



Neutral Citation Number: [2023] EWCA Civ 486

Case No: CA-2022-001258

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION (ADMINISTRATIVE COURT)
Mrs Justice Heather Williams DBE
[2022] EWHC 1547 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 May 2023

Before:

LORD JUSTICE POPPLEWELL
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

Between:

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(On the application of
PIFFS ELM LIMITED) **Appellant**
- and -
(1) COMMISSION FOR LOCAL ADMINISTRATION
IN ENGLAND
(2) TEWKESBURY BOROUGH COUNCIL **Respondents**

John Hunter (instructed by **Harrison Clark Rickerbys Solicitors**) for the **Appellant**
Jason Coppel KC (instructed by **Bevan Brittan LLP**) for the **First Respondent**
James Pereira KC and Horatio Waller (instructed by **Tewkesbury Borough Council**) for the
Second Respondent

Hearing dates: 22 and 23 March 2023

Approved Judgment

This judgment was handed down remotely at 11.00am on 10 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant, Piffs Elm Limited ('Piffs Elm') appeals, with the leave of Singh LJ, against an order made by Heather Williams J on 22 June 2022. The appeal is resisted by the Local Government Ombudsman ('the Ombudsman') and by Tewkesbury Borough Council ('the Council'). The broad issues are whether the Ombudsman had power to withdraw a final report issued in August 2019, and if so, on what grounds, and if not, whether that final report was unlawful, and, if so, whether a second report which the Ombudsman issued in the Council's favour in February 2021 was unlawful or not.
2. On this appeal Piffs Elm was represented by Mr Hunter, the Ombudsman by Mr Coppel KC, and the Council by Mr Pereira KC and Mr Waller. Messrs Pereira and Waller did not appear at the hearing, in order to save costs. I thank the first two counsel for their written and oral submissions and the last two for their written submissions.
3. In this judgment I will use the following definitions.
 - i. The final report issued by the Ombudsman on 22 August 2019 is 'decision 1'.
 - ii. The Ombudsman's decision on 14 November 2019 to withdraw decision 1 is 'decision 2'.
 - iii. The final report issued by the Ombudsman on 3 February 2021 is 'decision 3'.
 - iv. There have been two hearings of relevant applications for judicial review in this case. I will refer to the first, by HHJ Jarman QC (as he then was: he is now HHJ Jarman KC) as 'JR1'. I will refer to him as 'Judge 1', and to his judgment as 'judgment 1'. The second hearing concerned two applications for judicial review, which I will refer to as 'JR2' (in claim CO/612/2020) and 'JR3' (in claim CO/1135/2020) (see further, paragraph 41, below). That hearing led to the judgment which the subject of this appeal. I will refer Heather Williams J as 'Judge 2', and to her judgment as 'judgment 2'.
 - v. The case has a complicated procedural history involving several applications by Piffs Elm and several decisions by the Council refusing those applications. I will explain that history, and the definitions I have used in relation to it, in paragraphs 7, 8, and 10, below.
 - vi. 'The Complaint' is the complaint made by Piffs Elm to the Ombudsman on 2 June 2017.
4. Paragraph references are to judgment 2, or to decision 1, or decision 3, as the case may be, unless I am referring to an authority. For convenience, I will use the pronoun 'he' when referring to the Ombudsman.
5. For the reasons given in this judgment I have reached three conclusions, which are subject to the reservations which I express in paragraphs 90, and 91, below.
 - i. Decision 1 was unlawful.

- ii. The Ombudsman had no power to withdraw decision 1. Decision 2 was therefore unlawful.
- iii. Decision 3 was lawful.

I would therefore dismiss Piffs Elm's appeal, despite its successful argument that decision 2 was unlawful.

An outline of the facts

6. I have taken this outline from judgment 2, and from the terms of decision 1 and of decision 3.

Applications 1-3 and refusals 1-3

7. In October 2015, Piffs Elm applied for planning permission for an industrial development ('application 1'). On 16 February 2016, the Council refused application 1 ('refusal 1'). Piffs Elm then made a second similar application ('application 2'). The Council refused application 2 on 18 May 2016 ('refusal 2'). Piffs Elm then applied for judicial review of refusal 2. JR1 was listed for a 'rolled-up' hearing on 4 November 2016. In the meantime, Piffs Elm made a third application for planning permission ('application 3'), asking for a waiver of the application fee. The Council refused the application for a waiver ('refusal 3'). The Council drew the attention of Piffs Elm to section 70A of the Town and Country Planning Act 1990 ('the 1990 Act') (see further, paragraph 86 below), saying that section 70A would be engaged if application 3 were submitted with a payment, and advising Piffs Elm to reconsider its position. Piffs Elm nevertheless paid a fee of £41,244 ('the Fee').

The section 70A decision and judgment 1

8. Judge 2 recorded a statement (in a letter dated 25 June 2019 from the Council to the Ombudsman) that an officer from the Council rang Piffs Elm's planning agent after the Council had received the Fee, and told him that if the Council validated application 3, and then decided to refuse it, the Fee would be forfeited. Judge 2 made no finding of fact about this. In a letter dated 14 July 2016, the Council refused to decide application 3 on the ground that Piffs Elm had made more than one similar application and had not appealed to the Secretary of State against the decisions refusing those applications. Piffs Elm did not challenge this refusal, which I will refer to as 'the section 70A decision'. Judge 1 heard JR1 in November 2016. He decided that there was an appearance of bias in refusal 2. He did not quash refusal 2, on the ground that Piffs Elm had had, and had not used, a suitable alternative remedy (that is, an appeal to the Secretary of State for which the time limit had not expired). Mr Coppel told us in the hearing that Piffs Elm had, at that stage, still had 17 days in which to appeal.

The ensuing correspondence

9. On 14 November 2016, Piffs Elm's solicitors wrote to the Council. They drew attention to the judgment of Judge 1. They asked the Council to 'confirm' what steps they would take in the light of Judge 1's judgment and how they would exercise their

discretion to refund the Fee. The Council replied on 18 November 2016. The Council disagreed with the inferences which Piffs Elm had drawn, but said that it was inappropriate to comment without a copy of Judge 1's order and a transcript of his judgment.

Refusal 4

10. On 24 November 2016 the Council replied substantively, despite the fact that the Council had still not received a transcript of Judge 1's judgment. I will refer to this as 'refusal 4'. Inexplicably, refusal 4 was not in the documents which were before Judge 2. It was not provided to us until we asked for it during the hearing. Counsel told us, however, that it was among the documents which Piffs Elm sent to the Ombudsman when, in due course, Piffs Elm made the Complaint. The letter of 24 November said that the case turned on the appearance of bias, not actual bias. There had been no abuse of power, and it was not an exceptional case in which a planning appeal should not be pursued. The Council then made three points.
 - i. The Council would take steps to ensure that the matters found to have given rise to an appearance of bias would not be repeated in so far as they related to the position of Piffs Elm. Had Piffs Elm's claim not been rejected, the Council 'would most likely have appealed' because they did not agree with Judge 1's analysis of the facts. If Piffs Elm were to appeal and were given permission to appeal, the Council would be likely to cross-appeal. But as matters stood, the Council would take steps to abide by the judgment.
 - ii. The Council then explained what those steps were.
 - iii. The Council said that Piffs Elm would not 'receive any refund'. Piffs Elm had been told that making a third application would lead to the loss of the Fee, and was 'in effect discouraged from making' application 3. Piffs Elm had nevertheless chosen to make application 3, 'in full knowledge of these consequences'. Refusal 3 had not been the subject of challenge. It was clear from Judge 1's judgment that refusal 2 should have been appealed. 'Consequently, there will be no refund'.

The Council's internal complaints procedure

11. Piffs Elm then made a formal complaint to the Council, under stage 1 of the Council's complaints scheme. The Council rejected the complaint in an email dated 11 January 2017. The Council explained that the complaint related to the outcome of JR1. The Council did not consider that there was any actual or apparent bias, as it had followed its procedures, although Judge 1 had held that the decision was tainted by apparent bias. The Council did not agree with his analysis. Judge 1 had found there was no abuse of power, and refused relief because there was a suitable alternative remedy. Piffs Elm had been professionally represented but had not appealed. Piffs Elm could have appealed within the statutory time limit. The Fee had to be paid for application 3 to be validated, and Piffs Elm had been advised of the risks in respect of the decision and of the Fee. In paragraph 29 (see paragraph 47, below), Judge 2 considered how that email should be understood.

12. Piffs Elm made a stage 2 complaint in a letter dated 12 January 2017. The Council rejected that complaint in an email dated 17 March 2017. There was no justification for reimbursing the Fee. Piffs Elm had not appealed to the Secretary of State against the refusals of applications 1 and 2, had not applied for judicial review of the section 70A decision, and had made application 3 despite advice that application 3 might fail and the Fee might not be refunded. The Council told Piffs Elm that this was the last stage of the complaints process but that Piffs Elm could contact the Ombudsman.

The complaint to the Ombudsman

13. On 2 June 2017 Piffs Elm's solicitors made a complaint of maladministration to the Ombudsman, which I refer to as 'the Complaint'. Piffs Elm's solicitors said that the only alternative remedy in respect of the section 70A decision and refusal 4 was an application for judicial review and that no such application had been made. They said that refusal 4 was 'Wednesbury unreasonable'. That was 'made even more objectionable by reference to the individual circumstances of this case'. The solicitors referred to refusals 1 and 2 and to the section 70A decision. They said that the High Court had decided that refusal 2 was unlawful. That was relevant, as the premise of the section 70A decision and of refusal 4 was that similar applications for planning permission had been refused more than once; but refusal 2 was unlawful. The section 70A decision was 'Wednesbury unreasonable'. Refusal 4 was unlawful. The Council's stage 1 response was said to contain 'a clear misrepresentation' of Judge 1's judgment and was 'fundamentally flawed'. The Council's refusal to accept Judge 1's criticisms indicated serious maladministration.

The Ombudsman's draft responses to the Complaint

14. The Ombudsman issued five draft reports ('drafts 1-5') before finalising the report which contained decision 1. The parties were given a chance to comment on each. Each draft elicited comments from one or other of the parties and/or threats to apply for judicial review.

