Neutral Citation Number: [2016] EWHC 1527 (Admin)

Case No: CO/4203/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2016

Before :

RHODRI PRICE LEWIS QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between :

THE QUEEN **(on the application of Katharine Butler)**	**Claimant**
- and -	
EAST DORSET DISTRICT COUNCIL	**Defendant**
-and-	
GOOD ENERGY MAPPERTON FARM SOLAR PARK (007) LTD	**Interested Party**

Mr Andrew Parkinson (instructed by **Richard Buxton Environmental and Public Law**) for the **Claimant**
Mr Martin Edwards (instructed by **East Dorset Council**) for the **Defendant**

Hearing date: 18 May 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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RHODRI PRICE LEWIS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

The Deputy Judge (Rhodri Price Lewis QC) :

Introduction

1. Permission to bring this judicial review was given by Collins J on the 2nd December 2015. The Claimant seeks judicial review of the decision by East Dorset District Council, the local planning authority for their area, to grant planning permission for development described in the decision notice as "Proposed temporary change of use from agriculture to agriculture and solar photovoltaic farm with associated static arrays of photovoltaic panels together with cabins to contain inverter cabinets and transformers and a cabin to house a substation, with perimeter deer fencing, landscaping and ecological enhancements. As amended by plans received 23/3/2015 to reduce area for photovoltaic panels – Application reconsidered following quashing of the initial decision at Mapperton Farm, Mapperton, Almer, Blandford Forum, Dorset." I shall refer to the land in respect of which that planning permission was granted as "the Site".

Preliminary Issue:

2. At the hearing of the claim the Defendant argued that the claim should be dismissed because of delay in bringing the claim or as an alternative that the grounds to be argued should be limited to what is now ground four, namely a claimed failure to provide a statement of the reasons for the decision as required by Regulation 24 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. I ordered at the hearing that the claim would be allowed to proceed on all grounds and I indicated that I would give my reasons in this judgment. They are as follows.

3. The planning permission under challenge was granted on the 22nd July 2015. A judicial review pre-action protocol letter was sent on behalf of the Claimant to the Defendant on the 1st September 2015. It referred to the failure to provide the statement of reasons under Regulation 24. The letter stated: "Should the matter proceed further, we reserve the right to consider whether there are other grounds and if so include them in any submitted claim." The Claim Form was filed on the 2nd September 2015. Under Section 5 "Detailed statement of grounds" it read: "The attached pre-action protocol letter sets out the grounds as currently envisaged, although a fuller statement and possible amendment is likely to be lodged subject to receipt of response(s) to the PAP letter. In summary, the Defendant failed to comply with Reg 24 (1)(c)(iii) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011." Under Section 8 "Other applications" it read: "I wish to make an application for a stay of the application …to allow the Defendant (and if desired the IP) 14 days to respond to the PAP letter and a further 7 days for the Claimant to consider said response(s). If the Claimant decides to proceed with the Claim, including a fuller statement of facts and grounds and evidence in support, she is to do so within 14 days thereafter … and thereafter the Defendant (and IP) have 21 days to file acknowledgment of service. The Claimant, if necessary, to file a reply within 14 days thereafter." On the 14th September 2105 Collins J made orders in the following terms:

> "1. I have some concern that to leave indication of a possible claim until the 6 weeks are nearly up and then to do no more

than issue a PAP which does not contain the detail required for a claim but expect a stay may in effect be a means of extending the 6 week period. But it is arguable that the important point is to notify a claim within 6 weeks and what is proposed can save costs.

2. The propriety of the approach adopted in this case may need some judicial consideration following argument. It must be appreciated that any response by the defendant or the interested party will be treated as a preliminary Acknowledgment of Service and so if permission is not granted can affect an award of costs.

3. In the circumstances I am prepared to comply with the claimant's application to the following extent:

(1) The defendant and the IP (if desired) should respond to the PAP letter which will stand as the grounds within 21 days.

(2) The claimant must if the claim is to proceed lodge amended grounds and any further evidence (if any) within 14 days of receipt of the defendant's response.

(3) The defendant and IP may serve an amended Acknowledgment of Service within 21 days."

