Neutral Citation Number: [2011] EWHC 491 (Admin)

IN THE HIGH COURT OF JUSTICE Claim No.CO/13014/10

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT sitting at Manchester Date: 10 March 2011

Before:
HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

BETWEEN:

DERWENT HOLDINGS LIMITED

Claimant

and

TRAFFORD BOROUGH COUNCIL

Defendant

and

(1) TESCO STORES LIMITED
(2) LANCASHIRE COUNTY CRICKET CLUB
(3) ASK PROPERTY DEVELOPMENT

Interested Parties

Paul Tucker QC and Ian Ponter (instructed by Walker Morris, Solicitors) for the Claimant
Stephen Sauvain QC (instructed by Borough Solicitor, Trafford Borough Council) for the Defendant
Christopher Katkowski QC and Sasha White (instructed by Berwin Leighton Paisner Solicitors) for the First Interested Party
Matthew Slater (instructed by Lane, Smith, Shindler, Solicitors) for the Second Interested Party
The Third Interested Party did not attend and was not represented

Hearing Dates: 28 February and 1 March 2011

Approved Judgment

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

Introduction

1. This is a claim for judicial review of the grant of planning permission by the Defendant, Trafford Borough Council ("the Council") to the joint applicants, Tesco Stores Limited ("Tesco") and Lancashire County Cricket Club ("LCC") both of whom appear in this action as Interested Parties. The grant was made by a decision notice on 29 September 2010 following a resolution by the Council made on 11 March 2010. The application for planning consent ("the Joint Application") had been made on 11 November 2009.

2. The permission granted ("the Permission") was two-fold: to Tesco for a large superstore (15,501m^2 gross) on a site adjacent to the A56 Chester Road on its eastern side, and to LCC to redevelop its Old Trafford Cricket Club ("the Cricket Club") nearby. These locations are shown on the plan at 1/155. The application was made jointly because the scheme contemplated that if permission was granted, the Council would sell the relevant land to Tesco for £21m which would then be passed on to LCC for the purpose (together with other funds) of the redevelopment.

3. The Claimant ("Derwent") is the owner of an existing retail park known as White City Retail Park ("WCRP") several hundred metres away from the Tesco site, also fronting onto the A56. Their relative positions can be seen from the plan produced in the hearing. A further plan shows the detail of WCRP: at present its character is that of a warehouse-type retail park. Units H, I and J are occupied by CSL, Furniture Village and Currys respectively. On 5 August 2008 a Lawful Development Certificate ("LDC") was granted for the unrestricted sale of retail goods (including food) from those units. On 24 December 2008 permission was granted to Derwent to demolish the existing Units A1 to A4 (previously occupied by Homebase) and a further unit adjoining Unit H, and to create 4 new units for A1 retail sale of comparison (ie non-food) goods. On 7 December 2009 Derwent sought permission to create a new food store (9036 m^2 gross) and to refurbish existing units for non-food retail use. In support of its application Derwent claimed that it had a fall-back position whereby, even if permission were not granted, it could realistically introduce a food store at the site of Units H I and J ("the Fallback").

4. Both the Joint Application and the Derwent Application were to be dealt with at the meeting on 11 March of the Council's Planning Committee. Reports to the Committee on the Joint Application ("the Report") and on the Derwent Application ("the Derwent Report") by the Chief Planning Officer, Mr Castle, were produced on 3 March. They were supplemented by an Additional Information report ("the A.I.R") on 11 March itself. The Committee was told that it would not be possible to grant both applications because of the significant adverse effect on trade elsewhere if both were granted. It either had to be one or the other, or neither. Moreover, if the Fallback were not to be accepted as a realistic prospect, it was the recommendation of the Chief Planning Officer that Derwent's application should then fail on its merits, so the first matter to be decided was the validity of the Fallback. The two original reports recommended rejection of the Fallback, refusal of Derwent's application and the granting of the Joint Application.