Draft 1

15. The Ombudsman's initial response in draft 1 was that he proposed to discontinue the investigation because the case involved 'difficult and contentious legal issues' which were best resolved by the courts. Piffs Elm's solicitors then narrowed the scope of the Complaint. They said that the Ombudsman did not need to consider whether refusals 1 and 2 were null and void. That would only be an issue if the Complaint was that the section 70A decision was unlawful. The Complaint simply related to whether or not refusal 4 was unreasonable in the light of Judge 1's finding that refusal 2 was unlawful (judgment 2, paragraphs 38 and 39).

Draft 2

16. This led the Ombudsman to change his position in draft 2. He said he would investigate refusal 4 because it was not ‘inextricably linked to’ the section 70A decision. It was reasonable for Piffs Elm not to pursue a legal remedy because refusal 4 turned on compliance with planning guidance (‘the Guidance’), rather than a strict question of law. The Ombudsman said that the Council were at fault in not returning the Fee because this was contrary to requirements which were implied in the Guidance. The Fee should be refunded and the Council should apologise. In draft 2 and the drafts which followed, the Ombudsman maintained his view that he would not investigate the section 70A decision. In draft 2 he said he was exercising his discretion under section 26(6)(c) of the Local Government Act 1974 (‘the LGA’) (see paragraph 80, below) to discontinue that aspect of his investigation. The reason he gave was that this issue could not be decided without a judicial determination of the question whether the Council’s ‘previous planning decisions’ were lawful.
17. In a letter dated 31 May 2018, the Council, in short, attacked the Ombudsman’s reasoning in support of the view that the Council had acted unlawfully in not refunding the Fee. The Council attached a short advice from Mr Pereira QC (as he then was), dated 8 May 2018, confirming the position stated in the letter of 31 May, which he had helped to settle. The Council also made representations which persuaded the Ombudsman that he could not ‘disentangle’ the issues in the way he proposed. The Ombudsman would have needed to consider the legal status of refusals 1 and 2, and Piffs Elm’s challenge to refusal 4 was largely based on the findings of Judge 1. The Ombudsman would have to decide the legal status of refusals 1 and 2, and he could not do that.

Draft 3

18. In draft 3, the Ombudsman therefore said that he would discontinue the entire investigation in the exercise of the discretion conferred by section 24A(6) of the LGA.
19. Piffs Elm’s solicitors continued to try to persuade the Ombudsman that he could investigate refusal 4. They further clarified the Complaint in letters dated 28 September and 3 December 2018. The first letter said that the Complaint was not about refusals 1 or 2 or the section 70A decision. There was no need to make any decision about whether or not the section 70A decision was lawful. The Council had simply been unreasonable in refusing to refund the Fee ‘after the High Court judgment’ when that showed that application 2 had not been fairly dealt with. The second letter was in similar terms.

Draft 4

20. In draft 4, the Ombudsman drew a distinction, which he repeated in draft 5, between the Council’s failure to consider whether or not to exercise their discretion to refund the Fee, which he did investigate, and the other points which had been made. As a result of Piffs Elm’s clarification of the scope of the Complaint, the Ombudsman was ‘now only investigating the administrative actions of [the Council] in relation to the retention of the [Fee]’. The Ombudsman had not investigated the Council’s actions ‘in the context of [applications 1 and 2]’. The refusal to make the refund was ‘a standalone administrative action’. The Ombudsman’s provisional view was that the

Council had a discretion to refund the Fee which they had not considered exercising in this case.

21. The Council continued to maintain, in their response dated 6 March 2019, that they did not have a discretion to refund the Fee. The Council referred again to an advice to that effect from Mr Pereira. The Council accepted that they had not considered the exercise of their discretion to refund the Fee after application 3 was made. However the Council had been asked to waive the Fee when Piffs Elm made application 3 and did consider whether there was a justification for that. Whether or not the Council had a power to refund the Fee, they had a power to waive the Fee. The Council had considered whether or not to exercise that discretion. In that situation, it would have been lawful, and would not have been maladministration, if the Council had refused to consider refunding the Fee after Piffs Elm made application 3. There was ‘no conceivable basis on which the Council having decided not to waive the [Fee] pre-application, should nevertheless decide to refund the [Fee] post-application’.

Draft 5

22. Draft 5 was in ‘materially the same terms as draft 4’ (judgment 2, paragraph 46).

Decision 1

23. The final version of the report containing decision 1 was dated 22 August 2019. The report summary identified the complainants as ‘Mr and Mrs Y’ rather than as ‘Piffs Elm’, which is a limited company. The Ombudsman described the Complaint as a complaint about the Council’s ‘decision to retain a planning application Fee after the Council used its powers to decline to determine their planning application’. The Ombudsman ‘found fault with the Council because it did not consider exercising its discretion to refund the Fee. The Council should now consider whether it intends to exercise its discretion to refund the Fee’. The ‘finding’ was described as ‘Fault found causing injustice and recommendation made’. The recommendation echoed the description of the finding. In the introduction, the Ombudsman explained that he used the word ‘fault’ to indicate maladministration and that the word ‘injustice’ referred to any adverse impact on the complainant.
24. The Ombudsman described the Complaint in more detail in paragraph 1, by adding that refusal 4 was said to be ‘unreasonable’ given [Judge 1’s] findings about their previous ‘planning applications’. The Ombudsman had not investigated ‘the reasonableness of the Council’s actions in the context of the judicial review, and any previous planning decisions’ for reasons given at the end of the report. In pages 4-5, the Ombudsman referred to section 70A of the 1990 Act (see paragraph 86 below), to the relevant guidance and to the Town and Country Planning (Fees for Applications, Deemed Applications, Request and Site Visits) (England) Regulations 2012 (‘the Regulations’). The Ombudsman noted that neither the Regulations nor the Guidance imposed a duty on the Council to refund the Fee in this case, or gave the Council any power to do so. Paragraph 15 suggests that the Ombudsman considered that the Council might, nevertheless, have an implied power to refund the Fee. That

suggestion is not explained. In paragraphs 19-28, the Ombudsman made some findings of fact about the history. His conclusions were in paragraphs 29-40.

25. The Ombudsman said that in a previous draft, he had proposed not to investigate the Complaint about the retention of the Fee because he considered that the Complaint was ‘inextricably linked to the status of the two previous planning decisions; a matter which we cannot determine’ (paragraph 29). The complainants had ‘re-confirmed the scope of their complaint’. The Ombudsman referred back to paragraph 1. He was now ‘only investigating the administrative actions of the Council in relation to the retention of [the Fee]’. He had not investigated the Council’s ‘actions in the context of’ applications 1 and 2.
26. When considering those ‘administrative actions’ the Ombudsman had considered the ‘law and guidance’. He considered that the Council has a ‘general discretion to make refunds if it is appropriate to do so’ (paragraphs 31, 34, 35 and 40). He rejected the Council’s argument to the contrary (paragraph 32). The Ombudsman recorded the Council’s argument that this was a matter of interpretation, the Council’s interpretation was not wrong, and the Council were not at fault (paragraph 33). The Council had, in response to the draft decision, ‘confirmed that it did not give any thought to the exercise of its discretion because it maintains that the only option it had was to apply the statutory fee scale’ (paragraph 34). The Ombudsman considered that ‘if there is no such discretion...we would expect to see this made clear in legislation’. He referred to two cases in which councils ‘have used their discretion to make refunds after declining to determine a planning application’. The facts of the cases were different, but the councils had made refunds. ‘It therefore follows that there must be discretion ...to refund planning application fees if it is appropriate to do so’ (paragraph 36).
27. The Ombudsman ‘found fault with’ the Council ‘for failing to consider its discretion to refund [the Fee]... The fault has caused injustice to Mr and Mrs Y because there is uncertainty as to whether they would have received a refund, had the Council considered its discretion’. In paragraph 38, the Ombudsman described the Council’s response to his request that they consider whether or not to make a refund. The Council’s response to the draft decision was that they would not comply with the recommendation. They considered that they would be vulnerable to an application for judicial review if they complied with the recommendation (paragraph 38).
28. The Ombudsman did not refer in decision 1 to the Council’s actual response to the application for a refund, the letter of 24 November 2016 (see paragraph 10, above). Indeed, in paragraph 39, he referred to the Council’s response to the request for a pre-application waiver of the Fee, and said ‘Although the Council considered Mr and Mrs Y’s request to waive [the Fee] before it was paid, there is no evidence to show that it gave any thought to the exercise of its discretion once Mr and Mrs Y paid the fee and requested a refund’. He referred to the Council’s response to the stage 1 and stage 2 complaints instead of to the Council’s letter of 24 November 2016. I have already mentioned that counsel told us during the hearing that that letter was attached to A’s Complaint. In paragraph 40 the Ombudsman repeated his conclusion that the Council had ‘a general discretion to refund [the Fee]...and not doing so was fault’. He set out his recommendations in paragraphs 41 and 42. He explained in paragraph 46 that he

had considered ‘the issue of the refund as a standalone administrative action’ and had not reached a view on ‘the reasonableness of the Council’s actions in the context of the first two planning applications because our jurisdiction prevents us from determining the legal status of those applications’.

The pre-action protocol letter

29. On 28 October 2019 the Council sent a pre-action protocol letter to the Ombudsman challenging decision 1. Either the Council had no power to refund the Fee, or the position was so uncertain that refusal 4 could not amount to maladministration.

Decision 2

30. The Ombudsman then took legal advice and decided that decision 1 was ‘legally flawed’. He wrote to Piffs Elm and to the Council on 14 November 2019 saying that he intended to re-open the investigation, withdraw decision 1 and issue a further report. This was decision 2. Piffs Elm’s response was that he had no power to do that. The Ombudsman’s reply was that decision 2 was based on the Council’s representations and on legal advice. He considered that he had made a public law error in decision 1.

The first draft of decision 3

31. On 17 January 2020, the Ombudsman issued the first draft of decision 3. His provisional view was that the Council had not been at fault. Independent legal advice confirmed that there were ‘respectable legal arguments’ that the Council did not have a discretion to refund the Fee. The Ombudsman could not decide legal disputes and there was no good reason why Piffs Elm had not litigated that issue. He continued to consider that the scope of the Complaint was as he had described it in decision 1.

