Case No: C1/2016/4538
Neutral Citation Number: [2018] EWCA Civ 860
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE CRANSTON
[2016] EWHC 2898 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 April 2018

Before:

Sir Terence Etherton M.R.
Lord Justice McCombe
and
Lord Justice Lindblom

- -

Between:

R. (on the application of Goring-on-Thames Parish Council)	**Applicant**
- and -	
South Oxfordshire District Council	**Respondent**
- and –	
Goring and Streatley Community Energy Ltd.	**Interested Party**

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- -

Mr Charles Streeten (instructed by **Richard Buxton Environmental and Public Law**) for the **Applicant**
Mr Jeremy Pike (instructed by **South Oxfordshire District Council**) for the **Respondent**
The interested party did not appear and was not represented.

Hearing date: 20 March 2018

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Judgment

Sir Terence Etherton M.R., Lord Justice McCombe and Lord Justice Lindblom:

Introduction

1. This is the judgment of the court.

2. The application before us is an application under CPR 52.30 to re-open a decision of this court refusing permission to appeal on the papers.

3. The applicant is Goring-on-Thames Parish Council. In a claim for judicial review it challenged a planning permission granted by the respondent, South Oxfordshire District Council, for a development of turbines at Goring Weir on the River Thames, to generate hydropower for local use. The application for planning permission was made by the interested party, Goring and Streatley Community Energy Ltd. Planning permission was granted on 9 March 2016. The claim for judicial review came before Cranston J. at a hearing on 9 November 2016. In an order dated 29 November 2016 the judge made a declaration that the district council's decision "did not comply with the duty in section 72 of [the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act")], and did not comply with the duty in regulation 7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011". No other relief was granted. The judge refused the parish council's application for permission to appeal. An application for permission to appeal was subsequently made by the parish council to this court. It was dealt with by Rafferty L.J. on paper. In an order dated 10 February 2017 she refused it.

4. The application to re-open Rafferty L.J.'s decision was made by an application notice issued on 27 March 2017. The district council and Goring and Streatley Community Energy Ltd. were given the opportunity to make representations in writing on the application, and the court subsequently ordered that the application would be dealt with at an oral hearing.

The issues on the application to re-open

5. The parish council's grievance is stated in this way, under the heading "Application in a Nutshell", in the grounds of its application to re-open Rafferty L.J.'s decision:

> "4. The Permission Decision failed to grapple with the Appellant's principal ground of appeal and incorporated fundamental legal errors. It appears that the court did not have the opportunity properly to consider the Appellant's skeleton argument, or, if it did, to comprehend the submissions contained within it. This is precisely the sort of *"corruption"* of the judicial process with which the … jurisdiction [under *Taylor v Lawrence* [2002] EWCA Civ 90] was intended to grapple.
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> 5. Unlike any of the other cases concerning the principle decided in [*Taylor v Lawrence*], this is the first such case in which the Appellant has not had the opportunity to appear and make oral arguments to the court. That right, which was lost on 3 October 2016, would have avoided any need for this application. Without that opportunity, described by Laws LJ in [*Sengupta v Holmes*] [2002] EWCA Civ 1104 as "central" to the English legal system, the Appellant has been denied justice.

6. The single Lady Justice's failure to address the Appellant's principal ground of appeal and the basic legal errors in the Permission Decision, combined with the fact that the Appellant has had no opportunity to appear before the court make this case where the Appellant has suffered exceptional injustice such that the application pursuant to CPR 52.30 and should be granted. Failure to do so would undermine the integrity of and confidence in the English legal system."

6. The first and main issue in the application is whether Rafferty L.J. failed to address the parish council's "principal ground of appeal", namely ground 1 in the appellant's notice. That ground asserted that, in performing the duty under section 31(2A) of the Senior Courts Act 1981 ("the Senior Courts Act"), Cranston J. was wrong to find it was highly likely that the outcome of the district council's decision-making would not have been substantially different if it had followed the correct approach to proposals for development in a conservation area under section 72 of the Listed Buildings Act.

7. The second issue is whether Rafferty L.J.'s decision "discloses fundamental legal errors which critically undermine the integrity of the decision taken". The essential complaints here are that Rafferty L.J. misunderstood the duty in section 72 of the Listed Buildings Act and Cranston J.'s relevant conclusions, and that she also misunderstood the duty of a local planning authority, under section 85 of the Countryside and Rights of Way Act 2000 ("the Countryside and Rights of Way Act"), to have regard to the purpose of conserving and enhancing the natural beauty of an Area of Outstanding Natural Beauty.

The court's jurisdiction under CPR 52.30

8. Under the heading "Reopening of Final Appeals", CPR 52.30 states:

> "52.30 – (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
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> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.
>
> …
>
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.
>
> (6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
>
> (8) The procedure for making an application for permission is set out in Practice Direction 52A."

9. This rule enshrines the residual jurisdiction, confirmed by a five-judge constitution of the Court of Appeal in *Taylor v Lawrence*, to re-open an appeal so as to avoid real injustice in circumstances that are exceptional. In confirming the existence of this jurisdiction, the court

emphasized (in paragraph 55) "… the greatest importance … that it should be clearly established that a significant injustice has probably occurred and that there is no alternative remedy".

10. The note in the White Book Service 2018 describing the scope of the rule states, at paragraph 52.30.2:

> "… Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings … has been critically undermined. … ."

11. We would endorse those observations, which are justified by ample authority in this court. The relevant jurisprudence is familiar, but the salient principles bear repeating here.

