and harm to "the significance of heritage assets through development within their settings." Plainly the Panel did not think these differences in wording were important for a true understanding of their reasoning on local policies.

227. In DL28 the SST stated:-

> "The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the

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> overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is a factor to which substantial weight can be attributed [ER 7.5.11]."

228. The claimant complains that this failed to address the breach of Core Policy 58 as a result of harm caused to the settings of a number of designated assets (para. 262 of skeleton). But the SST's summary in DL28 accurately and fairly reflects the language used by the Panel themselves to cover the issues raised by both Core Policies 58 and 59. The criticism is wholly untenable.

229. The second complaint is that the SST disagreed with the Panel on the level of harm that would be caused to heritage assets (i.e. from the western cutting and from the Longbarrow junction) and so cannot be taken to have accepted, in accordance with DL 10, that that lesser degree of harm still involved conflict with the three local policies. But the language used in those policies does not indicate that "less than substantial" harm could not involve any conflict therewith and the SST said nothing to the contrary. The only rational inference is that the SST accepted that there remained a conflict with those policies. The second criticism is no better than the first.

230. There is nothing in the decision letter to indicate that the conflict with local policies was disregarded by the SST. In any event, and as Mr. Strachan QC submitted, the local policies do not refer to any balancing of harm against the benefits of a proposal, as required by the NPSNN. The NPSNN was the primary policy document to be applied under the PA 2008 according to s.104(3) , which may be contrasted with s.38(6) of PCPA 2004 Act (see also para. 91 of the defendant's skeleton and *Bramshill* at [87]).

231. For these reasons ground 5(i) must be rejected.

(ii) The alleged error regarding the business case for the scheme

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232. This complaint arises from paragraph 4.5 of the NPSNN (see [40] above). An application is normally to be supported by a business case prepared in accordance with Treasury Green Book principles. It provides the basis for investment decisions and will also be important for the consideration by the Examining Authority or by the Secretary of State of the adverse impacts and benefits of a proposal. However, the NPSNN does not suggest that such a business case should put a monetary value on every factor which goes into a planning balance or a balance carried out under paragraphs 5.133 or 5.134 of the NPSNN.

233. Nonetheless, the claimant submits that the SST's decision was flawed because he did not take into account his conclusion that two elements in the western section of the scheme would result in less than substantial harm to heritage assets.

234. The point is said to arise in this way. The cost benefit analysis for the scheme placed a monetary value of £955m on the benefit of removing the existing A303 from the WHS. This was by far the greatest monetary benefit ascribed to the scheme, being approximately ¾ of its overall benefits. The costs of the scheme were said to be between £1.15bn and £1.2bn (Table 5-6 of IP1's "Case for the scheme and NPS accordance"). So without the sum attributed to the removal of the A303 the analysis would be heavily negative. That is hardly surprising. The construction of a 3.3 km tunnel, the cuttings and the junctions are expensive works.

235. The figure of £955m was arrived at by a public attitude survey which asked people to put a monetary value on their willingness to pay for the perceived benefit of removing the existing A303 and its traffic from the immediate vicinity of Stonehenge; or to put a monetary value on their willingness to accept a payment as compensation for the loss of amenity to travellers on the existing A303 through no longer being able to see Stonehenge while travelling. The survey was targeted at three groups: visitors to Stonehenge, road users and the general population (PR 5.17.94).

236. A number of criticisms were made of this approach during the Examination (see e.g. PR 5.17.96 to 5.17.99). IP1 accepted that it was unusual for cultural heritage assets to be given a monetary value in the appraisal of a transport scheme, but here the enhancement of the cultural heritage was so significant that it formed an integral part of the objectives of the scheme and it was therefore considered appropriate to make an attempt at quantification of that factor (PR 5.17.100). However, it is plain that the exercise did not attempt to monetise all positive or negative impacts upon cultural heritage or all factors going into the planning balance. IP1 submitted at the Examination that the two should not be confused (PR 5.17.112). The cost benefit analysis formed part of a value for money exercise. It was relevant, for example, that funding was in place, given that compulsory purchase powers needed to be

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granted as part of the DCO.