Decision 3

32. The Ombudsman issued the report containing decision 3 in February 2021. The summary of the report was that Mr and Mrs Y complained about the Council’s decision ‘to retain a planning application fee after the Council used its powers to decline to determine their planning application’. By contrast with the summary in decision 1, the Ombudsman then set out the Council’s position, which was that they had no discretion to refund the Fee. His conclusion was that the Council had not ‘acted with fault’.
33. Paragraph 1 described the Complaint in the same way as paragraph 1 of decision 1. Paragraph 2 was the same as paragraph 2 of decision 1. The Ombudsman’s description of his role and powers (paragraphs 3-8) differed somewhat from, and was fuller than, the equivalent description in decision 1. In particular, in paragraph 7, he referred to *R (Rapp) v Parliamentary and Health Services Ombudsman* [2015] EWHC 1344 (Admin) (‘*Rapp*’) as authority for the proposition that he has no duty to decide

questions of law and is not a surrogate for the court in deciding whether or not there has been unlawful conduct.

34. The analysis of the law about section 70A and about the refund of planning application fees was aligned with the position set out by the Council in correspondence with the Ombudsman. He maintained that the Regulations and Guidance were silent on the circumstances in which there is a power to refund a fee (paragraph 17).
35. The Ombudsman's findings were in paragraphs 21-30. They were the same as the findings in decision 1. The conclusions were in paragraphs 31-43. In paragraph 31, he referred to an earlier draft in which he had proposed not to investigate the Complaint because it was 'inextricably linked to' the status of the applications 1 and 2. Mr and Mrs Y had then limited the Complaint to the allegation described in paragraph 1 of decision 3. He was now only investigating the 'administrative actions' of the Council in retaining the Fee. He had not investigated the Council's actions in connection with applications 1 and 2. There was an argument that councils had a general discretion to make refunds where it is appropriate to do so. The Council's position was that this was 'a matter of interpretation' and did not disclose 'fault' (paragraph 34).
36. Mr and Mrs Y argued that the Council had not relied on the absence of a power to make a refund as a reason for refusing the refund. The Council had 'taken legal advice on the point and reached a view that it has no such discretion. Our view is that no unremedied injustice has been suffered as a result of that limited allegation' (paragraph 35). The three relevant cases did not decide the legal question (paragraph 36).
37. In paragraph 37, the Ombudsman referred to further arguments by Mr and Mrs Y, based on 'section 11' [sic: I think section 111 must be meant] of the Local Government Act 1972 ('the 1972 Act'); section 92 of the Local Government Act 2000 ('the 2000 Act') and section 1 of the Localism Act 2011 ('the 2011 Act'). He had considered those arguments. Those powers were 'not absolutely determinative' (paragraph 38). There was a legal dispute between the Council and the complainants. There were respectable legal arguments on both sides. It was not his role to decide legal disputes. There is a difference between fault and conduct which may be wrong in law. 'It is not fault merely for the Council to have got the law wrong providing there are reasonable arguments for it having adopted the position that it did, which in our view there are' (paragraph 39).
38. In paragraph 40, the Ombudsman noted that Piffs Elm had made application 3 despite having been advised to appeal refusal 2, and despite being warned that it might be a duplicate application and would not be determined. He decided that he could not make a finding of fault because independent legal advice supported the Council's view that they did not have power to refund the Fee in the circumstances (paragraph 41).
39. The uncertainty about the legal position had three consequences in the Ombudsman's view (paragraph 42).
 - i. It would not be appropriate for him to make a finding about the legal position as that would 'place him at risk of making a legal determination or treading into the jurisdiction of the courts'.

- ii. If it were open to him to consider whether or not to make a finding of maladministration, he did not consider that fault had occurred, because the Council's position was supported by respectable legal arguments and legal advice, even if others took a different view from the Council. The question whether there has been maladministration is for the Ombudsman alone.
 - iii. Even if there was a discretion to refund the Fee, it would be 'very difficult' for him to decide whether it was reasonable for the Council not to refund the Fee without forming a view about the status of applications 1-3. He had already declined to investigate 'the validity of the previous planning applications'.
40. In paragraph 43, the Ombudsman said that it was not clear that the Council had a discretion to refund the fee. 'Given the ambiguity' the Ombudsman could not say that the Council's 'position that it has no discretion to refund [the Fee], having considered the question of whether such discretion exists, amounts to fault'. He added that he could not 'determine legal matters and there is no good reason why the complainants cannot take the matter to court for a definitive determination'. The Ombudsman then summarised his 'Decision' thus: he had 'completed his investigation with a finding of no fault for the reasons explained in this report' (paragraph 45). In paragraphs 46-48 he described what he had decided not to investigate. He reminded himself that Mr and Mrs Y had confirmed that 'the sole question for consideration by the Ombudsman is whether it was reasonable for the Council to refuse to refund the [Fee] given [Judge 1's] findings' (paragraph 47). The Ombudsman had not reached a view on the reasonableness of the Council's actions in the context of applications 1 and 2 because his 'jurisdiction prevents' him 'from determining the legal status of those applications' (paragraph 48).

Judgment 2

41. Judge 2 was considering two applications for judicial review. In JR2, Piffs Elm had originally applied for judicial review of decisions 1 and 2. Piffs Elm was later given permission to amend the claim in order to challenge decision 3. In JR3 the Council challenged decision 1. JR3 was only necessary if and to the extent that decision 2 was unlawful, and did not effectively withdraw decision 1. In paragraph 5, Judge 2 listed the issues raised by JR2 and JR3 in relation to each of decisions 1, 2 and 3.

The challenges to decision 1

42. Three of the issues raised by the challenges to decision 1 concerned whether the Council had a discretion to refund the Fee, and, if so the nature of the discretion and whether it would have been irrational for the Council to refund the Fee on the facts. The fourth, raised by Piffs Elm, was whether the Ombudsman erred in law in deciding that he did not have jurisdiction to decide that part of Piffs Elm's Complaint which related to section 70A.

The challenge to decision 2

43. The challenge to decision 2 raised one issue: whether the Ombudsman had power to withdraw decision 1, re-open the investigation and issue decision 3.

The challenge to decision 3

44. The challenge to decision 3 raised three issues.
- i. Did the Ombudsman err in law in refusing to consider the Council's actions 'in the context of [JR1] and any previous planning applications' when determining whether there was 'any fault resulting in injustice' in its refusal to refund the Fee; and/or did he fail to give adequate reasons for that view? Judge 2 referred to this as 'the Context Ground'.
 - ii. Did the Ombudsman err in law in concluding that he did not have jurisdiction to determine the Complaint in so far as it related to the Council's section 70A decision? Judge 2 referred to that as 'the Section 70A Ground'.
 - iii. Did the Ombudsman err in law in concluding that there was no fault resulting in injustice in refusal 4 because there was a 'respectable legal argument that it had no power to do so, and/or did he fail to give adequate reasons for that view'. Judge 2 referred to this as 'the Fault Ground'.

The background to Judge 2's decisions on the issues

45. Judge 2 said that she would consider, first, whether or not the Ombudsman had power to withdraw decision 1 (or, in other words, whether decision 2 was lawful). If he had such a power, the question was whether decision 3 was lawful.
46. In paragraphs 7-12 she considered the legislative framework, and in paragraphs 13-22, the authorities to which she had been referred. She summarised the material facts in paragraphs 23-60.
47. Judge 2 recorded (paragraph 29) that the parties offered different interpretations of the email of 11 January 2017 (see paragraph 11, above). She considered that the Council had given several reasons for not refunding the Fee. She also considered that while the Council had said that it did not agree with the analysis of Judge 1 'this appears to me to have been included more by way of narrative comment, than as an assertion that the Fee would not be returned because the Council thought [Judge 1's] conclusion was wrong'. She noted that her interpretation of the stage 1 decision was supported by the reasons which the Council gave for rejecting Piffs Elm's stage 2 complaint (paragraph 30).
48. Judge 2 observed of the Complaint as first made that, at that stage, it was clear that Piffs Elm's complaint related both to the section 70A decision and to refusal 4. Judge 2 described the financial remedy sought by Piffs Elm in paragraph 34. The Council responded on 6 November 2017. The Council said that Piffs Elm had an alternative remedy (judicial review) and that the Council did not have power to refund the Fee. In paragraphs 36-46 she described 'the development of certain strands in the

Ombudsman's thinking and also of the clarification...as to the scope of the complaint'.

49. Judge 2's summary of decision 1 was that the Council were at fault in not considering whether or not to exercise a discretion to refund the Fee. The Ombudsman considered that the Council had a discretion to refund the Fee and were at fault for failing, as they had admitted, to consider exercising the discretion. That failure had caused injustice. The Ombudsman disagreed with the Council's view about the existence of the discretion. The legislation was not clear about that, and the Ombudsman knew of two cases, which he cited, in which local planning authorities ('LPAs') had refunded fees. The fault had caused injustice because it was uncertain whether or not Piffs Elm would have received a refund if the Council had considered the exercise of the discretion. The Ombudsman recommended that the Council should review the case within four weeks, consider whether they intended to exercise their discretion to refund the Fee and confirm within three months what action they proposed to take.
50. Judge 2 commented (paragraph 50) that the Ombudsman had not made the position as clear as he could have done. It seemed to her that his reasoning about the scope of his investigation was based on a perceived exercise of the power conferred by section 24A(6), rather than an application of section 26(6)(c). Draft 2 was the only draft which referred to section 26(6). The final report referred to section 24A(6) 'in terms that were consistent with the decision as to scope which [decision 1] went on to explain.' The Ombudsman appeared to have decided that part of the Complaint 'could be investigated as a standalone complaint about administrative action, whereas part of it could not be investigated because it entailed a resolution of legal issues' which it was for the court to decide.
51. Judge 2 summarised decision 3 in paragraphs 55-60. The Ombudsman considered Piffs Elm's argument that refusal 4 was not, at the time, based on a contention by the Council that they had no power to refund the Fee. He did not consider that this should prevent him from taking into account the argument that the Council had no such power. His view in paragraph 35 was that 'no unremedied injustice has been suffered as a result of that limited allegation'. Judge 2 said that that phrasing was rather clumsy, but she understood it to mean that if a failure to refund the Fee could not amount to maladministration, for the reasons given by the Ombudsman, then no injustice could follow from the failure to refund the Fee.