4. The Defendant wrote a letter dated the 18th September 2015 setting out a response to the one ground of claim expressly relied upon and complaining of the procedure that had been adopted. On the 2nd October 2015 an Amended Statement of Facts and Grounds of Judicial Review was lodged on behalf of the Claimant relying on all the grounds now advanced and on the 19th October an Acknowledgment of Service with preliminary summary grounds of opposition was served. That document set out more fully the complaints about the procedure adopted on behalf of the Claimant. A reply dated the 26th October 2015 responded to those complaints. On the 2nd December 2015 Collins J granted permission and observed that all grounds can be argued.

5. The claim form was filed not later than six weeks after the grounds to make the claim first arose as required in planning cases by CPR 54.5(5). There is no additional requirement of promptness in planning cases - no doubt because of the reduction in the time limit in such cases to six weeks from the 3 months limit that applies in other judicial review claims. There was no delay in filing the claim. There is a power to seek permission from the court to rely on grounds other than those for which permission has been given under CPR 54.15. Here whilst expressing initial concerns about the procedure adopted on behalf of the Claimant, Collins J gave permission for all the grounds which by then had been pleaded to be argued. The questions of delay and the addition of new grounds were live issues before Collins J when he granted permission. I read his grant of permission on all grounds in those circumstances as meaning that his initial concerns had been allayed. Furthermore, I do not consider that the Defendant has suffered any prejudice in having to address the five grounds on which permission to proceed has been granted. They all raise matters which the

Defendant is able to address. It is for these reasons that I ordered that the claim should proceed to a full hearing on all the grounds and it did so.

The Factual Background:

6. The Site is located approximately 670m from the hamlet of Mapperton. Approximately 1km from the Site lies Charborough Park, a Grade I listed building which sits in a Grade II* Registered Park and Garden. Also within the Park is the Grade II* listed Charborough Tower. Mapperton is within a Conservation Area.

7. In July 2013, the Interested Party submitted a planning application to change the use of agricultural land at the Site to use as a solar farm for a period of 30 years. On the 14th November 2014, the Council granted planning permission for the proposed development. That permission was challenged by the Claimant on the grounds, *inter alia*, that (i) the reasons given in the screening opinion for finding that the development was not EIA Development were inadequate and (ii) that the decision to grant permission was unlawful on the grounds of apparent bias and procedural unfairness. The Council conceded that both grounds were made out, and the permission was quashed by a consent order dated 25th April 2014. The application was remitted back to the Council for re-determination.

8. By a screening opinion dated 19th September 2014, the Council determined that the Application was EIA Development as it was considered likely to have a significant effect on the landscape and visual environment.

9. The Council's Planning Officer prepared a report ("the OR"), which recommended to the Council's Planning Committee that planning permission be granted. The Application was scheduled to be considered by the Planning Committee at its meeting on 21st July 2015. On 14th July 2015, a 90-page update sheet was published and on 21st July 2015, the Planning Committee resolved to grant planning permission. On 22nd July 2015, planning permission was granted for the development sought in the Application, as amended by the plans received on 23rd March 2015 ("the Permission").

Legal principles for reviewing decisions taken by local planning authorities

10. The general approach to challenges to decisions of local planning authorities to grant planning permission were recently summarised by Holgate J in *R (oao Nicholson) v Allerdale Borough Council* [2015] EWHC 2510 (Admin) and I gratefully adopt his summary, as follows:

> "10. The grounds of challenge in this case primarily involve criticisms of the officer's report. The relevant principles upon which the High Court will approach a challenge of this nature have been set out in a number of cases and were summarised in *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at paragraphs 90 to 98.
>
> 11. For the purposes of the present application I would emphasise the following principles drawn from that summary: -

In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the officer's report, particularly where a recommendation is accepted;

The officer's report must be read as a whole and fairly, without being subjected to the kind of examination which may be applied to the interpretation of a statute or a contract;

Whereas the issue of whether a consideration is relevant is a matter of law, the weight to be given to a material consideration is a matter of planning judgment, which is a matter for the planning committee, not the court;

"An application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" per Lord Justice Judge (as he then was) in *Samuel Smith Old Brewery (Tadcaster) v Selby District Council* (18 April 1997)."