12. Giving the judgment of the court in *In re Uddin (A Child)* [2005] 1 W.L.R. 2398, Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the *Taylor v Lawrence* jurisdiction "can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined". And she added this (in paragraph 22):

> "22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations": *Taylor v Lawrence* [2003] QB 528, para 55. Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

13. In *Barclays Bank plc v Guy (No.2)* [2011] 1 W.L.R. 681 Lord Neuberger M.R. said (in paragraph 36 of his judgment):

> "36. … If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts

were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). … .”

14. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):

> “65. … The following principles relevant to [the] application [of CPR 52.17, as the relevant rule then was] to this appeal appear from *Re Uddin (A Child)* … and *Guy v Barclays Bank plc* … . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in *Taylor v Lawrence* … . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality.”

Sir Terence Etherton C went on to say (in paragraph 69):

> “69. … [The] appellants’ reasons for re-opening the application for permission to appeal Judge May’s possession order amount, on one view, to no more than a criticism that Arden LJ’s decision to refuse permission to appeal was wrong. That is not enough to invoke the *Taylor v Lawrence* jurisdiction.”

15. For completeness, there should be added to that summary of the principles in *Lawal* the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined.

The judgment of Cranston J.

16. Cranston J. identified three issues in the claim for judicial review. His conclusions on two of them, “Issue 1: Impact on the AONB” and “Issue 2: Impact on listed buildings”, are relevant to the application to re-open.

17. On “Issue 1: Impact on the AONB”, Mr Charles Streeten – who appeared for the parish council both in the court below and before us – submitted to Cranston J. that the district council’s conclusion that the development would cause no harm to the Chilterns or North

Wessex Downs Areas of Outstanding Natural Beauty was *Wednesbury* unreasonable. The judge disagreed. He concluded (in paragraph 50 of his judgment):

> "50. In my judgment the Council's assessment in paragraph 6.5iii of the officer's report that there might be a degree of impact upon the Goring conservation area is not inherently incompatible with the assessment in paragraph 6.3vi that there might be no impact upon the AONB. That is despite Mr Streeten's submission, which I have said I accept, that heritage enters a planning assessment with an AONB."

and (in paragraph 54):

> "54. The important point is that there is no suggestion that the Council wrongly applied planning policies. The boards of the AONBs made no submissions on the proposal when invited to do so. The line of attack by those opposing the development was on the visual, not the heritage, impacts of the proposal. This was a classic matter of planning judgment, and the Council's assessment that there was no harm to the AONB cannot be said to be *Wednesbury* unreasonable."

18. The judge then turned to the second part of Mr Streeten's argument, which related to "acoustic harm". Mr Streeten had submitted that the district council's consideration of noise impacts "resulted in a lacuna in the decision-making process in that the harm which the noise would cause to the AONB was ignored" (paragraph 55 of the judgment).

19. The judge rejected that argument. He concluded (in paragraphs 58 and 59):

> "58. Again the nature of the legal challenge, *Wednesbury* unreasonableness, is determinative. That challenge is not that the Council failed to take into account a material consideration. What the Council did was to apply its policy on noise, EP2, concerning residents, as it was obliged to do. The AONBs' management plans are not statutory planning policies. No one pointed to tranquillity in relation to the AONBs. The Swan Hotel was to be specially notified of the planning application. Nothing said by any of the specialist consultees could be characterized as a concern with loss of tranquillity. Even if a couple of the public responses to the planning application can be interpreted as raising noise in a broader sense than its impact on residents, it was not in terms of tranquillity or "mucking about in boats" in the AONBs.
>
> 59. The Council was entitled to reach the planning judgment it did in paragraph 6.3iv that there was no harm to the AONB from the scheme. There was nothing for it to have regard to under section 85 of the Countryside and Rights of Way Act 2000 or paragraph 115 of the [National Planning Policy Framework ("the NPPF")]. It was not irrational for it to reach the conclusions it did."

20. On "Issue 2: Impact on Listed Buildings" Mr Streeten had submitted to the judge that there was nothing to show that the district council had considered the implications of the proposed development for listed buildings, in particular the grade I listed Church of St Thomas of Canterbury and the grade II listed Swan Hotel. The district council was in breach of its "duties to investigate" under section 66(1) of the Listed Buildings Act.

21. Cranston J. did not accept that argument. He concluded (in paragraph 63):

"63. Apart from the Swan Hotel, the setting of listed buildings was never a main issue of the application. Therefore it was not necessary for the officer's report to identify each one simply to confirm that there would be no material impact upon it. As Evans LJ put it in *MJT Securities* v. *Secretary of State for the Environment* (1998) 75 P & CR 188, there is no need to refer to insignificant issues, only the main issues. Since there was no harm to any listed building which the Council was required to take into account, the duty in section 66 of [the Listed Buildings Act] did not arise."

22. In his report to committee the district council's planning officer had recognized that there would be harm to the conservation areas in Goring and Streatley, but had concluded that the harm was "less than substantial" and could be "satisfactorily outweighed" by the benefits of the scheme. Mr Streeten submitted to the judge that no consideration had been given to the duty in section 72 of the Listed Buildings Act to pay "special attention … to the desirability of preserving or enhancing the character or appearance of [the conservation area]". For the district council, Mr Jeremy Pike submitted that the officer had dealt appropriately with the possibility of impact on the conservation areas. The judge was unpersuaded by that submission. He said (in paragraphs 66 and 67):

"66. The difficulty I have with this is that what the Council needed to do under section 72 was to give considerable importance and weight to harm to the conservation area: see Sales LJ (with whom Richards and Floyd LJJ agreed) in *Mordue v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, [2016] 1 W.L.R. 2682. … .