Did the Ombudsman have power to withdraw decision 1?

52. In paragraphs 61-95 Judge 2 considered, against the background of her summary of the arguments and the legal principles about the doctrine of *functus officio*, first, whether there were any errors of law in decision 1 and second, whether the Ombudsman had power to withdraw decision 1. Piffs Elm argued that there was no power to withdraw decision 1, whereas the Ombudsman argued that there was, at least if there was a compelling reason to do so, 'including where he...reasonably forms the view that the conclusion reached was legally flawed'. The Ombudsman relied on section 12(1) of the Interpretation Act 1978 ('the 1978 Act'). It applied as there was nothing to indicate a contrary intention. It would be time-consuming and expensive to require an application for judicial review to be made before the Ombudsman could

withdraw a legally flawed report. This would not cause injustice as an application for judicial review of the further decision could be made.

53. Judge 2 referred to exceptions to the *functus officio* principle which had been recognised in paragraph 3 of *R (Sambotin) v Brent London Borough Council* [2018] EWCA Civ 1826; [2019] PTSR 371 (paragraph 64). She accepted that the Ombudsman had no express statutory power to revoke a section 30(1) report. The question was whether a statutory power could be implied (paragraph 65). She noted, in paragraph 68, that cases from other statutory contexts were of limited use in this different context. The ‘factors that proved to be influential’ in the cases might be of some help, nevertheless. She listed nine such factors in paragraph 74.
54. In paragraphs 75-81 she considered the Ombudsman’s argument that he was justified in withdrawing decision 1 and re-making it because he ‘reasonably considered that he had erred in law in’ decision 1. The Ombudsman relied on three errors of law: first, the section 26(6)(c) bar applied to all the issues raised by Piffs Elm with the consequence that he should not have investigated the Complaint or made a decision about it; second, his approach ignored the principle that making a mistake about the law was not, of itself, maladministration; and/or, third, he wrongly treated the two cases to which he referred in decision 1 as authority for the proposition that the Council had power to refund the Fee.
55. Judge 2 did not accept the first argument. She explained why in paragraph 80. Her view was that the Ombudsman thought he was exercising his powers under section 24A(6), not section 26(6)(c). That did not entail ‘an apparent error of law’. Nor did she believe that he thought at the material time that he had made an error in not applying section 26(6)(c). That view was confirmed by the documents in JR3. She accepted, however, that he ‘reasonably believed’ that decision 1 was flawed for the second and third reasons (paragraphs 76-78).
56. Judge 2 then considered (paragraphs 82-95) whether the Ombudsman had power to withdraw decision 1. In paragraph 82 she said that section 12(1) of the 1978 Act could apply here, subject to a ‘contrary intention’. She did not think that it mattered that sections 24A(6) and section 30(1) did not confer an express power to withdraw a decision: ‘...if there was an express power to revoke’ in either provision ‘there would be no need to imply a power to do so or to rely on’ the 1978 Act ‘at all’. Those provisions expressly conferred powers to investigate and to issue a report once the investigation was completed. If there was no contrary intention, ‘the effect of section 12(1) is that these powers may be exercised on more than one occasion...Revocation of an earlier decision is simply a concomitant of a power to re-make it’. Section 12 was wide enough to imply a power to revoke and re-take a decision.
57. She then considered whether there was a ‘contrary intention’. She made it clear that she only intended to decide whether there was a power to withdraw a decision made under section 30(1) if the Ombudsman reasonably believed it to be legally flawed. She would not decide whether there was a wider power to withdraw decisions made under section 30(1) (paragraph 83).
58. She rejected Piffs Elm’s submission that the LGA was a complete code which could not be construed as conferring additional, implied, powers. The LGA conferred broad

discretions on the Ombudsman. The procedure was informal. The Ombudsman had operated a review process for 20 years. If Piffs Elm was right, the review would be ultra vires ‘a proposition which appears less than desirable’ (paragraph 84). She took four aspects of the statutory scheme into account in deciding that there was an implied power to withdraw a ‘final’ report and ‘re-make the decision (with such further investigation as may be necessary)’. They included that the LGA was silent about any power of review, that the Ombudsman does not decide legal rights, and that he continued to have statutory functions after issuing a report under section 30(1) (paragraph 85). The terms of the LGA pointed against Piffs Elm’s submission. Given section 12(1), the lack of an express power to withdraw a report or to re-open an investigation did not matter. The word ‘completes’ was neutral. The detailed and prescriptive nature of the provisions in section 31 which apply after a report is issued shed no light on whether the report could be withdrawn and re-issued (paragraph 86).

59. A power to withdraw a decision which the Ombudsman reasonably considered to be legally flawed did not undermine the statutory scheme. It would not undermine finality and would be procedurally less cumbersome and quicker and cheaper than the alternative. The power for which he argued was close to exceptions to the functus officio principle which have already been recognised and to which she had referred in paragraph 64 (paragraph 87). She could not see that ‘any particular unfairness would result from the existence of such a power’. Someone who preferred the original report ‘would still have the opportunity to challenge the new report and/or the withdrawal decision if they considered it flawed by public law error’ (paragraph 88).
60. Judge 2 then considered whether she was bound by a decision of the Divisional Court about the Parliamentary Ombudsman (*R v Parliamentary Commissioner for Administration ex p Dyer* [1994] 1 WLR 621) (*‘Dyer’*) to hold otherwise. She noted that the applicant in that case was in person. The applicant challenged a refusal by that Ombudsman to re-open his investigation. There were similarities and differences between the two legislative schemes. That Ombudsman only acted on a referral by a Member of Parliament and his role ended once he had laid a report before both Houses. She distinguished *Dyer* on three grounds: the issue was not whether that Ombudsman had power to withdraw a report when he considered it was wrong in law; the legislative schemes were different, and she doubted whether the Divisional Court intended to make a comprehensive statement of the legal position (paragraph 93).
61. She did not need to decide the Ombudsman’s alternative submission that decision 1 was ‘null and void’, but did not find it persuasive, in the light of *R (Majera) v Secretary of State for the Home Department* [2012] UKSC 46; [2022] AC 461, paragraph 29. ‘An unlawful administrative act or decision cannot be described as void, independently of a Court’s determination to that effect’ (paragraph 94). She did not need to decide, either, the Council’s challenge to decision 1 and Piffs Elm’s original ground 4 (paragraph 95).

Judge 2’s approach to the challenges to decision 3

62. Judge 2 then considered the three grounds of challenge to decision 3 (paragraphs 96-132).

The Section 70A Ground

63. She rejected the Section 70A Ground. This ground failed to acknowledge that Piffs Elm had told the Ombudsman in the letter of 2 May 2018 that it was not complaining about the section 70A decision. Piffs Elm had persuaded the Ombudsman ‘not to decline to investigate by disavowing this aspect’ and could not complain if he then did not investigate a part of the Complaint which had been abandoned. She rejected Piffs Elm’s attempt, in oral argument, to escape that conclusion by submitting that the Complaint concerned the refusal to refund the Fee in the context of the section 70A decision and of judgment 1. That was not the way the challenge had been pleaded, and the oral submission was a re-statement of the Context Ground, not an independent ground of challenge (paragraph 97). She also rejected the section 70A ground on its merits. In order to investigate this challenge, the Ombudsman would have had to decide whether refusals 1 and 2 were lawful in the light of judgment 1. He was entitled to take that view; it reflected the original terms of the Complaint. He had a wide discretion and while he could decide legal questions, the extent to which a complaint raised questions which would better be decided by the courts was ‘highly relevant’ to the exercise of the section 24A(6) discretion. He was entitled to decide that that aspect of the Complaint raised legal issues which ‘could be and were better determined by the Courts’. Judge 2 further noted that Piffs Elm had not contested the proposition that it could have challenged the section 70A decision by judicial review (paragraph 102).

The Context Ground

64. Judge 2 then considered the Context Ground. She summarised paragraphs 83-84 of Piffs Elm’s pleading in paragraph 103. She accepted that Piffs Elm had indicated in correspondence that it relied on judgment 1. Piffs Elm’s reliance on refusals 1 and 2 was ‘more problematic’ as it read ‘as an indirect attack on the section 70A decision’ and Piffs Elm had disavowed that aspect of the Complaint (paragraph 104). The Ombudsman had only been willing to consider the Complaint in so far as it could be considered as a ‘standalone issue’. A wider approach would have required him to consider the legal significance of refusals 1 and 2 and whether it was reasonable to refund the Fee in the light of judgment 1. That was a legal question which could be decided on an application for judicial review. The Ombudsman was reasonably entitled, in the exercise of the discretion conferred by section 24A(6), to treat it as an issue which should be decided by the courts (paragraph 106).
65. Similar considerations applied to Piffs Elm’s reliance on judgment 1 for its impact on refusals 1 and 2 and whether it was appropriate for the Council to rely on refusals 1 and 2 in refusing to refund the Fee. That too, was ‘a legal matter for the Courts, or, at least, “inextricably linked” to the legal matters raised’. Judge 2 did not understand the Council to have refused to refund the Fee because they disagreed with the conclusions of Judge 1. In any event, it was open to the Ombudsman to consider that ‘this point was also bound up with the legal issues that he reasonably considered should be determined by Court proceedings’ (paragraph 107). The “context” matters relied on’ by Piffs Elm were ‘far from “obviously material”...they were simply not relevant to the narrowed investigation...’. The focus of that was whether the Council were ‘at fault in not considering to exercise a discretion to refund’ the Fee (paragraph 108).

The Ombudsman had only been prepared to continue the investigation because of assurances dated 28 September and 3 December 2018 that the complaints could be ‘disentangled’. If the Ombudsman had thought that he had to consider judgment 1 and refusals 1 and 2 in order to decide the Complaint, ‘he would have (permissibly) reverted to’ his earlier proposed course of action, that is, discontinuing the investigation (paragraph 109). Judge 2 also dismissed the reasons challenge to decision 3 (paragraph 110).