"In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge."

(*R v Mendip District Council ex parte Fabre* (2000) 80 P CR 500 per Sullivan J, as he then was).

"The purpose of an officer's report is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large, but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development plan policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail." (emphasis added)

(Sullivan J in the Ex parte Fabre case at page 509)

Likewise in *Morge v Hampshire County Council* [2011] UKSC 2 at paragraph 36, Baroness Hale of Richmond said:

"Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose would be defeated..."

12. ... the observations of Sullivan J (as he then was) in *R (Newsmith Stainless Ltd) v Secretary of State* [2001] EWHC Admin 74 (at paragraphs 6 to 8) on perversity challenges to the decisions of planning Inspectors are also applicable where challenges of that nature are made to the decisions of a local authority.

13. Thus, an application for judicial review is not an opportunity for a review of the planning merits of the Council's decision. Although an allegation that such a decision was perverse, or irrational, lies within the scope of proceedings under CPR Part 54, "the Court must be astute to ensure that such challenges are not used as a cloak for a rerun of the arguments on the planning merits" (*Newsmith* at paragraph 6). In any case where an expert tribunal is the fact finding body, as in the case of a planning committee (see Cranston J in *R (Bishops Stortford Federation) v East Herts D.C.* [2014] PTSR 1035 at paragraph 40), the threshold for *Wednesbury* unreasonableness is a difficult obstacle for a Claimant to surmount, which is greatly increased in most planning cases by the need for the decision-maker to determine not simply questions of fact, but a series of planning judgments. Since a significant element of judgment is involved, there will usually be scope for a fairly broad range of possible views, none of which could be categorised as unreasonable (*Newsmith* at paragraph 7). Moreover, the decision may also be based upon a site inspection, which may be of critical importance. Against this background, a Claimant alleging that a decision-maker has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment "faces a particularly daunting task" (*Newsmith* at paragraph 8).

14. On the other hand, as Mr. Dan Kolinsky QC (who appeared on behalf of the Claimant) pointed out, irrationality challenges are not confined to the relatively rare example of a "decision which simply defies comprehension", but also include a decision which proceeds from flawed logic (relying upon *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, 244 at paragraph 65)."

11. Further, section 70(2) of the Town and Country Planning Act 1990 provides that in dealing with an application for planning permission the local planning authority "shall

have regard to (a) the provisions of the development plan so far as material to the application … and (c) any other material consideration." By section 38(6) of the Planning and Compensation Act 2004 such an application for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. As Lord Reed said in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13:

> "17 It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361* ; *Horsham DC v Secretary of State for the Environment (1991) 63 P & CR 219* , 225–226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act [section 38(6) of the 2004 Act in England and Wales]. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33, [1997] 1 WLR 1447* . It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:
>
> "In the practical application of section 18A [now section 38(6)] it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."
>
> 18 In the present case, the planning authority was required by section 25 [now section 38(6)] to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan… in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department [2008] QB 836*), policy statements should be interpreted objectively in

> accordance with the language used, read as always in its proper context.
>
> 19 That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759* , 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

12. The Christchurch and East Dorset Local Plan Part 1 Core Strategy adopted by the Council in April 2014 is the development plan for these purposes in this case.

13. In the light of those principles I shall consider the grounds of claim.

Ground 1: Failure properly to interpret policy HE1 of the Core Strategy:

14. So far as is material, Policy HE1 of the Core Strategy (entitled "Valuing and Conserving our Historic Environment") provides as follows:

> "Heritage assets are an irreplaceable resource and will be conserved and where appropriate enhanced for their historic significance and importance locally to the wider social, cultural and economic environment.
>
> The significance of all heritage assets and their settings (both designated and non-designated) will be protected and enhanced especially elements of the historic environment which contribute to the distinct identity of Christchurch and East Dorset. Such key historic elements include the market towns of Wimborne Minster and Christchurch; Christchurch Quay; Highcliffe and Christchurch Castles; 11th Century Christchurch Priory Church and Saxon Mill; site of civil war siege in 1645; the setting of Wimborne Minster; significant Neolithic, Iron Age and Roman archaeological landscape; and prominent estates such as Cranborne and Wimborne St Giles.".