237. The National Audit Office pointed out that although IP1 had used approved methodologies to arrive at the figure of £955m, calculating benefits in that way was inherently uncertain and decision-makers were advised to treat them cautiously (PR 5.17.108).

238. The Panel took a realistic attitude to this debate (PR 5.17.117):-

> ”The ExA makes no specific criticism of the manner in which the study has been undertaken, or the methodology adopted. It appears to the ExA a genuine attempt undertaken to put a value on heritage benefits as described in the survey material. However, the ExA recognises that this is hedged with uncertainty and endorses the cautious approach advocated by the NAO and the DfT itself. The ExA notes the concerns of SA and others that the visual information provided to survey participants did not fully represent the impact of the Proposed Development on the WHS and recognises that participants could not be expected to have the detailed knowledge of impacts that the Examination process has allowed. The ExA also understands that participants might, if presented with choices about what their taxes would be spent on, adjust the priority given to otherwise desirable heritage outcomes.”

239. The whole of the Panel’s report was before the SST. The Panel accepted that respondents to the survey could not be expected to have detailed knowledge about impacts on cultural heritage that had been discussed in the Examination. It did not suggest that this component of the economic or investment analysis should be adjusted, in some way, whether quantitatively or otherwise, according to the judgments reached on heritage impacts, for example, from the western section of the scheme.

240. The SST did not disagree with the Panel’s approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an “obviously material consideration” which the SST was obliged to take into account as altering the business case.

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241. Accordingly, ground 5(ii) must be rejected.

(iii) Alternatives to the proposed western cutting and portals

242. The focus of the claimant's oral submissions was that the defendant failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800m of the cutting and secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243. The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2 of the report which brought together in the planning balance the various factors which had previously been considered. Paragraph 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at paragraphs 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244. It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see [41] above) (see PR 5.4 to 5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56 to 5.4.75.

245. IP1's case, applying paragraph 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were:

(i) "to be satisfied that an options appraisal has taken place,"
(ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and
(iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012) ("the Habitats Regulations 2017 ") or the Water Framework Directive (PR 5.4.57 to 5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied

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the sequential and exception tests for flood risk and that no part of the scheme fell within a National Park or an Area of Outstanding Natural Beauty (PR 5.4.59). However the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35 to 5.4.55).

247. The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16 to 5.4.27 and the representations of interested parties on that issue at PR 5.4.45 to 5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18 to 5.4.19). In the HIA IP1 stated that the options involving 4.5km tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para. 7.3.12) However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248. It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets ([73] above). Second, it considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above).

249. The Panel recorded the position of IP2 as having been satisfied that IP1 had undertaken "an options appraisal in relation to the alternatives to the route of a highway in place of the A303…." (PR 5.4.55). Once again "options appraisal" referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in [247] above from paragraph 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1's additional contention that the extended tunnel options would bring only

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minimal benefits in heritage terms.

250. In its conclusions the Panel said that it was satisfied that IP1 had carried out a "full options appraisal" for the project in achieving its selection for inclusion in the RIS [1] as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2's view that "the EIA has addressed alternatives" and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred expressly to IP1's case that because the scheme retained its status in the RIS, "further option testing need not be considered by the [Panel] or by the [SST]" (PR 5.4.68). The Panel also referred to the "full response" which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had "explained" its reasons for their rejection and the selection of the scheme route. The Panel said that it found "no reason to question the method and approach of the appraisal process that led to that outcome" (PR 5.4.69).

251. After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:-

> "However, insofar as the options appraisal is concerned, the ExA is content that the Applicant's approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker* ." (emphasis added)

This simply restated paragraph 4.27 of the NPSNN.

252. The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72 to 5.4.73. Its conclusions focused on the adequacy of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which

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subsequently drove its recommendation that the application for development consent be refused.

253. In PR 5.4.74 the Panel addressed alternatives in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254. The Panel's overall conclusions at PR 5.4.75 was:-

> "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255. Similarly at PR 7.2.28 the Panel concluded:-

> "The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative."

256. In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives, the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [Panel's] reasoning and conclusions on these matters."