The Fault Ground

66. In paragraphs 111-132, Judge 2 considered the ‘Fault Ground’. Piffs Elm argued that the Ombudsman had erred in law in three ways in concluding that there was ‘no fault resulting in injustice’ in the Council’s refusal to refund the Fee. First, the Council had not at the time relied on the existence of ‘respectable legal arguments’ that they had no power to make a refund. The existence of fault should have been assessed solely by reference to the reasons given by the Council at the time. In any event, that was irrelevant to the question whether Piffs Elm had suffered any injustice and/or the Ombudsman had not explained how, if there was fault, there was ‘no unremedied injustice’. Third, the Ombudsman was wrong about the legal arguments: the Council plainly had power to refund the Fee (paragraph 111).
67. Judge 2 recorded the Ombudsman’s argument that Piffs Elm did not challenge his decision that it was not appropriate for him to decide whether or not the Council had power to refund the Fee as that was a question for the courts. Judge 2 considered that this had been pleaded by the Ombudsman. Judge 2 therefore accepted that Piffs Elm did not challenge the Ombudsman’s alternative ground that he found no fault as the question whether the Council had power to refund the Fee was for the courts to decide (paragraphs 112-3). The Ombudsman’s finding that he could not make a finding of fault would stand in any event, even if Judge 2 was persuaded by the ‘Fault Ground’. She would therefore refuse permission to apply for judicial review on that ground. She would consider its merits nevertheless (paragraph 114).
68. Judge 2 considered that the key to Piffs Elm’s first two arguments was the reasoning in paragraph 35 of decision 3. The Council had given various reasons why they would not refund the Fee. The argument that they had no power to do so was raised in their response to the Complaint and maintained after that. The Ombudsman ‘concluded in circumstances where a reason for the refund refusal existed that would not amount to fault, then no injustice had been suffered by the fact that this reason was advanced after, rather than at the time of the initial refusal’ (paragraph 115).
69. She accepted that this line of reasoning was open to the Ombudsman. He was not exercising a judicial review jurisdiction, but exercising a broad discretion in deciding whether there had been injustice. Moreover, the Council’s contention that they had no such power was their main argument to the Ombudsman and they would take that position in response to any recommendation by him. It was legitimate for the Ombudsman ‘to consider whether that position involved fault’ (paragraph 116).

70. The Complaint was that the Council had not refunded the Fee. A refund was the primary remedy sought. The other remedies sought were subsidiary to that remedy. If the Fee ‘could be retained without the alleged maladministration, then there was no financial loss or ancillary losses that flowed from the refund refusal’. The Ombudsman had not found that the reasons which the Council gave at the time amounted to maladministration. The Ombudsman, permissibly, decided only to investigate the failure to consider exercising the discretion to make a refund. Everything else was outside the scope of the investigation. Even in decision 1 the only injustice identified by the Ombudsman had been uncertainty about the way the discretion would have been exercised, if, as the Ombudsman had then considered they should have done, the Council had considered whether or not to exercise a discretion which the Ombudsman then thought that the Council had (paragraph 117).
71. Judge 2 distinguished *R v Parliamentary Commissioner for Administration ex p Balchin* [1998] 1 PLR 1 on two grounds. First, in that case the Ombudsman had found fault. It was not an answer in such a case to say that the outcome would have been the same in any event. Second, outrage and distress had been caused. There was no such finding here. Judge 2 did not accept, on the basis of *Rapp*, that in considering whether or not there was injustice it was necessary to focus only on what was known at the time. There is, in any event, no warrant for limiting such a broad concept in that way (paragraph 119).

Did the Council have power to refund the Fee?

72. In paragraphs 120-131 Judge 2 considered the parties’ arguments about whether or not the Council had power to refund the Fee. She emphasised that she was not deciding whether or not the Council had power to do that, but, rather, whether Piffs Elm was right that the Ombudsman had erred in law in deciding that there were respectable legal arguments that the Council did not have such a power (paragraph 120). Counsel agreed that there was no relevant express power and no relevant case law (paragraph 121). She was not addressed on the question whether the Council could have refunded the Fee pursuant to section 31(3)(b) of the LGA, had the Ombudsman found that there was maladministration (paragraph 124).
73. Since the Council did not accept that they were or might have been guilty of maladministration, section 92(1) of the 2000 Act (described as Piffs Elm’s ‘strongest candidate’) did not apply (paragraphs 125-126). There were arguments both ways as regards section 1(1) of the 2011 Act (paragraphs 127-128). There was a respectable argument that section 111(1) of the 1972 Act give the Council such a power (paragraphs 129-132). Judge 2 rejected a reasons challenge as ‘unarguable’. The Ombudsman had explained at some length in decision 3 why there were respectable arguments on both sides (paragraph 132).

Judge 2’s conclusions

74. Judge 2 therefore dismissed Piffs Elm’s argument that the Ombudsman had no power to withdraw decision 1, refused permission for Piffs Elm’s ‘Fault Ground’ and dismissed Piffs Elm’s other challenges to decision 3. She did not decide the challenges brought by Piffs Elm and by the Council to decision 1.

The order of 5 July 2022

75. Judge 2 made an order on 5 July 2022 ('the order'), dealing with costs. In paragraph H of the reasons for the order, Judge 2 dealt with the costs of JR3. Judge 2 said that the three grounds relied on by the Council in JR2 'were considerably wider' than the concession made in the Ombudsman's summary grounds. It did not follow from Judge 2's conclusions in paragraphs 77 and 78 of the judgment (that the Ombudsman reasonably believed that decision 1 was flawed for the reasons given there) 'that grounds of challenge in [JR3] would have succeeded, or that this was a highly likely outcome, particularly in respect of Ground 2, which raised the most substantial issues'.

The grounds of appeal

76. There are three grounds of appeal, as amended with the permission of Dingemans LJ, which he gave on the papers.
- i. Judge 2 was wrong to conclude that decision 2 was lawful.
 - ii. Judge 2 was wrong to conclude that decision 1 was unlawful.
 - iii. Judge 2 was wrong to conclude that decision 3 was lawful.

The cross-appeals

77. Dingemans LJ (again on the papers) gave
- i. the Ombudsman permission to cross-appeal to affirm on different grounds Judge 2's decision to dismiss JR2 and
 - ii. the Ombudsman and the Council permission to cross-appeal against Judge 2's decision to dismiss JR3, in the event that Piffs Elm's appeal on ground ii. were to succeed.

The statutory framework

The Local Government Act 1974

78. Part III of the LGA creates, and confers functions on, the Ombudsman. The Ombudsman is referred to in Part III as a 'Local Commissioner'. Section 23(1) of the LGA provides for the establishment of a 'body of commissioners to be known as the Commission for Local Administration in England' for the purpose of 'conducting investigations in accordance with this Part and Part 3A' of the LGA. The rest of section 23 makes detailed provision for such matters as the appointment and terms of office of Local Commissioners, and the functioning of the Commission. Section 23(11) requires each Local Commissioner to prepare a general report on the discharge of his functions and to submit it to the Commission no later than two months after the end of the year to which it relates. Section 23A(1) imposes a duty on the Commission to 'prepare a general report' and to submit it to various bodies. It must be submitted 'as soon as may be' after the Commission have received the annual reports from

Local Commissioners (section 23A(2)). The Commission must publish its report and lay it before Parliament (section 23A(3) and (3A)).

79. Section 24A gives a Local Commissioner power to investigate various matters, including any matter ‘which relates to action taken by or on behalf of’ an authority to which Part III of the LGA applies, which is subject to investigation by virtue of section 26, and in relation to which section 24A(2), (3) or (5) is satisfied.
80. Section 26(6) provides that ‘In determining whether to initiate, continue, or discontinue an investigation, a Local Commissioner shall, subject to the provisions of this section and sections 26-26D, act in accordance with his own discretion’. There is no dispute but that the Council is an authority to which Part III of the LGA applies (see section 25). By section 26(1)(a), one of the matters which is subject to investigation is ‘alleged or apparent maladministration in the exercise of the authority’s administrative functions’. Section 26(1) is subject to section 26(5), (6), (6A), (7) and (8). Section 26(6)(c) is the relevant restriction. It prevents a Local Commissioner from investigating ‘any action in respect of which the person affected has or had a remedy by way of proceedings in any court of law’, unless he is ‘satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or to have resorted to it’.
81. Section 28 is headed ‘Procedure in respect of investigations’. The Local Commissioner must give the subject of the complaint an opportunity to comment if he proposes to investigate a matter (section 28(1)). Every investigation must be in private, but subject to that, the Local Commissioner has broad general and case-specific powers about the procedure he adopts for an investigation (section 28(2)). The conduct of an investigation ‘shall not affect any action taken by the authority concerned or any other person or any power or duty of the authority concerned or any other person to take further action with respect to any matters subject to the investigation’ (section 28(4)). Section 29 confers wide powers on the Local Commissioner to obtain information for the purposes of his investigation. He may also obtain advice (section 29(6)).
82. Section 30(1) provides that if a Local Commissioner ‘completes an investigation of a matter...he shall prepare a report of the results of the investigation and send a copy to each of the persons concerned’ (unless section 30(1B) applies). Such a report may include recommendations (section 30(1A)). In the circumstances described in section 30(1B) and 30(1C), the Local Commissioner either ‘may instead’ or ‘must prepare a statement of his reasons for’ the relevant decision. The consequences of a report are described in section 30(4), (4A), (5), and (6). If a Local Commissioner ‘thinks fit’ he may after taking into account the public interest and the interests of the complainants and others, ‘direct that a report specified in the direction shall not be subject to section 30(4), (4A) and (5)’ (section 30(7)). The consequence specified in section 30(6) is that if any person who has custody of the report made available for public inspection obstructs anyone’s attempts to get information about the report, he is guilty of a criminal offence.
83. If a Local Commissioner ‘reports’ that there has been maladministration, ‘The report shall be laid before the authority concerned, and it shall be the duty of that authority to consider that report, and, within the period of three months beginning with the date

on which they receive the report...to notify the Local Commissioner of the action which the authority have taken or propose to take' (section 31(1) and (2)). If the authority do not do so, or the Local Commissioner is not satisfied with their response 'he shall make a further report setting out those facts and making recommendations' (section 31(2A)). In the case of maladministration, those recommendations are recommendations 'with respect to the action which, in the Local Commissioners' opinion, the authority should take' to remedy any injustice suffered by the person affected by the maladministration and to prevent injustice being caused in future (section 31(2B)). Section 30 applies, with any necessary modifications, to a report issued under section 31(2A) (section 31(2C)). If the authority does not respond, or the Local Commissioner is not satisfied with the upshot, he may 'by notice to the authority require them to arrange for a statement to be published in accordance with section 31(2E) and (2F) (section 31(2D)). Section 31(3) gives the authority power to make any payment or to confer a benefit on any person who has suffered injustice in consequence of maladministration when a report is laid before them under section 31(2) or 31(2C).