15. **The Claimant's Submissions:** The Claimant submits the Planning Officer and subsequently the members of the committee erred in interpreting the policy and so mistakenly concluded that the proposed development conformed with the policy. It is submitted that the proper interpretation of this policy is clear: development will be contrary to Policy HE1 if it causes any harm to and so fails to protect the significance of a designated or non-designated heritage asset. The policy does not distinguish between substantial harm and non-substantial harm: any degree of harm is contrary to the policy. Further, the policy does not require or permit a balancing exercise between the harm to heritage assets and the public benefits of a development proposal. Any harm to heritage assets will result in non-compliance with Policy HE1, regardless of the associated public benefits. Instead, those public benefits are only relevant to the question of whether the proposal accords with other development plan policies (and therefore with the development plan taken as a whole) or the question of whether any conflict with the development plan is outweighed by other material considerations.

16. The Claimant submits that it is clear from the OR that the Planning Officer found that there would be harm to heritage assets (albeit that it would be less than substantial) but also found that the proposal accorded with the policy, writing:

> "The Council's Conservation Officer advises that the setting of the very northern end of the Mapperton Conservation Area is likely to be slightly affected by the proposal. There is also potential for views of the site to be experienced from Charborough Tower and Park.
>
> Officers consider the significant separation distance between the designated heritage assets and the site, together with the amount and type of intervening vegetation and varied topography is likely to result in less than substantial harm on these designated heritage assets. Consequently paragraph 134 of the NPPF is relevant, which requires the harm to be weighed against the public benefits of the proposal.
>
> As some harm has been found to designated heritage assets, Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires special regard to be given to the impact on the heritage assets in the planning assessment, which gives additional weight to this impact. In making this assessment Officers are mindful of the decision of the Court of Appeal in Barnwell Manor Wind Energy v East Northants DC and others [2014] EWCA Civ 137 to the effect that officers are aware of the need to give considerable weight and importance to the desirability of preserving the setting of heritage assets.
>
> Officers consider the substantial benefits of the development arising from the significant renewable energy production, contribution to Dorset's and the UK's renewable energy production targets; producing significant levels of energy from a non-polluting source; improving the natural environment for future generations, and providing energy security (as it will be

> produced in the UK and not rely on overseas sources), sufficiently outweigh the less than substantial harm that may arise for the aforementioned designated historic assets. This balancing exercise accounts for the extra weight that is required to be attached to the harm to designated historic assets.
>
> Therefore there is considered to be no significant adverse impact on historic assets and their settings in terms of the built heritage in the site's vicinity, and the proposal accords with policy HE1 of the CS, and the advice in Chapter 12 of the NPPF."

17. **The Defendant's Submissions:** The Defendant submits that the Claimant's argument under this ground is unduly legalistic and misconceived. Mr Edwards on behalf of the Council submits that a matter of fact all heritage assets will be conserved and that there would only be a breach of the policy if any identified harm would harm the significance of the heritage asset or the significance of its setting. He submits that the Defendant concluded that there would be no harm to the significance of any heritage asset. He stressed that the development would be temporary.

18. **Discussion and conclusions:** It is clear from the officer's report that he was advising the members that "some harm has been found to designated heritage assets": see the first line of the third paragraph of the passage of the OR quoted at paragraph 16 above. He advised that "paragraph 134 of the NPPF is relevant". That paragraph provides: "Where a development proposal will lead to less than substantial harm to the significance of a heritage asset of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use." So for that paragraph to be relevant the officer must have concluded that the development proposal here would lead to harm – albeit less than substantial harm – to the significance of a heritage asset. The significance of a heritage asset is the value of the asset to this and future generations because of its historic interest: see the glossary to the NPPF in Annex 2. So there is not a category of harm where the heritage asset's significance is unaffected. In assessing whether there would be harm from a proposal it is necessary to consider its effect on the significance of the heritage asset i.e. its "value because of its historic interest." Significance can be harmed through development within the setting of a heritage asset: see paragraph 132 of the NPPF. In my judgment on a straightforward non-legalistic reading of the report the officer was advising members that there would be harm, albeit less than substantial harm, to the significance of heritage assets here from the proposal being within the settings of the Conservation Area and of the Tower and Park.