5. At the meeting the Planning Committee resolved as follows:

(1) By 9 votes to 3 not to defer consideration of the applications to another date;

(2) By 10 votes to 2 to reject the Fallback as a realistic option for Derwent;

(3) By 8 votes to 4 to refuse the Derwent Application and

(4) By (the same) 8 votes to 4, to grant the Joint Application

and a decision notice in relation to the refused application was issued on 15 March.

6. Derwent appealed the refusal of its application and the appeal was heard at a public inquiry which took place between 22 September and 1 October 2010 ("the Inquiry"). It had also requested the Secretary of State to call in the Joint Application. Initially he refused but then on 27 August 2010 he issued a holding direction preventing the Council from granting the planning permission until he had given the call-in further consideration. On 28 September, while the Inquiry was still proceeding, the Secretary of State announced by letter that he would not call in the permission. On 29 September the Council made the grant of permission to Tesco and LCC.

7. On 20 December 2010 (ie just within the three month period) Derwent issued this claim for judicial review of the grant.

8. On 22 February 2011, the week before the start of this hearing, the Secretary of State refused Derwent's appeal, adopting the recommendations of the Inspector who conducted the Inquiry. So whatever happens to the planning permission at issue here, Derwent cannot now proceed with its development of WCRP as sought in its application.

Permission

9. The hearing before me was on a "rolled-up" basis because of the urgent need for LCC to act upon the permission and commence its development. The grounds alleged by Derwent to impeach the Permission are clearly arguable. Although a point on delay was originally taken, alleging that the claim was not brought promptly, this has not been pursued. Accordingly I grant permission on all the grounds now relied upon and turn to the substantive claim.

Planning history at the Tesco site

10. In January 2004 permission was granted to Tesco to build a smaller food-store of 4506 m^2 ("the Small Tesco") at the site, which remains undeveloped. On 3 November 2006 the Inspector refused Tesco's appeal against a refusal by the Council to permit a larger development than the Small Tesco albeit smaller than the development now in question.

The Nature of the Joint Application

11. It is highly material to note here that neither the Report nor the A.I.R. suggested that any aspect of the Joint Application, whether in relation to the new Tesco store or the new cricket ground, was unacceptable from a planning point of view, subject to the need to impose some conditions and subject to the fact that there was a loss of some open space from the site of the new Tesco store which would be compensated for by improved sporting facilities for the public at the new cricket ground (see the summary at paragraph 142 of the Report). Although the cricket ground element would create undoubted regeneration benefits for the area quite apart from leading, it is hoped, to it being accepted by the English Cricket Board as suitable to host international matches (and in particular the Ashes in 2013) this was not an "enabling" proposal whereby planning disbenefits of the proposal, or one part thereof could be ruled acceptable because of specific benefits elsewhere. Here, both elements had to be considered acceptable before the Joint Application could be approved.

12. Paragraph 1 of the Report stated "the principle of development" as follows:

> "The proposed development seeks to ensure the retention of Lancashire County Cricket Club in the borough of Trafford and to secure redevelopment of the ground to meet the ECB's standards for International and Test match status. This part of the development would be partly funded by the sale of a Council owned site on Chester Road to Tesco on which permission for a large foodstore is sought. The applicant maintains that this is not an "enabling" proposal but instead is a "cross-subsidy" proposal. In essence the applicant's position is that each element of this planning permission is acceptable 'in principle' but that the cricket club element of the proposal will only come forward in the event that the whole proposal is approved by reason of the cross-subsidy to LCCC which will be released by the Council following the sale of land to Tesco for the purpose of this development. The link between the proposed foodstore and redevelopment of the cricket club would be through a separate funding agreement and a Section 106 agreement both of which will include clauses to ensure that the foodstore will not open for trading until LCCC have 'let' the contract for all those works at the ground required to meet the ECB's TSF2 requirements (listed as Phases 2a, 2b and 2c in the Supporting Statement). Other than the proposed pedestrian link there is no physical link between the two elements of this application and as such each must be considered separately by the Council when assessing the acceptability of the principle of development.."