84. Section 31B gives the Local Commissioner a power to publish and re-publish reports and statements, and to supply copies to anyone who asks for one. Section 32 confers absolute privilege on the publications set out in section 32(1). Section 32(2) imposes limits on the disclosure of information obtained by a Local Commissioner in the course of an investigation.
85. Section 34(3) declares that 'nothing in this Part of this Act authorises or requires a Local Commissioner to question the merits of a decision taken without maladministration by an authority in the exercise of a discretion vested in that authority'. Judge 2 does not appear to have been referred to this provision.

Section 70A of the Town and Country Planning Act 1990

86. Section 70A(1) of the 1990 Act read with section 70A(4) gives an LPA power to decline to decide an application if in the 'relevant period', the LPA has refused more than one similar application and there has been no appeal to the Secretary of State against any such refusal, and if the LPA 'think that there has been no significant change in the relevant considerations since the relevant event'.

Section 92 of the Local Government Act 2000

87. Section 92 of the 2000 Act is headed 'Payments in cases of maladministration etc.'. Where a relevant authority consider that any action they have taken 'amounts or may amount to maladministration' and that a person has, or might have been 'adversely affected by that action', they may 'if they think appropriate, make a payment to, or provide some other benefit to' that person (section 92(1)). The Council is a 'relevant authority for this purpose.

Section 32 of the Interpretation Act 1889

88. Section 32 of the Interpretation Act 1889 ('the 1889 Act') was in a part of the 1889 Act headed 'New General Rules of Construction'. Section 32 was headed 'Construction of provisions as to exercise of powers and duties'. It provided:

'(1) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where an Act passed after the commencement of this Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

(3) Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws.'

Sections 12 and 14 of the Interpretation Act 1978

89. Sections 12 and 14 of the 1978 Act are in a part of the 1978 Act headed 'Statutory powers and duties'. Section 12 is headed 'Continuity of powers and duties'. Section 12(1) provides:

'Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as the occasion requires.'

Section 12(2) makes similar provision in relation to office holders. It provides:

'Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office'.

Section 14 is headed 'Implied power to amend'. It provides:

'Where an Act confers power to make-

(a) rules, regulations or byelaws; or

(b) Orders in Council, orders or other subordinate legislation to be made by statutory instrument,

it implies, unless the contrary intention appears, a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re-enact any instrument made under the power.'

Discussion

The issues

90. In response to a question from the Court, Mr Hunter acknowledged that it was not open to him to argue on this appeal that if the Ombudsman had no power to withdraw decision 1, it would follow that the Ombudsman did not have any power to make decision 3, either. This judgment should not, therefore, be read as deciding expressly or by implication anything about the Ombudsman's power, or lack of power, to make decision 3. Nor should this judgment be read as deciding, expressly, or by implication, any point about section 12 of the 1978 Act which it is not necessary for me to decide in order to reach a conclusion on the first of the issues which I list in paragraph 92, below.
91. I should also make clear that, in the light of the arguments which were before Judge 2, it is not necessary for me to say anything about two further issues which do not arise on this appeal. I have not done so, expressly, or by implication. Those issues are
- i. whether there is an exception to the *functus officio* principle in the case of fraud or fundamental mistake (and if so, what its basis might be) and
 - ii. what the position would have been if the Ombudsman had argued (as he did not, on this appeal) that decision 1 was, in law, a nullity.
92. There are, therefore, three issues.
- i. Did the Ombudsman have power to withdraw decision 1?
 - ii. If not, was decision 1 unlawful?
 - iii. If so, was decision 3 unlawful?

Did the Ombudsman have power to withdraw decision 1?

93. It is common ground that the Ombudsman has no express power to withdraw a report. Judge 2 accepted as much. The question, as she framed it, was whether the Ombudsman had an implied power to withdraw decision 1. Another way of putting the same question is to ask whether, when he issued decision 1, he was '*functus officio*'. I agree that that is the issue. The test is whether such an implication is necessary, not whether it would be convenient.
94. I do not consider that, in this statutory scheme, it is necessary to imply a power to withdraw a report which contains 'the results of an investigation' which the Ombudsman has completed (and, it would follow) to re-open an otherwise concluded investigation. All the indications in the LGA are the other way. Part III of the LGA is a complete code. It confers powers on the Ombudsman to investigate and make reports in relation to particular complaints but it also confers powers to prepare annual reports on the Commission and on the Ombudsman. It could not be realistically suggested that those annual reports, once published and circulated, could, by implication, be withdrawn. If that is right, it is hard to see in principle why the Ombudsman should be able to withdraw a report about a complaint, once he 'completes' the investigation. However informal his procedures may be, the Ombudsman makes a decision about a disputed issue, that is, on a complaint brought by a complainant against a local authority, which alleges maladministration by that authority. He considers the parties' representations, and once he 'completes' an investigation he must issue 'a report of the results of the investigation'. He may also make recommendations. A report is a formal, and potentially public document, with many legal consequences both for the local authority concerned and for the

Ombudsman. One potential (albeit relatively remote) consequence is criminal liability (see paragraph 82, above).

95. I do not agree with Judge 2 that ‘completes’ is a neutral word, nor that the ‘detailed and prescriptive’ nature of the provisions in section 31 which apply after a report is issued shed no light on whether the report could be withdrawn and re-issued. Contrary to Judge 2’s view, the availability of the disputed power is inimical to finality; it produces results which are just as cumbersome, slow and expensive as the alternative (as to which, see the litigation in this case). The very fact that the Ombudsman has a wide power to decide what procedure he adopts in the course of his investigation is a cogent argument against the implication of the disputed power. The Ombudsman has many opportunities before the final report to gather and consider information and arguments (see the long iterative process which led to decision 1), and to make a judgment about whether the investigation is complete, and about what its results are, so as to get his report right. The use of the disputed power can be unfair, as in this case, because if the Ombudsman has such a power, the party who, after a long exchange of information and arguments has ‘won’ a favourable decision from the Ombudsman substitutes for that win, at best, the potential for a quashing order, but only if he applies successfully for judicial review. There would be no time limit on the exercise of this disputed power. The fact that the Ombudsman does not, usually, determine legal rights (a point to which Mr Coppel gave great emphasis) is not decisive (see the last two sentences of the previous paragraph).
96. I have not relied on *Dyer* for this conclusion. It concerns a similar but not identical statutory scheme, in which the relevant function was also the preparation of a report after an investigation. The applicant in that case, however, was not represented. I note, nevertheless, that it supports the conclusion I have reached about the Part III of the LGA.
97. The only possible source of an implied power to withdraw a report is therefore section 12 of the 1978 Act. It is necessary to consider the words of section 12 in their statutory context. In the next few paragraphs, for concision, I will describe the legislative imposition of a duty or the conferring of a power on a statutory body or office holder as ‘the conferring of a function’.
98. Section 12 is a general provision which confers an implied power on those statutory bodies and office holders on which or on whom express functions are conferred. Its simple effect is to imply that the duty may be discharged, or the power exercised, whenever it is necessary to do so. The reader would understand it to mean no more than that duties and powers are not (unless a contrary intention appears) exhausted by a single use. As Mr Hunter put it, the effect of section 12 is that the Ombudsman must issue a report whenever he completes an investigation. Its words do not, on any view, enable the Ombudsman, once he has decided that an investigation in a particular case is complete, and what its results are, to issue a report and then to withdraw it, investigate again, and issue another report in the same case.
99. Section 12 says nothing about revocation. Judge 2 recognised this, but she did not explore the implications of that silence. The absence of a reference to revocation is highly significant, if section 12 is considered on its own, and then in its statutory context, for two reasons. First, section 12 describes what powers are implied when

Parliament confers a function. Those powers do not expressly include a power to revoke. Second, Parliament had made provision for some implied powers of revocation in section 32 of the 1889 Act, from which sections 12 and 14 of the 1978 Act are derived (see paragraphs 88 and 89, above). So, for about 150 years, Parliament has distinguished, in broad terms, between the powers which are conferred, by implication, when Parliament confers functions on statutory bodies and on office holders, and those which are conferred by implication when it confers powers to make rules, regulations and orders. I will refer to such subordinate provisions, for concision, as ‘rules etc’. The latter powers, now conferred by section 14, but not the former (see section 12), confer, by implication (unless the contrary intention appears), ‘a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules [etc]...’ (section 32 of the 1889 Act) or, similarly ‘a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re-enact any instrument made under the power’ (section 14 of the 1978 Act). The version in section 14 of the 1978 Act is more concise than the version in section 32(3) of the 1989 Act, but it is, in substance, the same.