19. In my judgment that means there would be a conflict with policy HE1 which says that "heritage assets …will be conserved" and that "the significance of all heritage assets …will be protected". The policy is saying that those assets and their significance will be preserved from harm in the Council's decision-making. Conservation and preservation are synonyms for these purposes. In a conservation area special attention is to be paid to the desirability of preserving or enhancing its character or appearance: see section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. It has long been held that "preserving" in that context means not harming: see *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 A.C. 141 at p.150 A-F. So in my judgment a heritage asset is not conserved if its

significance is harmed and that significance is not protected if it would be a harmed by a development proposal.

20. Further, in my judgment the fact that the harm identified might only be temporary – albeit for some 30 years as is permitted under condition 7 attached to the planning permission – has no bearing on how the policy is properly interpreted and the policy itself makes no distinction between temporary and permanent harm. If harm would be caused to the significance of a heritage asset by reason of development in its setting there is a conflict with the policy even if that harm is for a period of some 30 years. There is nothing in policy HE1 to suggest it permits harm provided that harm is only temporary.

21. In my judgment therefore the officer wrongly interpreted the policy when he advised members that in these circumstances the proposal would "accord with policy HE1 of the CS". There is no suggestion that the members did not follow that advice and did not adopt that same view in deciding to grant planning permission. They were therefore significantly misled on this point by the report.

22. Ground 1 is therefore made out.

Ground 2 – Failure to consider whether the proposed development complied with the heritage criterion of policy ME5 of the Core Strategy

23. Policy ME5 is entitled "Sources of Renewable Energy" and is the key development plan policy dealing with renewable energy. So far as is relevant to this ground, the policy reads as follows:

> "The Councils encourage the sustainable generation of energy from renewable and low carbon sources where adverse social, environmental and visual impacts have been minimised to an acceptable level.
>
> Proposals for renewable energy apparatus will only be permitted where:
>
> ...
>
> - It is in accordance with Policy ME1 regarding adverse ecological impacts upon the integrity of priority habitats or local populations of priority species and opportunities for biodiversity enhancement.
>
> ...
>
> - It avoids harm to the significance and settings of heritage assets."

24. The policy is quoted in full in the OR and the officer advised members under the heading "Impact on biodiversity/ecology" that "the proposal is considered to comply

with Policy … ME5 of the CS". There is no consideration in the report, however, of this last heritage criterion.

25. **The Claimant's submissions:** The Claimant submits that the heritage criterion should have been considered and if it had been, consistency with the views expressed in relation to harm to heritage assets when policy HE1 was considered would mean that the view would have been expressed that harm to the significance and setting of heritage assets had not been avoided and so there was a conflict with the policy. Further Mr Parkinson for the Claimant submitted that policy ME5 already takes the benefits of renewable energy into account before setting the criteria for acceptability in the latter part of the policy and so such benefits could not outweigh the failure to comply with the last criterion.

26. **The Defendant's Submissions:** Mr Edwards submits that the limited harm to heritage assets identified in the OR where it deals expressly with "historic assets" did not contravene policy HE1 and so there could be no conflict with this one heritage criterion of policy ME5. Further he submits that provided any adverse impact had been "minimised to an acceptable level" as the first part of the policy requires, there is no conflict with the policy.

27. **Discussion and conclusions:** In my judgment a proper reading of this policy requires a view to be formed as to whether a proposal for renewable energy apparatus would avoid harm to the significance and setting of heritage assets. For the reasons I set out under Ground 1 I am satisfied that the officer had identified that the proposed development would cause such harm and he should have advised the members that the last criterion was not met by this proposal as harm would not be avoided. The criteria that must be met for a proposal to be permitted go beyond the requirement that any adverse impacts should have been minimised to an acceptable level. Each criterion identified what would be acceptable. So far as heritage assets are concerned only an avoidance of harm is acceptable. Again the officer should have advised members of that. I am satisfied that the OR significantly misled members therefore and this ground is made out.