13. I return to the s106 obligation below.

The Fallback and adverse impact matters in March 2010

14. The essence of the Fallback argument was that there was a realistic prospect that Derwent could bring in a major food retailer like Sainsbury's to take over Units H I and J and that the present occupants could be persuaded to go elsewhere. The Derwent Report did not accept this. See paragraphs 51-69 thereof.

15. A key consideration for both applications was whether they would have a significant adverse impact upon retail trade in the area. The Report considered first whether the proposed new Tesco store ("the Large Tesco") would by itself have such an impact in particular on the nearby Stretford Mall, and concluded that it would not. See paragraphs 27-36 thereof. Next it considered whether it would have such an impact taken together with

other "commitments" (ie recent permissions and developments) within the relevant catchment area. Tesco maintained that the permitted food use at WCRP should not be taken into account because it was not a realistic prospect. Given its view of the Fallback the Report agreed and on that basis there was, again, no significant adverse impact. See paragraphs 46-51 thereof. At that stage the cumulative impact considered was only in terms of convenience (ie essentially food) retail sales not comparison goods.

16. As for Derwent, however, the position was different. Here, having rejected the Fallback, the Derwent Report concluded that whether by itself or cumulatively with the extant permission for the Small Tesco, the new development at WCRP would have a significant adverse impact on the nearby Regent Road Neighbourhood Centre ("Regent Road"). Furthermore, on a cumulative basis there would be a significant adverse impact on Stretford Mall.

17. Following production of the reports, Derwent pointed out that as a significant part of the sales and area at the Large Tesco would consist of comparison goods, there needed to be a cumulative impact assessment there as well, noted at p8 of the A.I.R. As a result Tesco produced a further such assessment. This took into account the existing retail use at WCRP of Units H to J for the sale of "bulky" goods and concluded that there was no significant adverse impact. At the time, that was the only retail use said to be in contemplation (other than the Fallback) albeit that there was in theory unrestricted A1 use at those units and A1 (non-food) use permitted at the other end of the site. This was dealt with at pp9-10 of the A.I.R. which agreed with Tesco. So the Tesco element of the Joint Application remained unobjectionable in this regard.

The Fallback and related matters at the Inquiry

18. By the time of the Inquiry matters had moved on somewhat. In a letter dated 21 September 2010 Mr Carney, a surveyor who acted for, and is a director of, Derwent, suggested, for the first time, that the Fallback did, or could, consist not simply of a food-store at Units H I and J but an "anchor" food-store with another anchor major retailer at the other end (the suggestion was a Currys megastore) and a high-street type pedestrianised mall in between ("the Shopping Park") so that the site would change significantly in character. One reason for advancing this scenario as a Fallback was that if it came about under existing permissions the Council would have no right to impose conditions on that development. On the other hand, if the new permission sought by Derwent was granted on the appeal, the Council could impose restrictions. These points were advanced and developed at the Inquiry itself which started on the following day.

19. The Inspector rejected them in a detailed section of his report at paragraphs 8.67 to 8.101. In paragraph 8.90 and in the light of his view as to the lack of large food retailer interest in the Fallback scheme and because of problems in any event over car parking, he said that he had substantial doubts about the realism of this project. See also his paragraphs 8.97- 8.99 where he reiterated these conclusions. Since the introduction of a major food retailer as an anchor tenant was essential to any shopping park scheme, these findings put paid to any notion of the Fallback including one which consisted of the Shopping Park.

20. In paragraph 8.101 he specifically dealt with the contention that in the absence of a permission, to which conditions could be attached, there was nothing to prevent the changing of character at WCRP by the introduction of high street shops. In answer to this, however, he said that there was no evidence that high-street outlets would sit comfortably with the existing tenant mix or be attractive to such retailers. As to the argument that any such scheme could have wider and different impacts on nearby centres there had been no assessment of this ie it was not possible to test that point.