100. Sections 12 and 14 of the 1978 Act are an exhaustive statement of the circumstances in which Parliament has conferred an implied power to revoke an earlier exercise of a function. The provisions are clear that when a rule-making power is conferred, then, absent a contrary intention, Parliament also, by implication, confers a power to rescind or revoke the rule etc. The close juxtaposition of that express conferring of an implied power to revoke a rule etc in section 14 with the absence, in section 12, of the conferring of any implied power to revoke an earlier exercise of a function when functions are conferred on statutory bodies and on office holders is eloquent. It is clear from these provisions that if Parliament confers a function on a body or on an office holder, the provision conferring that power does not confer, by implication, on that body or office holder a power to rescind or revoke an earlier exercise of that function (cf *R (Kalonga) v Croydon London Borough Council* [2022] EWCA Civ 670; [2022] PTSR 1568, paragraphs 73, 75 and 79, citing *Hazell v Hammersmith and Fulham London Borough Council* [1992] 1 AC 1).
101. I was not persuaded by Mr Coppel’s answer to that analysis in his oral submissions. The fact that the word ‘revoke’ may not be entirely apt to describe the withdrawal of a statutory report is irrelevant. The withdrawal of a statutory report is, conceptually, the equivalent of the revocation of a rule etc. I also note that Judge 2 used the word ‘revoke’ more than once in her reasons on this issue.
102. Judge 2’s starting point seems to have been that section 12 must apply so as to enable the Ombudsman to withdraw a report and re-open an investigation which was ‘complete’. This is suggested by her view (see paragraph 56, above) that the absence of an express power of withdrawal in the LGA did not matter because ‘if there was an express power to revoke...there would be no *need* to imply a power to do so’ (my emphasis) or to rely on the 1978 Act. She also realised, rightly, that section 12(1) does not in terms confer a power to revoke. But instead of asking whether that omission from section 12(1) was an obstacle, she concluded, instead, that ‘Revocation of an earlier decision is simply a concomitant of a power to re-make it’. That reasoning assumes what it is necessary to prove. It ignores the fact that section 12 is a complete statement by Parliament of the powers which are implied when a statutory function is

conferred. It involves implying a further power in an implied power. Mr Coppel acknowledged as much in his oral submissions. But a further, unstated power cannot be implied into an express power which describes what powers are implied when a statutory function is conferred (cf the ‘incidental to the incidental’ line of reasoning about section 111 of the 1972 Act which was rejected in *McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC* [1992] 2 AC 48 HL (E)). The language of section 12(1) is not, contrary to Judge 2’s view, ‘wide enough’ in its statutory context, to imply a power to revoke and to re-take a decision. Moreover her approach is inconsistent with section 14 of the 1978 Act. It is unfortunate that the parties did not draw her attention to section 14, or, for that matter, to section 32 of the 1889 Act.

103. Judge 2’s focus on the Ombudsman’s argument that there was an implied power to withdraw a report if he reasonably believed that it was flawed by legal error meant that she did not explore the ramifications of her decision about the meaning of section 12. If it is assumed that section 12(1) or (2) does confer an implied power to revoke a decision or report, there is no clue in the language of section 12 or in the statutory context about the circumstances in which it could be exercised, or about the limits of any such power. Such a power cannot, therefore, simply be limited to the circumstances for which the Ombudsman argued. Subject to the doctrine in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, no obvious limit on those circumstances can be derived from the words of the statute. That point should have given Judge 2 pause. Moreover, as Judge 2’s reasoning shows, the test which the Ombudsman advocated was a recipe for confusion and error (see further, paragraph 118, below). Further, as Mr Hunter submitted, the Ombudsman’s test substitutes his belief in a legal flaw for a determination by the court that a decision is unlawful. It deprives the parties of the opportunity to go to court and have the matter decided by an independent arbiter, and of the procedural protections, such as time limits, which apply on an application for judicial review.
104. This conclusion makes it unnecessary for me to say anything about Judge 2’s reasoning on the question whether ‘the contrary intention’ appeared in the LGA. The factors which led to my conclusion that it is not necessary to imply a power to withdraw a report may not be identical with, but do overlap significantly with, the factors which would show, if that were necessary, that the ‘contrary intention’ appears in Part III of the LGA (see paragraphs 94-96, above).
105. As Mr Hunter pointed out in his oral submissions, the Ombudsman’s position on his power to withdraw a report reveals a paradox. His limited statutory jurisdiction means that the Ombudsman is not competent to decide legal issues, yet, at the same time, he is competent to withdraw a report if he ‘believes’ that it is legally flawed. The difficulty of the Ombudsman’s position was further exposed when Mr Coppel accepted, in answer to a question from Popplewell LJ, that the Ombudsman could not withdraw a report if he ‘believed’ that it was affected by fraud, but only if it was in fact affected by fraud, which was a question which could only be decided by a court.
106. For those reasons, I conclude that the Ombudsman had no express or implied power to withdraw decision 1 and to re-open the completed investigation.

Was decision 1 unlawful?

107. Mr Hunter had two main arguments in support of the reasoning in decision 1. He accepted, first, that the two cases on which the Ombudsman relied in decision 1 were not authority for the proposition that the Council had power to refund the Fee. He submitted, nevertheless, that Ombudsman had been right to decide that the Council had power to refund the Fee. Whether or not they had such a power under section 111 of the 1972 Act or under section 1 of the 2011 Act, section 92 of the 2000 Act clearly did give them the necessary power. It did not matter that the Council had never accepted that they had been guilty of maladministration, because the Ombudsman had found that they had been. His second point was that the Council did not, at the time of refusal 4, rely on an argument that they had no power to refund the Fee. So even if the Council's later argument to that effect was reasonable, if mistaken, it could not be relevant to the question whether, when it refused to refund the Fee, it was guilty of maladministration (cf *Rapp*). The Ombudsman was right to look at the Complaint on the basis of the information which the Council had at the relevant time, and not with the benefit of hindsight. He submitted orally that the Ombudsman had considered the proviso to section 26(6) in the May draft (see paragraph 16, above) and had decided that it would not be reasonable for Piffs Elm to pursue an alternative legal remedy because the failure to return the Fee depended on compliance with planning guidance and was not a strict question of law.
108. Mr Coppel relied on three main arguments in support of his submission that decision 1 was unlawful. I will consider them in a different order from the order in which he made them.
109. The crucial point concerns section 26(6)(c). I accept Mr Coppel's submission that the approach of the Divisional Court in *R v Commissioner for Local Administration ex p Croydon London Borough Council* [1989] 1 All ER 1033 is incorrect. Section 26(6)(c) is fundamental to the Ombudsman's jurisdiction. It applies at the start of an investigation but it continues to apply throughout any investigation. I agree with Mr Coppel that that judgment dilutes the section 26(6)(c) duty by converting it into a discretionary consideration once the investigation has begun. The correctness of that suggested approach can be tested by a case in which it emerges, for the first time, well into the investigation that, on analysis, there was a remedy in court in respect of the complaint. The Ombudsman does not, at that point, merely have a discretion to discontinue the investigation. He must consider the alternative remedy argument, and whether it was reasonable for the complainant not to resort to it, whenever that issue emerges. If it is at any point in the investigation clear to him that there is such a remedy and he is not satisfied that it was not reasonable to expect the complainant to resort or have resorted to it, the Ombudsman must decline jurisdiction.
110. I therefore reject Mr Hunter's submission that if the Ombudsman has considered section 26(6) at an earlier point in his investigation, he has a discretion not to change his mind about his jurisdiction, even if, in the light of later information, it turns out that he does not have jurisdiction. Moreover, even if Mr Hunter's submission were correct, it could not help Piffs Elm in this case, because, at the point when the Ombudsman did consider whether or not the proviso to section 26(6) applied (see paragraphs 107 and 16, above), he erred in law. I accept Mr Coppel's submission to that effect. There are two reasons why. First, whatever the status of the Guidance may be, its meaning is a question of law for the court. Second, and in any event, whatever

its status, Guidance cannot give a statutory body a power which is not conferred by the relevant statutory scheme.

111. There is a further, more fundamental point. If the Ombudsman fails to consider the issue posed by section 26(6)(c) in a case in which it arises, he errs in law, and any subsequent investigation or report would be made without jurisdiction. As this is a jurisdictional question, it does not matter whether or not the Ombudsman considers it at the time. Any court which later considers the decision-making process must decide, as an objective question of law, whether the Ombudsman had jurisdiction, regardless of his own approach to the question. The jurisdictional bar is to be given a wide construction: see, in relation to the analogous provision in section 26(6)(a), *R (Milburn) v the Local Government and Social Care Ombudsman* [2023] EWCA Civ 207.
112. Decision 1 is wholly based on the Ombudsman's determination of what, by that stage, was and only was, a disputed question of law. The question was whether the Council had power to refund the Fee. That is exactly the type of issue which should be decided by a court, and not by the Ombudsman, as section 26(6)(c) makes clear (unless the proviso applies). Whether or not the parties raised this point, it is fundamental to the Ombudsman's jurisdiction and he should have considered, before making decision 1, whether or not the section 26(6)(c) bar applied to the re-formulated Complaint. That he did not do so expressly is an error of law. Moreover, it is clear that, had he considered it, there was only one answer he could have reached, which was that he did not have jurisdiction to decide the Complaint, because, in its current guise, its resolution required a decision on a pure point of law, for which Piffs Elm had an alternative remedy in court, which it would be reasonable for Piffs Elm to use. Piffs Elm could have applied for judicial review of refusal 4 to test that point of law. The re-formulated Complaint did not concern, on any view, 'a standalone administrative action'. I consider that an investigation which breaches the bar in section 26(6)(c) is ultra vires. For those reasons, alone, therefore, decision 1 was unlawful.
113. It does not help Piffs Elm to argue that the Ombudsman was right that the Council had a power to refund the Fee. The question for Judge 2 and for this Court is not whether the Council had such a power, but an anterior question. That is, whether that question was a pure question of law or not. It is not necessary for me to express any view, therefore, on the question whether the Council did have such a power. I only observe that it is ironic that, in the argument I record in paragraph 121.iii.-v., below, Mr Hunter proposed section 92 of the 2000 Act as a candidate for a source of a power to refund the Fee, and that he criticised the Council for not thinking about section 92 at the relevant time. At the time of refusal 4, it cannot be suggested that the Council were at fault for not asking themselves whether they were or might be guilty of maladministration, as the Complaint had not yet been made. It follows that section 92 could not have been available to the Council when it made refusal 4. A further irony therefore arises from the argument I summarise in paragraph 121.ii., below, as the reliance on section 92 depends on ex post facto reasoning of a kind for which Mr Hunter criticised the Ombudsman.
114. Mr Coppel's first argument was that there were other errors of law in the Ombudsman's approach. This legal question was, on one view, straightforward. As the Ombudsman acknowledged in decision 1, there was no express power to make a

refund. It is a basic principle of the public law governing local authorities that if they do not have an express power to do 'x', a power to do 'x' must either be necessarily implicit in an express duty or power, or must be found in section 111 of the Local Government Act 1972 or in section 1 of the Localism Act 2011. The Ombudsman's attention was not drawn to any of those powers, or to their limitations. On their face, the Council's submissions to the Ombudsman were powerful. I accept Mr Coppel's submission that the Ombudsman's express reasons for finding that the Council had a power to make a refund are based on two clear legal errors. First, there is an incorrect assumption that a local authority can have an implied power when there is a detailed relevant code which does not confer such a power (cf *R (Kalonga) v Croydon London Borough Council* [2022] EWCA Civ 670; [2022] PTSR 1568, paragraphs 73, 75 and 79, citing *Hazell v Hammersmith and Fulham London Borough Council* [1992] 1 AC 1). Second, it does not follow that local authorities must have such a power simply because two authorities have purported to exercise such a power. Mr Coppel submitted that this erroneous reasoning was a further reason for finding that decision 1 was unlawful. But he did not go so far as to submit that the Council had no power to make a refund. In that situation, I do not consider that Mr Coppel's first argument is any more than an illustration of the dangers of ignoring the section 26(6)(c) bar. It is not an independent reason for finding that decision 1 was unlawful.