67. Nothing in the officer's report suggests that special priority was given to harm to the conservation area in accordance with the Council's duty. Rather, reflecting the officer's report, the planning permission simply concluded that the impact on the historic merits of the conservation area and visual effect on amenity constituted less than substantial harm, which was outweighed by the public benefit of renewable energy generation through use of the Thames."

23. Having reached those conclusions, the judge went on to perform the duty under section 31(2A) of the Senior Courts Act. He said (in paragraphs 68 and 69):

"68. If the Council did fall down in fulfilling its section 72 duty, as I conclude it did, there is the separate question of whether "it appears … to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred": Senior Courts Act 1981, s. 31(2A). This, on the authorities, is a backward-looking provision: *Bokrosova* v. *London Borough of Lambeth* [2015] EWHC 3386 (Admin), [90], per Elizabeth Laing J; *R (Williams)* v. *Powys County Council* [2016] EWHC 480 (Admin), [25], per CMG Ockelton, sitting as a deputy High Court Judge; *R (Mark Logan)* v. *London Borough of Havering* [2015] EWHC 3193 (Admin), [55], per Blake J. If so satisfied, the court must refuse relief.

69. In my view it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test. If there was any harm to heritage assets the response of both conservation officers, from the Council and

> West Berkshire Council, was that it was, at most, minor harm. That approach then became part of the officer's report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewable energy from an existing water source. In my view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72."

The parish council's grounds of appeal

24. In its written grounds of appeal, ground 1 of the parish council's appeal was this:

> "Ground 1: The learned judge erred in finding that it was highly likely that the outcome would not have been substantially different if [the district council] had applied the correct test under section 72 of [the Listed Buildings Act]."

That ground was amplified as follows:

> "4. In light of his finding at [66] – [67] that the Council had breached the statutory duty imposed under section 72 of [the Listed Buildings Act] by failing to give considerable importance and weight to the harm the Development would cause to the Goring and Streatley Conservation Areas, the learned judge was wrong to hold at [69] that it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test:
>
> (a) Firstly, a breach of the statutory duty under section 72 of [the Listed Buildings Act] is not the type of breach to which section 31(2A) was intended to or does apply. [Section] 31(2A) was introduced to filter out claims brought on technicalities highly unlikely to have made a substantial difference. Failure to give considerable importance and weight to harm to a conservation area under [section] 72 cannot be regarded as such a technical failure.
>
> (b) Secondly, as Cranston J accepts at [68], section 31(2A) is a backward looking provision[;] it requires consideration of what the Council would have done. The judge is not being asked to second-guess the decision of the administrative body. Neither the Officer's Report to Committee nor the other evidence put forward by the Respondent suggests that the Council gave any special weight to the benefits of renewable energy. Absent such an indication, Cranston J's finding that "importantly, the factors weighing in favour of granting planning permission were weighty" constitutes the impermissible exercise of planning judgement by the court.
>
> (c) Thirdly, the learned judge failed to apply the strong statutory presumption against granting planning permission which arises when section 72(1) is engaged, even where harm is less than substantial (per Lord Bridge in [*South Lakeland v Secretary of State for the Environment*] [1992] 2 AC 141 at 146E-G). His reliance on the fact that the harm was 'minor' (his gloss) is indicative of treating less than substantial harm as a less than substantial objection contrary to [the] approach set out by Sullivan LJ in [*Barnwell Manor Wind*

Energy Limited v East Northamptonshire District Council] [2014] EWCA Civ 137 at [29].

5. For these reasons the learned judge's finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test was wrong."

Further elaboration of ground 1 was provided in Mr Streeten's skeleton argument in support of the application for permission to appeal.

25. There were three further grounds. Ground 2 was that "[the] learned judge was wrong to hold that the conclusion that there would be no harm to the AONBs was lawful, despite admitted harm to conservation areas within, and acknowledged in policy to contribute to the special character of, those AONBs". Ground 3 was that "[the] learned judge erred in finding that the Council's approach to acoustic harm to the AONB was lawful". And ground 4 was that "[the] learned judge was wrong to conclude that the duty to investigate harm to listed buildings "must be triggered by at least someone either in the Council or outside raising it as a potential issue" and/or that it was not necessary for the officer's report to identify the listed buildings which may be harmed by the development". Each of those grounds was amplified in the written grounds of appeal and elaborated in the skeleton argument.

Rafferty L.J.'s decision on the application for permission to appeal

26. Rafferty L.J.'s reasons for refusing permission to appeal were these:

> "I can identify no flaw in the reason of Cranston J which imperils the decision he made. It depended on an application of the legal framework to the facts and his analysis was clear and is unassailable. At paragraph 50 he explained that a degree of impact identified by the officer is not inherently incompatible with an assessment that there might not be an impact on the AONB and at para 54 identified the important point that there was no suggestion of the Council applying the wrong policies. He was justified in concluding, at paragraph 59, that the Council was entitled to reach the decision it did, having rehearsed why that was his view, and for the avoidance of doubt also excluding any need for regard to have been had to S85 CRWA 2000 or to the NPPF. There was as he said nothing irrational in the decision and there is thus nothing irrational in his conclusion.
>
> As to listed buildings he at para 63 excluded the requirement that each should be identified for nothing other than an exercise in particularity. At para 67 he excluded special priority to harm, rather there was a conclusion that harm consequent upon the impact was less than substantial which in any event was outweighed by the public benefit. Having found a failure by the Council in its S72 duty he went on to find the outcome highly unlikely to have been substantially different even if it had not failed. This is not flawed reasoning.
>
> His conclusion, having stood back, that a reconsideration even on the terms most favourable to you in the context of his findings, was thus inevitable and is unimpugnable."