257. Accordingly, both the Panel and the SST considered alternatives on the same basis as

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IP1, in that it was necessary to consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see [31] above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258. Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224 to 5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular," namely the EIA Directive and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives." But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017 . Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and AONBs and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

260. But the Panel, and by the same token, the SST, applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision- maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (i.e. there has been full options testing for the purposes of a RIS) the applicant

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does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an "investment decision-making process". For example, page 91 of the current RIS, "Road Investment Strategy 2: 2020-2025", explains that the document makes an investment commitment to the projects listed on the assumption that they can "secure the necessary planning consents." "Nothing in the RIS interferes with the normal planning consent process." [2]

261. A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in para. 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

262. Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process, or there may have been a change in circumstance since that exercise was carried out. In the present case page 3-3 of chapter 3 of the ES stated that the options involving a 4.5 km tunnel (i.e. a western extension) all involved costs significantly in excess of the available budget and so had not been considered further. During the Examination IP1 stated in a response to questions from the Panel that it also considered that extending the tunnel to the west would provide only "minimal benefit" in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel.

263. Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset ([71] above) and (ii) there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets ([97-98] above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed, and its authenticity seriously harmed ([101 to 103] above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, *a fortiori* if there was a policy or legal requirement for that matter

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to be considered by the decision-maker.

264. The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see [46] above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265. Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see [120]). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266. The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see [130] and [140-141] above).

267. Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see [139] and [142 to 144] above).

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well-established and need only be summarised here.

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269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte v Secretary of State for the Environment (1987) 53 P & CR 293 at 299-300* has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider where there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Limited) v Westminster City Council [2017] PTSR 116 at [30]* . Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council [2001] PLCR 31 at [22] to [30]* . At [30] Laws LJ stated:-

> "…. it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.— such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

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272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] 1 P&CR 19* Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council [2009] EWCA Civ 734* the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

> "52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do

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> really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.
>
> 53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor QC in *First Secretary of State v Sainsbury's Supermarkets Limited [2007] EWCA Civ 1083* is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational ([30 and 32]). Accordingly, that was not a case, like the present one [3] , where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see [272] above).

276. The wider issue which the Court of Appeal went on to address at [33] to [38] of the *Sainsbury's* case does not arise in our case, namely must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets, but that was undoubtedly an example of the first principle stated in *Trusthouse Forte* (see [269] above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account.* Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further,

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in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account [4] . I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278. First, the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (para. 5.131).

279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (e.g. scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see [137], [139] and [144] above).

280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of Articles 4 and 5 of the Convention , the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations.

282. Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at [78]). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that

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sense, it is not acceptable *per se* . The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse Forte* , where an assessment of relevant alternatives to the western cutting was required (see [269] above).

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr. Strachan QC says that the SST found the scheme to be acceptable collapses.

285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see [246] above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

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287. Eighth, it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017 . Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. Ninth, it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration. But in addition the SST's finding that the proposal accords with the NPSNN for the purposes of s.104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add for completeness that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

292. Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293. There is no basis for the court to hold that relief should be withheld under s.31(2A) of the Senior Courts Act 1981 . It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

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294. The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST's decision to grant development consent and the DCO itself.

Appendix 1 – Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well-established. Amongst other things:

a. There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The Court will not interfere with matters of planning judgment other than on legitimate public law grounds: see for example *Client Earth* at [101] and [103] [4/9/203- 204], applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221* and *St Modwen Developments v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643* ; *[2017] PTSR 476 at [7]* .

b. Decision Letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles *in Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153* , 164E-G).

c. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see for example *South Bucks DC v Porter (No 2) [2004] 1 WLR 1953* . The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council [2017] UKSC 79 at [42]*). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *Client Earth* High Court judgment at [146] and *Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767 at [19]* . However, 'if disagreeing with an inspector's recommendation the Secretary of State is…required to explain why he rejects the inspector's view' see *Horada v SSCLG [2016] EWCA Civ 169, at [40]* . Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ

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29434 1243 at [24]-[26]. Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government [2019] PTSR 668*).

d. The judgment of Lewis J. in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy [2017] EWHC 1111 (Admin)* has applied the South Bucks standard of reasons to development consent decisions (at [47]).