Ground 3 – Failure to apply section 38(6) of the 2004 Act

28. In R (Hampton Bishop Parish Council) v Herefordshire County Council [2014] EWCA Civ 878 Richards LJ held:

> "28. … It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. I say "as a general rule" because there may be exceptional cases where it is possible to comply with the section without a decision on that point: I have in mind in particular that if the decision-maker concludes that the development plan should carry no weight at all because the policies in it have been overtaken by more recent policy statements, it may be possible

> to give effect to the section without reaching a specific decision on whether the development is or is not in accordance with the development plan. But the possibility of exceptional cases should not be allowed to detract from the force of the general rule.
>
> ...
>
> 33. ...It will be clear from what I have said above that in my view compliance with the duty under section 38(6) does as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Reed in *Tesco Stores v Dundee City Council* ... they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations."

29. The OR dealt with section 38(6) as follows:

> "As with any planning application, determination must be made in accordance with the development plan (the Christchurch and East Dorset Core Strategy Part 1) unless material considerations indicate otherwise, as set out in Section 38 of the Planning and Compulsory Purchase Act 2004.
>
> Officers consider that although the proposal does not fully accord with all the relevant policies of the development plan for the reasons set out in the report above (most importantly in terms of its impact on the AGLV and the temporary loss of flexibility of some good quality agricultural land), the combined weight in favour of the proposal from its provision of renewable energy; contribution to national energy security; avoidance of greenhouse gas emissions and air pollution; ecological enhancement, farm diversification and socio economic benefits is considered to be significantly greater than the weight to be afforded to the impact on the landscape; the less than substantial harm that arises for designated heritage assets (recognising the requirement to attach greater weight to the impact on these assets); the significant level of objections and loss of flexibility of good quality agricultural land."

30. **The Claimant's Submissions:** The Claimant submits that the OR fails to decide whether the proposed development does or does not accord with the development plan, as is required by the duty under section 38(6) and as was explained by Richards LJ in *Hampton Bishop*. The passage quoted above from the OR does not make it clear whether (i) the proposal's compliance with other policies in the plan meant that it was in accordance with the development plan taken as a whole or (ii) the proposal was

considered to be not in accordance with the development plan as a whole but that this conflict was outweighed by other material considerations. It is submitted that the transcript of the meeting of the committee indicates that the members saw their task as balancing the benefits of the proposal against the harm caused without any appreciation of which considerations were addressed in the development plan and which were other material considerations. It is submitted that in policy ME5 the benefits of renewable energy are already taken into account so if there is a breach of that policy, to take the benefits of such renewable energy by way of its contribution to energy security and to the reduction in greenhouse gases into account in deciding whether there has been a breach of the policy is to double-count those benefits in the balancing exercise.

31. **The Defendant's Submissions:** Mr Edwards submitted on behalf of the Council in his skeleton argument that the passage from the OR quoted above shows that the view was taken that the proposal did not fully accord with the development plan but that material considerations outweighed the conflict with the development plan taken as a whole. In oral submissions he seemed to be saying that the proposed development "complies with" the development plan.

32. **Discussion and conclusions:** The judgment whether a development proposal is or is not in accordance with the development plan can be implied from a fair reading of the OR taken as a whole as Richards LJ was himself able to do in *Hampton* Bishop at [37] to [43] on a reading of the material before him even where the judgment is not set out in express terms. However, I find that in this case there is considerable doubt as to whether the officer and then the members were of the view that the development proposed was in accordance with the development plan taken as a whole or not. I agree with Mr Parkinson that the passage from the OR quoted above does not make it clear which of the two alternative readings he suggests is what was meant. The difficulty is compounded by the fact that I have already found that the officer having identified harm to the significance of heritage assets wrongly interpreted policy HE1 in finding there was no conflict with it. Further, he failed properly to consider the heritage criterion in policy ME5. In these circumstances I find that the Defendant did not carry out its duty arising from section 38(6) to decide whether the proposed development was or was not in accordance with the development plan.