21. As to the adverse impact of Derwent's development, the Inspector disagreed with the Derwent Report that there was a significant adverse impact upon Regent Road. But he agreed that there was such an impact on a cumulative basis upon Stretford Mall. See paragraph 8.46 and 8.66 of his report. Accordingly the scheme remained objectionable and the appeal was dismissed.

22. Given that the Fallback and the Shopping Park have now been definitively rejected, it must follow that if the Planning Committee had at or after the meeting on 11 March considered them or were to consider them now, they must be taken to have rejected them. And if ordered now to redetermine the Joint Application, Derwent's application would no longer be for reconsideration alongside it.

The Issues

23. Originally 10 grounds of challenge were advanced. Grounds 5, 8 and 10 have now been abandoned and Ground 3 is reduced in scope because of the findings of the Inspector at the Inquiry. It is convenient for me to retain the original numbers of the grounds however.

Grounds 1 and 2 – inability of Mr Highton to attend or speak at the meeting

24. It is alleged that the meeting on 11 March was procedurally unfair because Mr Highton, as Derwent's planning agent, could not get into the meeting-room where the applications were to be dealt with and/or because Derwent was not told beforehand that it could have two speakers in support of its application, not one and that this prejudiced Derwent at the meeting.

Ground 1

25. Given the public interest in the issues relating to the applications, it was unsurprising that this would be a very full meeting. After a conversation which took place between Mr Highton and Ms Cody on 8 March 2010 when Mr Carney's name was given, at least provisionally, as the nominated speaker for Derwent, Ms Cody sent a letter dated 9 March enclosing a speaker ticket. The system was that the name had to be registered although it would not appear on the ticket itself. The letter also said that arrival should be no later than 6.15pm for the start at 6.30pm and that others who wished to attend (ie non-ticket holders) should be told that entry was on a "first-come first served" basis.

26. What happened was that Mr Highton arrived at around 5.35pm. Mr Carney arrived later by which time there were 100 or so people outside. They say that at around 6.10pm when the doors were opened there was a rush from members of the public who wished to get in. Mr Carney got in, but before Mr Highton and Ms Johnson, Derwent's retail adviser, could do so, they were turned away by a security officer. When Mr Highton protested Ms Cody came to the door. Mr Highton said that he should be allowed in as he was Derwent's planning agent and had previously spoken to her, but it is common ground that she said that she could not let anyone else in because the room was full. It is not clear exactly where Mr Carney and Mr Highton were standing for most of the time but it would appear not to have been next to the door. Had that been the case and given that Mr Highton arrived in plenty of time, it is hard to see why the crowd of other people got ahead of them. Indeed Mr Carney says that at one point he went to speak to Mr Clark of the Tesco team who were standing by the door, but then returned to where Mr Highton and Ms Johnson were. There seems to have been no problem in all of the Tesco team getting in even though Mr Baker of Tesco says that they arrived 45 minutes before the meeting (which on Mr Highton's account would be 10 minutes later than him) and they were at the front of the queue. It looks as if Derwent's representatives did not position themselves near the door. The photograph at 5/1483 suggests that it was possible to get to the door beyond the many protesters gathered there.

27. The complaint is that the Council should have put in place a more sophisticated system for example general admission tickets or a dedicated queuing area with marshals, but in my view this is a counsel of perfection. And according to a letter from Ms Cody to Mr Highton dated 22 March the Council had used this system before where there was a large amount of public interest without complaint. I do not find any procedural unfairness or irregularity here. But even if there were, I would not quash the Permission because in my judgment there is no real evidence that the outcome might have been different, and for the other reason given in the context of Ground 2, below.