e. Where it is alleged that a decision-maker has failed to take into account a material consideration, it is insufficient for a claimant simply to say that the decision- maker has failed to take into account a material consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account: see *Client Earth* at [99] applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221*

f. The interpretation of planning policy is a matter for the court. In *R (Scarisbrick v Secretary of State for Communities and Local Government [2017] EWCA Civ 787* , the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008 . See paragraphs 5-8. Lindblom LJ (with whom the other Lord Justices agreed) held:

> "19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the *Supreme Court in Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13* , in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* . and *Richborough Estates Partnership LLP v Cheshire East Borough Council [2017] UKSC 37, at paragraphs 22 to 26*). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see

> paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council).* But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision making."

Heritage Assessment - the Statutory Duty

2. Regulation 3 of the 2010 Regulations states:

> (1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting.

3. The 2010 Regulations do not address World Heritage Sites, although they do address individual scheduled monuments, listed buildings etc. within a World Heritage Site.

4. The equivalent sections applying to listed buildings and conservation areas in relation to planning decisions are in s66(1) and s72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ('the Listed Buildings Act'). These state:

> (1) 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."
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

5. The case law concerning the wording of the statutory duties in the Listed Buildings Act refers to the decision maker being required to give 'considerable importance and weight' to the desirability of: (a) preserving listed buildings or their settings, (b) preserving or enhancing the character or appearance of a conservation area, (c) preserving scheduled monuments or their settings (see *East Northamptonshire District Council v SSCLG [2015] 1 WLR 45* the Court of Appeal (following *South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141* and *The Bath Society v SSE* [1991] 1 W.L.R.1303)).

6. In *Forge Field v Sevenoaks DC [2014] EWHC 1895* Lindblom J (as he then was) stated in respect of duties in the Listed Buildings Act that:

> "There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area" (at [45]).

The Judge went on [49]:

> "…an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

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7. The case of *South Lakeland* (above) confirmed that the concept of 'preserving' under the Listed Buildings Act means 'doing no harm' (per Lord Bridge of Harwich at pp 149- 50).
8. Lindblom LJ provided further guidance in relation to the duty in relation to the settings of listed buildings under the Listed Buildings Act in *Catesby Estates v Steer [2018] EWCA Civ 1697* . He highlighted that:

a. 'the s. 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is—even if its extent is difficult or impossible to delineate exactly—and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision- maker may find it hard to assess whether and how the proposed development "affects" the setting of the listed building, and to perform the statutory obligation to "have special regard to the desirability of preserving … its setting …"' [28]
b. '…though this is never a purely subjective exercise, none of the relevant policy guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will change from one case to the next.' [29]
c. 'the effect of a particular development on the setting of a listed building— where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance—are all matters for the planning decision-maker, subject, of course, to the principle emphasized by this court in *East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 W.L.R. 45 (at [26] to [29])* , *Jones v Mordue [2016] 1 W.L.R. 2682 (at [21] to [23])* , and Palmer (at [5]), that "considerable importance and weight" must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision- maker's approach, the court should not intervene (see Williams, at [72]). For decisions on planning appeals, this kind of case is a good test of the principle stated by Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government *[2017] 1 W.L.R. 1865 (at [25])* - that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".' [30].

9. The most recent judgment of the Court of Appeal addressing paragraph 196 NPPF is *City and Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320* . In that case the Court confirmed that neither 29838 paragraph 196 NPPF nor s66(1) Listed Buildings Act 1990 require an internal heritage balance to be conducted in order to arrive at the level of harm to an asset before weighing that

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harm against public benefits. The key passages of the judgment are at [71]-[81].