33. This Ground also succeeds.

Relief, Discretion and section 31(2A) of the Senior Courts Act 1981:

34. Before going on to consider the more subsidiary remaining grounds 4 and 5 which in my judgment would not result in the quashing of the planning permission, I will consider the arguments put before me that even if these first three grounds were made out that I should not quash the planning permission. In *Simplex G.E. (Holdings) v Secretary of State for the Environment* [1989] 57 P&CR 306, the Court of Appeal held that a planning permission should not be quashed if the identified legal error made no difference to the ultimate decision made. Further, section 31(2A) of the Senior Courts Act 1981 provides that the Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

35. I have found that the Defendant erred in the correct interpretation of policy HE1 because although harm to heritage assets was identified the officer and the committee proceeded on the basis that the proposed development complied with that policy whereas the proposed development would have resulted in a breach of the policy. I have also found that the officer failed to advise the committee that there was a breach of policy ME5 because of that harm to heritage assets. Partly as a consequence of those findings I have found that the Defendant did not comply with its duty to identify whether the proposed development was in accordance with the development plan as a whole.

36. Mr Edwards urges that even if I did make those findings I should refuse relief because the substance of all those issues namely the harm to heritage assets was before the committee. The committee members knew what the heritage assets in question were, they understood the nature of the identified harm and that officers considered it less than substantial. They understood that it was for them to judge that harm against the public benefits of the proposal and they agreed with the officer that the benefits set out before them in the OR outweighed the identified less than substantial harm. So, Mr Edwards argues, the decision to grant planning permission would have been the same even if they had properly understood the position in relation to the development plan or at the least it is highly likely that planning permission would have been granted even if the errors in relation to the development plan had not been made.

37. I do not accept that submission. The exercise of deciding whether an application for planning permission for a proposed development is in accordance with the development plan "is an essential part of the decision-making process": see *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at [27]. The Defendant needed to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such departure was justified by other material considerations: see *Hampton Bishop* at [33]. It is only in that way that the Defendant could give the development plan its statutory priority. Policies HE1 and ME5 are policies of a development plan that enjoys statutory priority. Paragraph 134 of the NPPF and its balancing exercise is a material consideration to be taken into account but it is not part of the development plan. In my judgment it cannot be said that the members would have been highly likely to vote to grant planning permission if they had properly been advised that the proposal before them was in breach of the key policy of the development plan dealing with heritage assets, HE1, and in breach of the key policy in the development plan on renewable energy, ME5. Of course on a redetermination of the application for planning permission it will be open to them so to decide in their planning judgment having properly considered the development plan and all material considerations but that will be for them to decide having properly understood and considered the development plan.

38. I therefore quash the planning permission on grounds 1, 2 and 3 and I do not exercise my discretion not to quash it in these circumstances for these reasons and in my judgment section 31(2A) of the 1981 Act does not require me to refuse relief.

Ground 4: Failure to comply with regulation 24(1)(c)(iii) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011

39. The permission in this case was for *"EIA development"* within the meaning of the EIA Regulations.

40. Under the heading *"Duties to inform the public and the Secretary of State of final decisions"*, regulation 24 of the EIA Regulations provides as follows:

> "(1) Where an EIA application is determined by a local planning authority, the authority shall—
>
> (a) in writing, inform the Secretary of State of the decision;
>
> (b) inform the public of the decision, by local advertisement, or by such other means as are reasonable in the circumstances; and
>
> (c) make available for public inspection at the place where the appropriate register (or relevant section of that register) is kept a statement containing—
>
> (i) the content of the decision and any conditions attached to it;
>
> (ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public;
>
> (iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development; and
>
> (iv) information regarding the right to challenge the validity of the decision and the procedures for doing so."

41. This regulation requires a single statement to be provided: see *R (on the application of the Friends of Hethel Ltd) v South Norfolk DC* [2010] J.P.L. 594 (QBD (Admin)). This is because, as it was put by the Court of Appeal in *R (on the application of Macrae) v County of Herefordshire District Council* [2012] EWCA Civ 457 :

> "The underlying statutory purpose of requiring local planning authorities to give a summary of their reasons for granting planning permission was to avoid the need for claimants to pursue a paper chase and to examine extrinsic evidence in order to ascertain what the reasons for granting planning permission really were."