How may the court's jurisdiction under CPR 52.30 be engaged by a refusal of permission to appeal?

27. Mr Streeten submitted that the court's jurisdiction under CPR 52.30 has two objectives, both of them relevant here: first, to ensure that injustice is avoided, and second, to maintain public confidence in the integrity of the justice system. He acknowledged, however, that the scope for the court to re-open an application for permission to appeal in the exercise of its jurisdiction under CPR 52.30 is extremely narrow, and that, if the jurisdiction is to be engaged, more must be shown than simply that the decision to refuse permission was wrong. He accepted that most applications for permission to appeal can be justly determined without an oral hearing. He did not argue that the removal under CPR 52.5(1) of an entitlement to an oral renewal hearing of an application for permission to appeal to the Court of Appeal (for appeals filed on or after 3 October 2016) has had the effect of making more onerous the duty to give reasons for a decision to refuse permission on the papers.

28. Mr Streeten did submit, however, that this change to the rules accentuates the importance of the applicant being able to understand why permission was refused – citing decisions of this court (see, for example, *Flannery v Halifax Estate Agencies Ltd.* [2000] 1 W.L.R. 377 and *English v Emery Reimbold and Strick Ltd.* [2002] 1 W.L.R. 2409, where Lord Phillips of Worth Matravers M.R., as he then was, said (in paragraph 16 of his judgment) that "justice will not be done if it is not apparent to the parties why one has won and the other has lost"). The reasons given for a refusal of permission to appeal on paper, Mr Streeten accepted, will normally be short and will not generally be vulnerable to criticism simply on the ground that they do not deal expressly with every argument put forward on behalf of the applicant. The essential task of the Lord or Lady Justice dealing with an application on paper, however, was to make clear that the main arguments identified in the applicant's grounds of appeal had been addressed. As Lord Neuberger M.R. had pointed out in *Barclays Bank v Guy* (at paragraph 36), where a judge has demonstrably failed to understand an argument, this can be enough to engage the CPR 52.30 jurisdiction.

29. In our view, Mr Streeten was right to concede as much as he did. The court's jurisdiction under CPR 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". It is "exceptional" in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered "Yes", the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong.

30. These principles apply to all applications under CPR 52.30, and with equal force to both applications to re-open substantive appeals and applications to re-open applications for permission to appeal. The authorities cited in argument before us have all concerned the application of the *Taylor v Lawrence* principles in cases where there has been a substantive decision of the court in the preceding litigation, rather than a decision to refuse permission to appeal from a decision in a lower court. It would be wrong, however, to suppose that the rigour of the principles applying to *Taylor v Lawrence* applications is in any way relaxed

where the decision under consideration is a decision, on the papers, to refuse permission to appeal to the Court of Appeal rather than a substantive decision of this court on an appeal itself.

31. In the context of an application for permission to appeal whose consideration is said to have been critically undermined or corrupted, the first question will be whether the judge whose decision is the subject of the application to re-open has sufficiently confronted and dealt with the grounds of appeal. Secondly, if the conclusion is reached that the process has been critically undermined it will still be necessary for the court to consider whether, had that not been so, that it is highly likely, in the sense of there being a powerful probability, that the decision on the application for permission to appeal would have been different and that permission to appeal would have been granted.

32. It should also be understood, and this case provides an opportunity to dispel any doubt there may be on the point, that the principles governing the CPR 52.30 jurisdiction have not been modified or relaxed in response to the change in the procedure for the determination of applications for permission to appeal that was brought about, with effect from 3 October 2016, in CPR 52.5.

33. The effect of CPR 52.5(1) and (2) is that an application for permission to appeal to the Court of Appeal will be determined on paper without an oral hearing, except where the judge considering the application on paper directs that the application is to be dealt with at an oral hearing. It is for the judge to decide whether the application cannot be fairly determined on paper without an oral hearing. This procedure has replaced the previous arrangements in Practice Direction 52C, under which an application for permission to appeal was normally dealt with by the court on paper in the first instance, but if the application was refused the applicant would be entitled to have the decision reconsidered at a hearing, except where the rules provided otherwise – for example, where the application had been found to be "totally without merit".

34. The new procedure under CPR 52.5 has considerable advantages in the saving of time, cost and uncertainty for the parties – both applicants and respondents – and in relieving pressure on the court's resources, whilst ensuring that applications continue to be fairly and justly determined. It has not created a procedural vacuum that needs to be filled by an expansion of the jurisdiction under CPR 52.30. Legal representatives advising applicants for permission to appeal should not think, and should not encourage applicants to think, that CPR 52.30 provides a default procedure for challenging the court's decision to refuse the application for permission to appeal, whether on paper or at an oral hearing, if one is held.

35. Under the new procedure it remains the duty of the Lord or Lady Justice determining an application for permission to appeal on paper, if the decision is to refuse permission, to address in his or her reasons the essential issues raised in the applicant's grounds of appeal. The reasons will seldom need to be lengthy provided that an adequate explanation is given for the refusal of permission on each ground (cf. the judgment of this court in *Wasif v Secretary of State for the Home Department* [2016] EWCA Civ 82, at paragraphs 19 to 22). This applies both to applications to appeal in first appeals, under CPR 52.6, and to applications in second appeals, under CPR 52.7. In short, the applicant must be able to understand why, on the appropriate test under the rules, the intended appeal is not being permitted to proceed.

36. A corollary of that principle is that advocates settling grounds of appeal ought to take care to draft each ground crisply and clearly as a properly formulated ground of appeal. Discursive, repetitive or prolix grounds are unhelpful and add unnecessarily to the burdens of a judge dealing with an application for permission to appeal. Each main issue in the proposed appeal should be succinctly identified in a separate ground. Where this has not been done, it is likely to be more difficult for an applicant to complain that a particular point has not been addressed by the judge.