115. Mr Coppel's third argument was that the Ombudsman asked himself the wrong question in decision 1. It is trite that it is not maladministration simply to get the law wrong. He submitted that the Ombudsman should not have asked whether the Council's position was wrong in law, but whether there were reasonable arguments in support of their position. Mr Coppel rightly acknowledged that there was an element of hindsight in that submission. There may be cases, like *Rapp*, in which the Ombudsman should confine his reasoning to the stance taken by the local authority when it takes the action which gives rise to a complaint. However, I do not accept Mr Hunter's submission that this is such a case. There are two reasons why. First, there is, now, and was, soon after Piffs Elm made the Complaint, significant doubt about whether the Council have a power to make a refund. That point was bound to surface eventually. Once it had, it would have engaged section 26(6)(c), and it would (or should) have been clear that the Ombudsman had no jurisdiction. It would also be a reason why the Council would refuse to make the refund. Second, and perhaps more fundamentally, while refusal 4 was not based on an argument that the Council had no power to make a refund, the Council gave cogent reasons, in the letter of 24 November 2016, why (on the unstated assumption that they did have such a power) they would not have exercised it on the facts (see paragraph 10, above). That approach did not even arguably amount to maladministration.

116. I turn to Judge 2's analysis of the jurisdiction point. She summarised what she considered to be the correct approach in paragraph 21. Reasonably, she followed *Croydon*. Paragraph 21 ii) suggests that she thought that if they were read together, the effect of the two relevant statutory provisions was that the Ombudsman was required to discontinue the investigation if to continue with it would conflict with section 26(6)(c), but in paragraph 21(iv), she held, while acknowledging that an investigation in breach of section 26(6)(c) would be ultra vires, that the exercise of this discretion would be difficult to challenge. In paragraph 80 she rejected the Ombudsman's argument about the effect of section 26(6)(c) by saying that in deciding on the scope of the investigation, he had not erred in law.

117. I am not persuaded by Judge 2's analysis of this point. It is immaterial whether, or in what terms, the Ombudsman approached the question posed by section 26(6)(c), whether in the draft reports or in decision 1. He must always consider that question if and when it arises, and if he does not consider it, and there is an alternative remedy in court, then (unless the proviso applies) he simply has no power to continue an investigation. Then, if the Ombudsman's decision is challenged, the court must itself decide the issue of jurisdiction, as an objective legal question, whether or not the Ombudsman has done so.
118. I must, however, make two points, in fairness to Judge 2. First, she was loyally applying the reasoning in *Croydon*, which does not bind this Court. Second, her error was inevitable, because she was also applying the test suggested by the Ombudsman, which was not whether he had in fact erred in law but whether he reasonably believed he had erred in law. I have already explained why that test is wrong. The test led her into a mistaken factual inquiry into what the Ombudsman thought when he made decision 2, which, in turn, led to her conclusion on this jurisdictional argument. Judge 2's understandable error well illustrates the complexity of analysis and risk of mistakes which are entailed in applying the test suggested by the Ombudsman.
119. For those reasons, I consider that decision 1 was unlawful. The Council's position on this appeal (skeleton argument, paragraph 35) was that if this Court accepted the Ombudsman's concession that decision 1 was legally flawed, the Council's claim for judicial review should succeed, and Piffs Elm's claim would be academic. I consider that this is a proportionate approach to the issues on this appeal. That makes it unnecessary for me to decide whether all the challenges to decision 1 in the Council's statement of facts and grounds in JR3 are well-founded. I need say no more than that, whether or not the Council had power to refund the fee, the position it took in the letter of 14 November 2016 was not even arguably maladministration. Even if it was, it did not even arguably cause Piffs Elm or Mr or Mrs Y such injustice as the Ombudsman found. They did not suffer any uncertainty 'as to whether they would receive a refund', because they were told, before they paid the Fee, when the Fee was paid, and at all times subsequently, that it would not be refunded.

Was decision 3 unlawful?

120. Mr Hunter submitted that although Piffs Elm limited the scope of the Complaint to refusal 4, part of the complaint was that the Council were at fault because they were aware that Judge 1 had found that refusal 2 was tainted by apparent bias, but refused to accept that finding. The Ombudsman, they argued, erred in not taking that factor into account. Judge 2's reasoning conflated the Ombudsman's 'power to limit the scope of his investigation' with a power to ignore considerations which were 'obviously material' to the complaint he had agreed to investigate. His reasons for not looking at that part of the Complaint were 'plainly bad'. That part of the Complaint did not require him to decide any legal issue, but only to take into account what Judge 1 had decided.
121. Mr Hunter also submitted that the Ombudsman erred in finding that the Council were not at fault in refusing to return the Fee, in essence, because the legal position was not

clear. The Council had not initially relied on the argument that it had no power to refund the Fee. The decision whether the Council were guilty of maladministration had to be based on what they had done at the time. There was no reasonable basis for doubting that the Council did have power to refund the Fee, not least because of section 92 of the 2000 Act. Bias is a recognised species of maladministration. Even if it was reasonable for the Council to reject the finding of apparent bias, it could not have disputed that its conduct might have amounted to maladministration. Section 92 would, therefore, have given it the necessary power.

122. Mr Hunter gave five reasons why Judge 2's approach to refusing permission to apply for judicial review were wrong.
 - i. Decision 3 did not give an alternative reason why the Council were not at fault; it explained only why it was not appropriate for the Ombudsman to make a definitive finding about whether the Council had the necessary power.
 - ii. Whether or not there were arguments both ways was irrelevant to the question of fault, because the Council did not rely on any such argument at the time. The finding that the limited allegation had caused no 'unremedied injustice was bizarre and illogical'. The allegation was not that it was maladministration to rely on the legal argument after the event, but rather, that it was maladministration for it to refuse to accept, or to take into account, the finding of apparent bias. The question for the Ombudsman was whether that maladministration had caused injustice. If Judge 2 considered that the existence of a respectable legal argument meant that the Council's refusal to return the Fee for a different reason was not maladministration, that did not follow.
 - iii. The Council clearly had such a power under section 92.
 - iv. The issue under section 92 was whether the Council's conduct was or might have amounted to maladministration and the Council never addressed that question.
 - v. That the Council had never admitted as much was irrelevant. The Council had never considered the issue.
123. Mr Coppel submitted that decision 3 was lawful. He had detailed answers to the submissions made by Mr Hunter, not least that the way in which the Complaint was described in the skeleton argument for this appeal represented yet another shift in Piffs Elm's position. His main point, however, was that the Ombudsman was clearly right that the Complaint that the Council had not refunded the Fee required the Ombudsman to decide a legal question and that Piffs Elm had an alternative remedy in court, that, is to apply for judicial review of refusal 4. That, he submitted, was a complete answer to the question whether decision 3 was lawful or not.
124. For the reasons which I have already given in relation to decision 1, I consider that the Ombudsman could not lawfully investigate the Complaint as limited and refined by Piffs Elm during the course of the investigation. The essence of the Complaint was that the Council had refused to return the Fee. That Complaint squarely raised, potentially, two legal questions. They were whether the Council had power to refund the Fee, and, if so, whether their refusal to refund the Fee for the reasons they gave at the time (that is, in the letter of 24 November 2016, see paragraph 10, above) was

unlawful. The Complaint was not a complaint about a purely administrative act. The attempt to suggest that reliance on Judge 1's finding of apparent bias in connection with refusal 2 somehow transforms the Complaint into a complaint of maladministration is misconceived. That reliance is no more than an argument in support of a request for a refund. Piffs Elm had, and did not exercise, an alternative remedy in respect of the Complaint, that is, an application for judicial review of refusal 4. There is no material to suggest that resort to that remedy would not have been reasonable. Moreover, Piffs Elm's characterisation of the Council's response, in the letter of 24 November 2016, to the finding of apparent bias was inaccurate (see paragraph 10, above), as a matter of fact. The Council acknowledged the finding of apparent bias, and said that it would take steps to ensure that it was not repeated. The Council said that they did not agree with Judge 1's analysis, but that they were not going to appeal because Piffs Elm's claim had been rejected. The Council clearly said that they would abide by the judgment. The Council's position was more combative in their responses under the complaints procedure, but what matters is their immediate response to the request for a refund.

125. The Ombudsman was undoubtedly right to conclude that he had no jurisdiction to consider the Complaint. That conclusion makes it unnecessary for me to consider the parties' other arguments. For those reasons, Piffs Elm's challenges to decision 3 fail.

Conclusion

126. For those reasons, I have decided that decision 1 was unlawful, that the Ombudsman had no power to withdraw decision 1, but that decision 3 was lawful. I would therefore dismiss this appeal.

Lord Justice Dingemans

127. I agree.

Lord Justice Popplewell

128. I also agree.