42. There has been no statement of reasons provided as is required by this regulation.

43. **The Claimant's Submissions:** Mr Parkinson submits that there has been a clear breach of this Regulation. Even though no time limit is prescribed for when a statement has to be provided, some 10 months have passed since the permission was granted and still there is no statement. There must be a reasonable time limit to comply and that time limit must have passed especially given the 6-week time limit for bringing judicial review claims in planning cases. So the only question is the form of relief and here the permission should be quashed for this reason alone as it is not possible to discern the Council's reasons for granting permission from the material in the case.

44. **The Defendant's Submissions:** Mr Edwards submitted that as there is no time limit for the provision of the statement there has been no breach of the Regulation. He further submits that the Claimant has been fully involved in the consideration of this application for planning permission and has not been prejudiced by the absence of a statement. The court retains a discretion to refuse relief where the claimant has been able in practice to enjoy the rights conferred by European legislation and there has been no substantial prejudice: see *R (Champion) v North Norfolk District Council* [2015] UKSC 52.

45. **Discussion and conclusions:** I have already decided that the earlier grounds of claim have been made out and I shall order that the grant of planning permission should be quashed. In those circumstances, there is no purpose in making an order under this ground as the Council will have a further opportunity to meet the requirements of this Regulation upon its redetermination of the application for planning permission.

Ground 5: "Tailpieces" on Conditions 6, 10, 11, 13 and 14

46. Each of those conditions attached to the planning permission includes the words "unless otherwise agreed in writing by the Local Planning Authority". They therefore allow the Council and the Interested Party to agree variations to the requirements of the condition. The conditions in question deal with the landscape and ecological management plan, the construction traffic management plan, the requirement that new cabling should be underground, noise mitigation and biodiversity mitigation measures.

47. **The Claimant's Submissions:** Mr Parkinson submits that the use of the phrase in question was held to be unlawful in *R (Midcounties Co-Operative Ltd) v Wyre Forest District Council* [2009] EWHC 964 (Admin) in cases where it would permit development which "could be very different in scale or impact from that applied for, assessed or permitted." This is because the public and not only the applicant and the local planning authority are entitled to know in public documents what a given planning permission permits and the ability to modify conditions informally deprives the public of the opportunity to be consulted upon any proposed changes. That is particularly important in cases of EIA development which has been carefully assessed for its effect on the environment before planning permission is granted. The conditions here address "matters of significance which could have a permanent effect on the control of potential environmental effects": see *R (Halebank Parish Council v Halton Borough Council* [2012] EWHC 1889 (Admin). Each condition therefore falls within the category of unlawful tailpieces identified in *Midcounties*.

48. **The Defendant's Submissions:** Mr Edwards submits that this wording gives flexibility to the developer in the interest of minimising unnecessary requirements and the Claimant has not shown how the operation of this level of flexibility could result in development that is very different in scale or impact from that permitted. He submits that the conditions control purely subsidiary matters that may arise after the grant of planning permission and do not have any central importance.

49. **Discussion and conclusions:** In my judgment each of these conditions addresses important potential effects of this proposed development on the environment in relation to landscape, ecology, construction traffic, the visibility of cabling, noise and biodiversity. The Council assessed those impacts and found them acceptable on the basis of material that was before it when the decision was taken to grant planning permission. The public can be reassured to that extent. If changes were however proposed to the measures relevant to those matters, there could be significant changes to the impact on the environment and in my judgment the public should be able to know about those proposed changes and make representations upon them. That would not be possible if these "tailpieces" were retained. I would not have quashed the planning permission because of those tailpieces because I could have ordered them to be excised from each relevant condition but as I am quashing the permission on grounds 1, 2 and 3 I need make no order in respect of these conditions. Again on its redetermination of the application and if it decides to grant planning permission the Council will be able to reconsider any conditions to be attached and their wording. It will be careful not to include any such tailpieces which would address matters of significance which could have a material effect on the control of potential environmental effects.

Conclusion:

50. I therefore quash this planning permission on Grounds 1, 2 and 3 and I invite the parties to draw up the appropriate order to be agreed if possible.