37. In planning cases, and generally, this court has urged a straightforward approach to the drafting of grounds in claims for judicial review and statutory challenges (see, for example, *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). The same should apply to the drafting of grounds of appeal.

The parish council's "principal ground of appeal" – section 31(2A) of the Senior Courts Act

38. Section 31(2A) of the Senior Courts Act was introduced by section 84 of the Criminal Justice and Courts Act 2015, coming into effect on 13 April 2015. It provides:

> "(2A) The High Court –
>
> (a) 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."

The forms of relief referred to in section 31(1)(1) include "(a) a mandatory, prohibiting or quashing order" and "(b) a declaration or injunction under subsection (2)". Subsections (2B) and (2C) state:

> "(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief … in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

39. The parish council now contends, although it did not do so before Cranston J., that section 31(2A) of the Senior Courts Act has no application when a claimant succeeds in establishing a substantive error of law as opposed to "a minor procedural technicality". This is so, it argues, because the duty imposed by section 31(2A) partly ousts the High Court's jurisdiction in claims for judicial review, and should therefore be narrowly construed (see the judgment of Lord Phillips of Worth Matravers M.R. in *R. (on the application of G) v Immigration Appeal Tribunal* [2005] 1 W.L.R. 1445, at p.1452). It is thus a provision of "constitutional significance". The natural and ordinary meaning of the word "conduct", construed as narrowly as it should be in this statutory context, does not encompass substantive errors of law. An error in the decision-maker's approach, such as Cranston J. found the district council had committed in failing properly to apply the duty under section 72 of the Listed Buildings Act – in effect, to give "considerable importance and weight" to

harm to a conservation area, would not be the kind of "conduct" contemplated by section 31(2A).

40. Support for these submissions is to be found, Mr Streeten contended, in the judgment of Blake J. in *Logan* (in particular, at paragraph 55), and in observations made about the scope of the provision that became section 31(2A) made by Lord Faulks Q.C., the then Minister of State for Justice, in the course of debate in the House of Lords during the passage of the Bill through Parliament – admissible, Mr Streeten submitted, under the rule in *Pepper v Hart* [1993] A.C. 593. In any event, he argued, there is conflicting authority at first instance on the construction and application of section 31(2A). This was, he said, the "principal ground" on which the parish council had sought permission to appeal to the Court of Appeal, as ought to have been apparent from his skeleton argument in support of the application for permission (in particular, in paragraphs 8 to 22). It raised, he said, an important point of law but Rafferty L.J. had failed to address it.

41. Mr Streeten's second argument was that, in performing the section 31(2A) duty, Cranston J. had ventured into the planning merits, offending the basic principle that questions of planning judgment lie within the sole competence of the planning decision-maker, subject only to the court's intervention on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780H, and the speech of Lord Keith of Kinkel, at p.764G). To describe the factors weighing in favour of planning permission, including the benefit of generating renewable energy, as "weighty", which the judge did (in paragraph 69 of his judgment), was to attribute weight of his own choosing to those considerations. This was, Mr Streeten submitted, an impermissible exercise of planning judgment by the court. The error was clearly raised as an argument in support of ground 1 in the parish council's grounds of appeal. Once again, however, Rafferty L.J. had not grappled with the submissions made.

42. The third argument here was that, in deciding not to quash the planning permission, Cranston J. had failed to recognize the strength of the statutory presumption, under section 72 of the Listed Buildings Act, against granting planning permission where harm would be caused to a conservation area, even where that harm would be, in the words of paragraph 134 of the NPPF, "less than substantial", or, as the judge had put it (in paragraph 69 of his judgment), "at most, minor harm" (see the speech of Lord Bridge of Harwich in *South Lakeland District Council v Secretary of State for the Environment*, at p.146E-G, and the judgment of Sullivan L.J. in *Barnwell Manor Wind Energy Ltd.*, at paragraphs 23 and 29). The strength of the section 72 presumption was enough to displace the section 31(2A) duty, unless the harm to the conservation area was "trivial" or "negligible". At least in the circumstances of this case, if the strength of the statutory presumption had been appreciated, it would not have been reasonably open to the court to find it was highly likely that the outcome would not have been substantially different. Rafferty L.J. had failed to tackle this argument too.

43. The only reasonable conclusion, Mr Streeten submitted, is that Rafferty L.J. did not properly consider the main arguments put forward in support of the parish council's application for permission to appeal. If she had considered those arguments and rejected them, she would have had to explain why. Given the significance of the issues raised, a decision to refuse permission to appeal on the second limb (in CPR 52.6(1)(b)) would have been very surprising, whatever conclusion was reached on the first (in CPR 52.6(1)(a)). Mr Streeten submitted that this failure had caused the parish council a real injustice. It had not had the

chance to reverse Rafferty L.J.'s decision before another Lord or Lady Justice at an oral hearing. It had been denied access to justice. This, said, Mr Streeten, exemplifies the "corruption" of the justice system that will engage the *Taylor v Lawrence* jurisdiction.

44. For the district council, Mr Pike submitted that Rafferty L.J. plainly did not misunderstand the parish council's position on section 31(2A). To the parties, familiar with the case, it was clear from her reasons why she saw nothing in ground 1. In the absence of any authority to suggest otherwise, she obviously accepted that the section 31(2A) duty did apply here, and, no less obviously, that the judge had complied with it. This was enough. There was no warrant here for re-opening her decision.