Ground 2

28. It is clearly the case that at some point before the meeting, the Chair, Councillor Ward, decided that instead of only one speaker being allowed to speak in support or against the applications, she would allow two. She is not sure when she communicated this decision. But it had obviously been actioned in relation to other parties because, by the time of the publication of the A.I.R. by 5pm on the day, it referred to two speakers in each case – save for the Derwent application where the only speaker in favour was Mr Carney. Once he got into the meeting he realised that parties were allowed two speakers. After the meeting, on 12 March, Mr Highton wrote complaining about the entry arrangements. In her letter of response dated 22 March Ms Cody said among other things that Mr Highton had had the opportunity to register himself as a second speaker as the Chair had allowed this. On 26 March Mr Highton wrote back saying that the opportunity to attend the meeting had now passed and he did not propose to engage further in the matter but for the record said that any agreement to allow two speakers before the meeting had not been conveyed to him and all his discussions with Ms Cody proceeded on the basis that only one speaker was allowed. In her first witness statement Ms Cody denied this and said that Mr Highton had been told of

the second speaker before the meeting. On this very limited issue of fact I allowed both of them to be cross-examined.

29. I consider that on the balance of probabilities Mr Highton was not informed about the ability to have a second speaker. If he had it would be very odd if Derwent did not take it up especially given the numerous pre-meeting representations made. Ms Cody says that she recalls speaking to Mr Highton at some point the day before telling him of the second speaker but if so it is hard to see why she did not retort, when confronted by him at the door, that he had been given the chance and did not take it. That is so even if she would not have gone on to say that he could come in now, because, as she explained in evidence, the Chair had also ruled that she would not allow any further speakers on the day. That one might have expected her to say something also follows from the fact that she had just earlier seen the A.I.R. and noticed with some surprise that Derwent had only registered one speaker. Finally, had she personally told Mr Highton that he could have two speakers it is surprising that she did not say so in terms in response to his letter of 26 March 2010, to put him right – notwithstanding that he did not want to engage in the matter further.

30. Telephone records show that Mr Highton did indeed call Ms Cody on 10 March as well as on 8 March – she says that she thinks he had called her back after she had tried his office to tell him of the second speaker and recalls the conversation they then had about having another speaker. Mr Highton could not recall what the conversation was about but thought he may have been firming up Mr Carney as the speaker. Notwithstanding Ms Cody's apparently clearer recollection of the telephone conversation that day, I still think that the more likely scenario is that Mr Highton was not told. It would have been a very busy day given the subject-matter of and interest in the meeting and different people had apparently been deputed to tell the parties about the second speaker. I suspect that she simply did not get around to it but has, since being asked about this matter months later, mistakenly assumed that she did because that is what should have happened. As a result there was procedural unfairness in this respect, albeit not deliberate. But the real question is what difference it would have made if Mr Highton <u>had</u> spoken.

Consequences

31. At paragraph 18 of his second witness statement, Mr Highton sets out how prejudice was caused. He says that if he had been allowed in, he could have made notes. Maybe, but that on its own does not suggest things may have turned out differently. He then says that he could have advised Mr Carney about the A.I.R. which Mr Carney had not had time to read, but for reasons explained under Ground 4 below I do not think that would or may have made any difference. In particular he says that he could have addressed conflicts in the respective assessments of the two applications but the A.I.R. addressed the further cumulative comparison goods assessment made by Tesco and it also responded to Derwent's points on the assessment of the Derwent Application on Regent Road and concluded that the position remained the same – see paragraph 45(1) below. He also says that he would have been able to address inadequacies in the Report but Derwent did make numerous points in correspondence after its publication which were extensively summarised

in the A.I.R. As regards making more of the fact of prior refusals of Tesco applications, save on one point (which is contentious – see below) all aspects of those refusals were dealt with in the Report.