Appendix 2 – Paragraphs 25 to 43 and 50 of the decision letter

25. The Secretary of State notes the ExA's consideration of cultural heritage and the historic environment in Chapter 5.7 of the Report and the differing positions on this matter among others of: Wiltshire Council [ER 5.7.55 – 5.7.61]; the Historic Buildings and Monuments Commission for England ("Historic England") [ER 5.7.62 – 5.7.69]; the National Trust [ER 5.7.70 – 5.7.71]; English Heritage Trust [ER 5.7.72]; International Council on 7 Monuments and Sites ("ICOMOS") Missions [ER 7.7.73 – 5.7.80]; Department for Digital, Culture, Media and Sport ("DCMS") [ER 5.7.81 – 5.7.83]; International Council on Monuments and Sites, UK ("ICOMOS-UK") [ER 5.7.84 – ER 5.7.98]; Stonehenge and Avebury World Heritage Site Coordination Unit ("WHSCU") [ER 5.7.99 – ER 5.7.104]; the Stonehenge Alliance (comprising: Ancient Sacred Landscape Network, Campaign for Better Transport, Campaign to Protect Rural England, Friends of the Earth, and Rescue: The British Archaeological Trust) [ER 5.7.105 – 5.7.108]; the Consortium of Archaeologists and the Blick Mead Project Team ("COA") [ER 5.7.109 – 5.7.120]; and the Council for British Archaeology ("CBA") and CBA Wessex [ER 5.7.121 – 5.7.128].

26. Central to the Secretary of State's consideration of cultural heritage and historic environment is the question of the Development's conformity with the NPSNN and whether substantial or less than substantial harm is caused to the Outstanding Universal Value ("OUV") of the WHS. The NPSNN (paragraphs 5.131-5.134) states that substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional and that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage site, the greater the justification that will be needed for any loss. Where the Development would lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm. Where the Development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.

27. The Secretary of State notes that the concept of OUV has evolved and been incorporated in the UNESCO document 'The Operational Guidelines ("OG") for the Implementation of the World Heritage Convention'3, which have been regularly revised since 1977 (the latest

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update being in 2019). It is noted that the term OUV is defined in paragraph 49 of the OG as meaning: 'Outstanding Universal Value means cultural and/or national significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity'. The Secretary of State notes the UNESCO definitions of criteria for inscription of the WHS on the World Heritage List [ER 2.2.2] and the description of the attributes of OUV4 [ER 2.2.6] has been set out by the ExA. The WHS Management Plan that was adopted for the WHS in 2015 sets out the vision and management priorities for the WHS to sustain its OUV [ER 3.13.1 - 3.13.2]. The ExA has also considered the local Development Plan, National Planning Policy Framework ("NPPF"), and the Statement of Outstanding Universal Value that exists for the WHS as important and relevant matters [ER 5.7.13 - 5.7.17].

28. The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is a factor to which substantial weight can be attributed [ER 7.5.11].

29. In the ExA's overall heritage assessment [ER 5.7.327 – 5.7.333] the ExA considers the cultural heritage analysis and assessment methodology adopted by the Applicant appropriate, subject to certain points of criticism. These include poor consideration of the influence of the proposed Longbarrow Junction on OUV; inadequate attention paid to the less tangible and dynamic aspects of setting, as well as the absence of consideration of certain settings; and concerns regarding the consideration given to the interaction and overall summation of effects. The ExA took these points into account in its assessment [ER 5.7.327]. The ExA is also content overall with the mitigation strategy, apart from the proposed approach to artefact sampling and various other points identified. As set out in Appendix E to its Report the ExA recommends the Secretary of State considers resolving these matters if the decision differs from the recommendation [ER 5.7.328].

30. On the effects of the Development on spatial relations, visual relations and settings, the ExA concludes that substantial harm would arise. This conclusion does not accord with that

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of Historic England, but is based on the ExA's professional judgments, having regard to the entirety of evidence on cultural heritage [ER 5.7.329]. In particular, the ExA places great weight on the effects of the spatial division of the cutting, in combination with the presence of the Longbarrow Junction on the physical connectivity between the monuments and the significance that they derive from their settings. This includes the physical form of the valleys, with their historic significance for past cultures, and the presence of archaeological remains [ER 5.7.330].

31. The ICOMOS mission reports and the WH Committee decisions, alongside the submissions of DCMS, in the context of the remainder of the evidence examined have been noted by the ExA and it regards the reports and decisions as both relevant and important, but not of such weight as to be determinative in themselves [ER 5.7.331].