45. We cannot accept Mr Streeten's submissions. It is, in our view, impossible to conclude that Rafferty L.J. failed to understand ground 1 of the parish council's intended appeal, or that she failed to deal with it sufficiently in her reasons.

46. Mr Streeten's three arguments evolved somewhat in his written and oral submissions. It seems fair to say, however, that they are, at best, ambiguous on the construction and scope of the duty in section 31(2A). The first argument urges the conclusion that the duty is simply inapplicable to a legal error of the kind identified by Cranston J. in his conclusion that the district council had failed lawfully to apply the presumption in section 72 of the Listed Buildings Act. On the other hand, the premise in the second and third arguments appears to be that, in principle, the duty did apply, and the complaint is that the judge failed lawfully to discharge it. One must keep in mind, therefore, that ground 1 itself, as formulated in the written grounds of appeal, asserts that the judge "erred in finding that it was highly likely that the outcome would not have been substantially different if the council had applied the correct test under section 72 of [the Listed Buildings Act]", which is a contention predicated on the assumption that the section 31(2A) duty was in play – not the argument that it was not.

47. We remind ourselves that our starting point here is not to consider the merit of Mr Streeten's argument on the scope of the duty in section 31(2A). We are not re-making the permission decision, or even at this stage considering whether there is a "powerful probability" that Rafferty L.J.'s decision to refuse permission was wrong. In our view, however, the proposition that the section 31(2A) duty applies only to "conduct" of a merely "procedural" or "technical" kind, and not also to "conduct" that goes to the substantive decision-making itself, is a surprising concept. The duty has regularly been applied to substantive decision-making across the whole spectrum of administrative action, including in the sphere of planning, both at first instance and in decisions of this court (see, for example, the judgment of Lindblom L.J. in *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427, at paragraphs 71 to 73). Although we did not hear full argument on the point, we would be prepared to say that the narrow construction of section 31(2A) contended for by the parish council is, on the face of it, mistaken. It does not seem to us to gain any real support in the first instance decisions on which Mr Streeten relied. The concept of "conduct" in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making. It is not expressly limited to "procedural" conduct. Nor, in our view, is such a qualification implied. But this, we must stress, is not a necessary conclusion for the purposes of our decision on the application to re-open.

48. In our view ground 1 of the proposed appeal was sufficiently and clearly dealt with by Rafferty L.J. in her reasons.

49. On this ground, as on the others, her reasons referred explicitly to the relevant passages of Cranston J.'s judgment. The passage of the judgment to which ground 1 related was in paragraphs 66 to 69. In the penultimate sentence of the second paragraph of her reasons, Rafferty L.J. expressly acknowledged the judge's conclusion that there had been, as she put it, "a failure by the Council in its S72 duty". This was a true reflection of what the judge said at the beginning of paragraph 68 of his judgment. In the previous sentence of her reasons Rafferty L.J. referred to the judge's conclusion in paragraph 67 of his judgment. In that paragraph Cranston J. said that "[nothing] in the officer's report suggests that special priority was given to harm to the conservation area in accordance with the Council's duty" – a reference to the section 72 duty, which he had accurately described in paragraph 66. And he then referred to what the district council's officer had said in her report to committee, and the balance she had struck between "less than substantial harm" and "the public benefit of renewable energy generation through use of the Thames".

50. It was clearly to this passage in Cranston J.'s judgment that Rafferty L.J. was referring when she said that "[at] para 67 he excluded special priority to harm, rather there was a conclusion that harm consequent upon the impact was less than substantial which in any event was outweighed by the public benefit". Properly understood, this was to recognize, and accept, the judge's conclusion that the section 72 duty had not been complied with. By her use of the word "excluded", Rafferty L.J. did not mean, and cannot have meant, that Cranston J. had ignored the district council's failure to do what section 72 required it to do, or had absolved it from that error of law. She can only have meant what Cranston J. had actually said, which she paraphrased in the way she did.

51. Rafferty L.J.'s crucial conclusion on ground 1 is in the last two sentences of the second paragraph of her reasons, where she said that the judge, having found the district council had failed in its duty under section 72, "went on to find the outcome highly unlikely to have been substantially different even if it had not failed", and that this, as she put it, was "not flawed reasoning". It is, in our view, significant that Rafferty L.J. was deliberately using the language of section 31(2A) of the Senior Courts Act in stating those conclusions. So too had Cranston J. in paragraph 69 of his judgment, having quoted the section accurately in paragraph 68. It is quite clear from what she said that Rafferty L.J. was unimpressed by the criticism of Cranston J.'s approach and conclusions as a basis for an appeal to this court, and accordingly that permission to appeal should not be granted on ground 1. The expression "not flawed reasoning" was a clear enough way of stating that view. But Rafferty L.J.'s reasons did not end there. In the third and concluding paragraph she endorsed as "unimpugnable" the judge's conclusion, "even on the terms most favourable" to the parish council, that the same outcome to the district council's decision-making would have been "inevitable" if the error of law had not been made. This was not merely to say that the judge's "reasoning" was secure, but also that his approach and conclusions were unassailable in substance.

52. Although Rafferty L.J. did not explicitly deal with the argument that section 31(2A) of the Senior Courts Act was inapplicable in this case, it was necessarily implicit in her reasons that she rejected that concept. If she had accepted it, she could not have stated her reasons in the way she did. Having in mind the duty in section 31(2A), which she demonstrably did, and having recognized that the judge, for his part, had the duty in mind, had applied it, and

had discharged it lawfully, she did not need to go on and say that this straightforward analysis was based on her conclusion that the duty applied because the "conduct" of the district council in failing to apply the presumption in section 72 of the Listed Buildings Act was "conduct" within the reach of section 31(2A). That was obviously inherent in her analysis. She did not have to spell it out. She was focusing, quite properly, on ground 1 as it had been pleaded, which alleged that the judge had "erred in finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test under section 72 of [the Listed Buildings Act]". She squarely confronted that allegation, and, in doing so, disposed effectively of the several arguments advanced in support of it.