32. In paragraph 19 Mr Highton says that many of the present complaints made now could have been dealt with at the meeting if he had been able to speak. This requires a brief overview of what those points were, as set out in his first witness statement. Paragraph 23 addresses the cross-subsidy as set out in the Report. But there was never an objection based on the fact that the Council accepted the Joint Application as valid or that a cross-subsidy was *per se* involved, and all the evidence shows that the Planning Committee was advised firmly to be sure that each element of the Joint Application was planning-acceptable; see further paragraphs 76- 77 below. Paragraph 24 addresses a point on s106 which, for reasons given in paragraphs 78-87 below, is ill-founded anyway. Paragraphs 25 and 26 address points about UDP S11 which, again, I reject, in paragraphs 51-56 below. Paragraph 27 makes a point on H10 which I also reject, in paragraph 50 below. Paragraph 28 concerns the refusal of consent by an Inspector in 2006 – but I explain in paragraphs 57-61 below why this is not a real ground of complaint. Paragraph 29 concerns a point which became Ground 10 and which is not now pursued. Paragraph 30 complains that the report does not adequately keep the assessment of the two elements of the Joint Application separate but that is very hard to allege when one sees the very extensive and separate treatment given to each in terms of planning considerations. One also needs to bear in mind that as far as the Report is concerned the time and place for a detailed critique of that was beforehand – and of course Derwent did raise many points of criticism then – see for example letters dated 5 and 9 March at 1/377 and 427. It is far from clear why they should only be left to the meeting or how many of such points Mr Highton would have been able to deal with.

33. Mr Highton does not make clear what exactly it is he would have said in relation to the A.I.R. had he been able to speak. The one substantive point about the A.I.R he makes at paragraph 23 of his second witness statement is that the cumulative comparison goods assessment done by Tesco and referred to in the A.I.R. was inaccurate because it assumed that the only use at WCRP was bulky goods as opposed to for example the Shopping Park. And so perhaps Mr Highton would have been able to draw members' attention to that. But this is misconceived because there <u>was</u> no other option being canvassed at the time – the existing Fallback was rejected in the original Report and any extended scheme like the Shopping Park was only raised much later – and has been conclusively rejected by the Inspector. See above.

34. Furthermore, it is hard to see why Mr Carney did not raise the exclusion of Mr Highton at the meeting itself once he appreciated that he could have had two speakers. Even if the Chair had ruled beforehand that no additional speakers on the day were to be allowed, Mr Highton did not know that and this was a rather unusual case. It by no means follows that the Chair would not have allowed Mr Highton in. I accept that Mr Carney says that he was prevented from interrupting on procedural points on other occasions but I cannot see why he did not raise this at the outset or as part of his own speech.

35. In addition, strictly these grounds relate to the inability of Mr Highton being able to speak for Derwent, not against Tesco, which had its own speakers against; one understands the fact that only one application could succeed and the interrelationship between the two in some respects but it would be surprising if Mr Highton could have *carte blanche* simply to mount a further attack against Tesco when he is meant to be speaking for Derwent.

36. Overall I cannot conclude that there was any real (as opposed to fanciful) prospect that had Mr Highton spoken along with Mr Carney he could have turned the meeting round, as it were.

Discretion otherwise

37. Moreover, critically, and in any event, if the Council were ordered now to redetermine the Joint Application, the subject of this judicial review claim, Derwent would have no locus to speak formally at all in the way that it did before (ie in support of the Derwent Application) because the Council would no longer have before it that application. It has been refused and its appeal dismissed. The so-called "beauty contest" between the two competing applications no longer exists.

38. In conclusion to the extent that there was any unfairness:

    (1) I do not accept that in its absence the result might have been different;

    (2) As a matter of discretion, there is no sound basis for ordering relief by way of quashing.

Ground 4 – late, inadequately summarised and/or inaccurate A.I.R.

Late Production

39. The first complaint is that this document came too late. It was apparently prepared by no later than 5pm on 11 March. The Conservative group would have had it then because it was put into all parties' political group rooms then and they had their usual pre-meeting. Those who voted in favour of the Joint Application and against the Derwent Application were this group. The 3 Labour members (who voted against along with the Liberal Democrat member) no longer had a meeting at this time so they would not have seen it prior to the meeting unless they went into their room then and Cllr Walsh did not. His colleagues may have done, because it was one of them who handed a copy to him, having presumably spotted it earlier.

40. Although it is said that at 23 pages it was a long document, it must be remembered that the first 11 pages dealt with Tesco and recited various complaints made by Derwent. Pages 12-20 deal with the Derwent application. The first 3 largely recount Derwent's own objections made about the treatment of its own application following the report. The remaining pages deal with further representations by other parties including some positively in support. Of the 4 appendices 3 came from Derwent.