32. The Secretary of State notes the ExA's approach has been to integrate cumulative and in-combination effects into its assessment, where relevant and that the ExA agrees with the outcome of the Applicant's exercise that cumulative effects arising from the future baseline would not be significant, and that adequate mitigation has been arranged in respect of in-combination effects during construction and operation [ER 5.7.332].

33. It is the ExA's opinion that when assessed in accordance with NPSNN, the Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [ER 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [ER 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they 9 consider there would or could be scope for a net benefit overall to the WHS [ER 5.7.54, ER 5.7.55, ER 5.7.62, ER 5.7.70, ER 5.7.72 and ER 5.7.83].

34. The Secretary of State notes the differing positions of the ExA and Historic England, who

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has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [ER 5.7.62 – 5.7.69] and considers it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Development in the planning balance.

35. Whilst also acknowledging the adverse impacts of the Development, the Secretary of State notes that Historic England's concluding submission [Examination Library document AS-111] states that it has supported the aspirations of the Development from the outset and that putting much of the existing A303 surface road into a tunnel would allow archaeological features within the WHS, currently separated by the A303 road, to be appreciated as part of a reunited landscape, and would facilitate enhanced public access to this internationally important site [ER 5.7.62] and that overall it broadly concurs with the Applicant's Heritage Impact Assessment [ER 5.7.66]. Furthermore, it is also noted from Historic England's concluding submission that it considers the Development proposes a significant reduction in the sight and sound of traffic in the part of the WHS where it will most improve the experience of the Stonehenge monument itself, and enhancements to the experience of the solstitial alignments [ER 5.12.32]. It considers that, alongside enhanced public access, these are all significant benefits for the historic environment.

36. The Secretary of State also notes from Historic England's concluding submission made during the examination [Examination library document AS-111] that its objective through the course of the examination was to ensure that the historic environment is fully and properly taken into account in the determination of the application and, if consented, that appropriate safeguards be built into the Development across the dDCO, OEMP and the Detailed Archaeological Mitigation Strategy ("DAMS") [ER 5.7.63]. Whilst it is also noted that Historic England identified during the examination a number of concerns where further information, detail, clarity or amendments were needed, particularly around how the impacts of the Development would be mitigated, their concluding submission states that its concerns have been broadly addressed. Historic England believe that the dDCO, OEMP and DAMS set out a process to ensure that heritage advice and considerations can play an appropriate and important role in the construction, operation and maintenance of the Development. As a consequence of the incorporation of the Design Vision, Commitments and Principles in the

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OEMP, together with arrangements for consultation and engagement with Historic England, it considers sufficient safeguards have been built in for the detailed design stage and there are now sufficient provisions for the protection of the historic environment in the dDCO. It is Historic England's view that the DAMS is underpinned by a series of scheme specific research questions which will ensure that an understanding of the OUV of the WHS and the significance of the historic environment overall will guide decision making and maximise opportunities to further understand this exceptional landscape. It considers the DAMS will also ensure that the archaeological mitigation under the Site Specific Written Schemes of Investigation ("SSWSIs") will be supported by the use of innovative methods 10 and technologies and the implementation of an iterative and intelligent strategy, which will enable it to make a unique contribution to international research agendas.

37. Given the amendments and assurances requested and received during the course of the examination and the safeguards that are now built into the DCO overall, Historic England states in the concluding submission that it is confident of the Development's potential to deliver benefits for the historic environment.

38. The Secretary of State also notes that Historic England would continue to advise the Applicant on the detail of the design and delivery of the Development through its statutory role and its roles as a member of Heritage Monitoring and Advisory Group and of the Stakeholder Design Consultation Group. The ExA agrees with Historic England's view that this would also help minimise impact on the OUV, and delivery of the potential benefits for the historic environment [ER 5.7.69].

39. Historic England's response to the Secretary of State's further consultation on 4 May 2020 also indicates that its advice has addressed the need to avoid any risk of confusion which might impede the successful operation of the processes, procedures and consultation mechanisms set out in the revised DAMS and OEMP designed to minimise the harm to the Stones and surrounding environment of the WHS.