53. But there is, we think, a further point that can fairly be made here. As we suggested to Mr Streeten while he was making his submissions to us, his argument on the construction and scope of section 31(2A) faces a fatal difficulty, which is that ultimately it proves too much – both for the purposes of the parish council's appeal on ground 1 and for the purposes of its application to re-open Rafferty L.J.'s decision. If the argument was right, and the concept of "conduct" in section 31(2A) does not extend to substantive as well as to procedural errors of law, so that the duty in that section did not apply in this case, the court would still have had its discretion as to relief, which it would have had to exercise in accordance with the well established principles in *Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* (1989) 57 P. & C.R. 306. It would then have had to consider whether there was any realistic possibility of the district council's decision being different but for the error of law (see Lord Carnwath's judgment in *Walton v Scottish Ministers* [2012] UKSC 44, at paragraphs 111 and 112, his judgment in *R. (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52, at paragraphs 54 to 66, and the discussion in De Smith's Judicial Review, eighth edition, paragraphs 18-047 to 18-050 and 18-057). In purporting to discharge the duty under section 31(2A), the judge, in effect, did exactly that. At the end of paragraph 69 of his judgment he concluded that there was "simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72". This was to go considerably further than section 31(2A) required, and as far as the *Simplex* approach demands. If, therefore, section 31(2A) did not apply, the result of the claim for judicial review on this ground would still have been what it was, namely a declaration, not an order to quash the planning permission. It would follow that even if Cranston J. and Rafferty L.J. were both in error in accepting the relevance of section 31(2A), the parish council suffered no injustice.

54. As to Mr Streeten's submission that Rafferty L.J. did not grapple with the argument that Cranston J., in performing the duty under section 31(2A), had descended into the planning merits, our conclusion is essentially the same as on the first argument, and for essentially the same reasons.

55. The mistake in Mr Streeten's submissions here is that, in the context of a challenge to a planning decision, they fail to recognize the nature of the court's duty under section 31(2A). It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker (see the judgment of Lindblom L.J. in *Williams*, at paragraph 72). If, however, the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law.

56. It is, in our view, clear from Rafferty L.J.'s reasons that she was not persuaded there was a real prospect of establishing that, in performing the section 31(2A) duty, Cranston J. had trespassed into the forbidden territory of planning judgment. She did not need to say more than she did to make this clear. Mr Streeten highlighted Cranston J.'s use of the word "weighty" in paragraph 69 of his judgment to describe the factors seen by the district council's officer as going in favour of the grant of planning permission, and outweighing the harm to the conservation area. Rafferty L.J., however, was plainly unpersuaded that this was anything other than the judge's description of the officer's own planning assessment, supported, to the extent it was, by the conservation officer's response. She plainly also accepted that the officer's assessment had, quite legitimately, informed, but not dictated, the judge's own conclusion in performing the section 31(2A) duty. Otherwise, her conclusion would have had to be different.

57. A similar answer can be given to Mr Streeten's third submission, that Rafferty L.J. did not confront the argument that Cranston J. failed to recognize the strength of the presumption in section 72 of the Listed Buildings Act, and failed, in particular, to discern that it was powerful enough to displace the section 31(2A) duty, either in every case or, at least, in this one. This submission, it seems to us, is untenable. There is no basis for it in the statutory provisions themselves, in authority, or in principle. Cranston J. referred, in paragraph 66 of his judgment, to the requirement under section 72, as he put it, "to give considerable importance and weight to harm to the conservation area", and he took care to refer to relevant authority in this court – in *Mordue*. In paragraph 67, he acknowledged that "special priority" had not been given to the harm to the conservation area "in accordance with the Council's duty". It is necessarily implicit in Rafferty L.J.'s reasons, and in particular in her reference to Cranston J.'s conclusion in paragraph 67 of his judgment, that she saw no arguable error in his understanding of the section 72 duty. We need go no further than that.

58. We therefore reject Mr Streeten's various arguments on section 31(2A) of the Senior Courts Act as a basis for re-opening Rafferty L.J.'s decision.

59. Finally here, we would add this. Although the point was not raised before us, it might be said to follow from Cranston J.'s conclusions in paragraphs 68 and 69 of his judgment that in granting declaratory relief in his order he went further than section 31(2A) would permit, unless he certified under subsection (2C) that "for reasons of exceptional public interest" it was appropriate to grant relief in reliance on subsection (2B). That, however, was not a point argued before us, and we do not need to decide it.

Fundamental legal errors?

60. Mr Streeten submitted that there were fundamental legal errors in Rafferty L.J.'s treatment of the issues raised in the grounds of appeal. He identified two in particular: first, that Rafferty L.J. failed to comprehend the full force of the statutory presumption in section 72 of the Listed Buildings Act, as explained in the relevant authorities, including, in particular, Sullivan L.J.'s judgment in *Barnwell Manor Wind Energy Ltd.*; and secondly, that she misunderstood the effect of the requirement in section 85(1) of the Countryside and Rights of Way Act that, "[in] exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard the purpose of conserving and enhancing the natural beauty of the area of outstanding

natural beauty", and also government policy in paragraph 115 of the NPPF, which says that "[great] weight should be given to conserving landscape and scenic beauty in … Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty".

61. We do not agree with either of those two arguments.

62. The first argument, concerning the section 72 duty, seems to repeat much of the substance of Mr Streeten's second and third arguments on section 31(2A), which we have already rejected, and to depend on a false meaning being given to Rafferty L.J.'s reference to Cranston J. having "excluded special priority to harm". The suggestion that she must have misled herself in reading the passages of Cranston J.'s judgment where he set out his own understanding of section 72 and how it operated in this case, because otherwise she would have had to conclude that permission to appeal should be granted on ground 1, is, in our view, wrong. As we have said, it is clear that she accepted those passages of Cranston J.'s judgment as indisputably correct, did not doubt his understanding of section 72, and did not find anything arguably wrong in his performance of the duty under section 31(2A). There is nothing approaching a "fundamental legal error" in that part of her reasons.

63. Nor do we accept that there is any such error in Rafferty L.J.'s reasons for rejecting the grounds of appeal relating to the judge's conclusions on the arguments concerning the Areas of Outstanding Natural Beauty.

64. The point in ground 2 was that Cranston J. was wrong to uphold the district council's conclusion that there would be no harm to the Areas of Outstanding Natural Beauty, despite the admitted harm to the conservation area. Rafferty L.J. addressed that point appropriately in the first paragraph of her reasons, where she explained why she rejected the point as unarguable. That betrays no "fundamental legal error". Rafferty L.J. referred to, and approved, the critical part of Cranston J.'s relevant conclusions, in paragraph 50 of his judgment, where he said there was nothing "inherently incompatible" between a finding of "a degree of impact upon the Goring conservation area" and a finding of "no impact upon the AONB". That was right.

65. The point in ground 3 was that the judge erred in finding nothing legally amiss in the district council's approach to "acoustic harm to the AONB". Mr Streeten submitted that, in paragraph 58 of his judgment, Cranston J. failed to distinguish an irrationality challenge from a challenge asserting a failure to have regard to a material consideration, which this was, and that Rafferty L.J. fell into the same error. The effect of the proposed development on the tranquillity of the Areas of Outstanding Natural Beauty was a material consideration. The district council had failed to take it into account. The judge had not found, as he should have done, that this was what the parish council was saying, and Rafferty L.J. had not confronted the point. Mr Streeten also submitted that Rafferty L.J. made the basic error of concluding that the district council was not under the duty in section 85 of the Countryside and Rights of Way Act, and did not have to take into account government policy in paragraph 115 of the NPPF.

66. We reject those submissions. They do not demonstrate any "fundamental legal error".

67. In paragraph 58 of his judgment Cranston J. explained why, in the absence of any relevant conflict with development plan policy, and given that "[no] one pointed to tranquillity in

relation to the AONBs", this part of the parish council's claim had to be regarded as a "*Wednesbury* unreasonableness" challenge, rather than an alleged failure to take into account a material consideration. This being so, and the district council having found no other harm to the Areas of Outstanding Natural Beauty, Cranston J. concluded in paragraph 59 of his judgment that "[there] was nothing for it to have regard to under section 85 of the Countryside and Rights of Way Act 2000 or paragraph 115 of the NPPF", and that "[it] was not irrational for it to reach the conclusions it did".

68. Rafferty L.J.'s relevant reasons are, once again, a sufficient explanation of her decision to refuse permission to appeal. In the penultimate sentence of her first paragraph she referred to paragraph 59 of Cranston J.'s judgment, observing that he was "justified" in concluding as he did. Necessarily, this involved the judge's conclusion that the thrust of this assault on the district council's decision was irrationality, and that it did not succeed. Rafferty L.J. agreed. There can be no sensible dispute about that. In the final sentence of that paragraph she made absolutely plain her own conclusion that there was, as Cranston J. had found, "nothing irrational in the decision …". That conclusion is not flawed by any "fundamental legal error". The same can be said of the observation that the judge was justified in concluding as he did in paragraph 59 of his judgment, "… excluding any need for regard to be have been had to S85 CRWA 2000 or to the NPPF". Once again, Rafferty L.J. was endorsing Cranston J.'s conclusion, not differing from it, or seeking to modify it. On a fair reading of her reasons and the judge's conclusion in paragraph 59, in the light of the district council's consideration of the possible effects of the development on the Areas of Outstanding Natural Beauty, they were both saying, in effect, that the requirement in section 85 of the Countryside and Rights of Way Act and the policy in paragraph 115 of the NPPF had been substantially complied with. Rafferty L.J. did not formulate her reasons in that way, we accept. But that does not amount a "fundamental legal error".

69. For the sake of completeness, we should say, finally, that Rafferty L.J.'s reason for refusing permission on ground 4, which concerns the judge's handling of the ground in the claim alleging a misapplication of the duty in section 66 of the Listed Buildings Act, affords no basis for a re-opening of her decision. Rafferty L.J. dealt with that point appropriately in the first sentence of the second paragraph of her reasons, where she referred to paragraph 63 of Cranston J.'s judgment. The decisive conclusion there, as Rafferty L.J. must have understood, was that "[since] there was no harm to any listed building which the [district council] was required to take into account, the duty in section 66 of [the Listed Buildings Act] did not arise". Her remark that the judge "excluded the requirement that each [listed building] should be nothing other than an exercise in particularity" was obviously a reference to what Cranston J. said in the second sentence of paragraph 63: that "… it was not necessary for the officer's report to identify each one simply to confirm that there would be no material impact upon it". That was correct.

Conclusion

70. For those reasons we conclude that the application to re-open falls well short of meeting the requirements of CPR 52.30(1). The parish council has suffered no "real injustice". The application is therefore dismissed.