40. Similarly, the Secretary of State also notes the National Trust's support for the Development and view that, if well designed and delivered with the utmost care for the surrounding archaeology and chalk grassland landscape, the Development could provide an overall benefit to the WHS. It also considers the Development could help to reunite the landscape providing improvements to monument setting, tranquillity and access for both

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people and wildlife. Following initial concerns about the lack of detail in relation to both design and delivery, it is now satisfied that sufficient control measures have been developed through the DAMS and OEMP and also in the dDCO [ER 5.7.70 – 5.7.71]. English Heritage Trust support the scope for linking Stonehenge back to its wider landscape and making it possible for people to explore more of the WHS and welcomes the reconnection of the line of the Avenue [ER 5.7.72]. DCMS also expressed the view that the Development represents a unique opportunity to improve the ability to experience the WHS and its overall impact would be of benefit to the OUV of the WHS, primarily through the removal of the existing harmful road bisecting the site [ER 5.7.81 – 5.7.83].

41. The Secretary of State notes that whilst Wiltshire Council acknowledge that the most significant negative impact of the Development would be that of the new carriageway, cutting and portal on the western part of the WHS, the Council considers the removal of the existing A303 road would benefit the setting of Stonehenge and many groups of monuments that contribute to its OUV and the removal of the severance at the centre of the WHS caused by the road would improve access and visual connectivity between the monuments and allow the reconnection of the Avenue linear monument. It considers the removal of the existing Longbarrow Roundabout and the realignment of the A360 would also benefit the setting of the Winterbourne Stoke Barrow Group and its visual relationship to other groupings of monuments in the western part of the WHS and the absence of road lighting within the WHS and at the replacement Longbarrow Junction would help reduce light pollution. The rearranged road and byway layout to the east would remove traffic from the vicinity of the scheduled Ratfin Barrows [ER 5.7.55 – 5.7.57].

42. The Secretary of State also notes from the Statement of Common Ground agreed between Wiltshire Council and the Applicant [Examination library document AS-147] that Wiltshire Council's regulatory responsibility include managing impacts on Wiltshire's heritage assets and landscape, in relation to its statutory undertakings. These responsibilities include having regard to the favourable conservation status of the WHS. The document notes that the Development affects several built heritage assets, both designated and undesignated. However, all sites of interest along the route had been visited by the relevant Council officer with the built heritage consultant, and general agreement exists regarding the likely extent of the Development's impacts. Wiltshire Council agreed that there are no aspects that are considered likely to reach a level of 'substantial harm'.

43. The Secretary of State has also carefully considered the ExA's concerns and the respective counter arguments and positions of other Interested Parties, including

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ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Development on the OUV of the WHS and on the cultural heritage and the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [ER 5.7.207]. He accepts there will be adverse impacts from those parts of the Development. However, on balance and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and therefore the adverse impacts of the Development should be balanced against its public benefits.

50. In conclusion on cultural heritage and the historic environment, the Secretary of State places great importance in particular on the views of his statutory advisor, Historic England and also sees no reason to doubt the expertise of those from Historic England or other statutory consultees that have advised on this matter (or indeed on other matters relating to the application). As indicated above, whilst he accepts there will be harm, there is no suggestion from Historic England that the harm will be substantial. The Secretary of State agrees with Historic England on this matter and is also encouraged by the continued role Historic England would have in the detailed design and delivery of the Development should consent be granted. Whilst also acknowledging some Scientific Committee experts are not content with the mitigation proposed and also that the ExA was not content with the proposed approach to artefact sampling, the Secretary of State accepts Historic England's views on this matter and is satisfied that the mitigation measures included in the updated OEMP and DAMS as submitted by the Applicant on 18 May 2020 and secured by requirements 4 and 5 in the DCO are acceptable and will help minimise harm to the WHS.

Footnotes

1 For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network v Secretary of State for Transport [2021] EWHC 2095 (Admin)*

2 See *R (Transport Action Network v Secretary of State for Transport [2021] EWHC 2095 (Admin) at [28]-[37] and [96* (vii)].

3 Which is to do with a failure to assess the relative merits of identified alternatives.

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4 It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.

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