41. In addition the main point against Tesco said to arise in relation to the A.I.R. concerned the basis of the cumulative goods comparison – but as explained above, the alternative to bulky goods in the form of a Shopping Park was not even raised at that stage. So any inability of Derwent to critique the Tesco assessment goes nowhere.

42. Although only Cllr Walsh spoke about the length of the A.I.R., Mr Castle invited members to consider deferral – see paras. 18 and 19 of his witness statement. A motion to defer was proposed, seconded, and debated and was lost 9:3. That was a fair way to deal with any perceived problem with its late arrival and cannot be said to have been perverse.

43. Furthermore, Mr Castle summarised the main points in the A.I.R. for the meeting. I do not accept that if the A.I.R. was late, this is an irrelevant point.

44. For all those reasons the late production of the A.I.R. was not unfair in these particular circumstances. And if unfair, there would be no basis to quash since the major point concerning "non-bulky" cumulative comparison goods, even if it could have been raised then, has been rejected now by the Inspector.

Inadequate Oral Summary

45. Mr Castle summarised the report but it is said that his summary was inadequate. As refined by Mr Tucker for Derwent there are in truth two points now taken, being sub-paragraphs (i) and (iv) in paragraph 2.36 of his Skeleton Argument. As to these:

    (1) On (i) it is said that Mr Castle did not tell the meeting that Derwent had objected to errors in the Council's retail impact assessment of the Derwent Application insofar as it concerned Regent Road. Mr Castle agrees that he did not mention it but points out that this complaint made by Derwent is set out in the A.I.R. as is the clear answer to it – see 3/1019 and 1021. The Council concluded that the result – significant adverse impact – remained the same. In my view there was no inadequacy here. But if there was, and Mr Castle should have referred to the complaint he would also note the answer – which would not help Derwent;

    (2) On (iv) it is said on the basis of Mr Carney's recollection, that Mr Castle told the meeting that all parties' experts had seen each other's reports, when in fact they had not. And it is true that Derwent's experts had not seen Tesco's latest cumulative impact assessment. But Mr Castle says that he did not say this – where possible, information was exchanged but this became difficult in the days leading up to the meeting. It is hard to see why Mr Castle would have said definitely that they had when he knew it was not so. It may be that he said that where possible, this had been done and Mr Carney, who made no notes, recalled it slightly incorrectly. But in any event any failure to mention here was immaterial. The real point is that the Council had had a chance to absorb the new material and did so. Had he told the meeting that Derwent actually agreed the new material that would have been different. But he did not.

46. I should add that Mr Tucker very properly did not pursue points (ii) and (iii) because they have been rendered redundant by the rejection of the Fallback by the Inspector. He sought to call them in aid by way of general forensic points against how the Council acted generally but in my view they do not show that.

47. The last point (v) was reshaped by Mr Tucker away from an inadequate summary point to a lateness point. I have dealt with that in paragraph 41 above. He also said that it showed an inaccuracy on the part of the A.I.R – I have dealt with that in paragraph 45(2) above.

48. Accordingly there was no unlawfulness or unfairness springing from Mr Castle's oral summary.

49. Overall, then Ground 4 fails.

Ground 9 – Failure of the Report to advise the Planning Committee of material factors in relation to the Tesco proposal

H10

50. Paragraph 6 of the Report at p32 stated that although the Tesco site did not benefit from an allocation for retail development, Policy H10 of the Revised Trafford UDP [June 2006 (Priority Regeneration Area: Old Trafford)] states that within the Old Trafford Area, opportunities would be taken to inter alia [see (iv)] provide new food retail store facilities along Chester Road (adjoining Stretford Leisure Centre). So the Tesco element would conform to that policy. Derwent complains that what the Report did not say was that the Small Tesco already permitted also served that end. It was material for the Planning Committee to be told this because they might then have placed less weight on the Tesco element. There is nothing in this point. It still remained true that the Large Tesco would satisfy that policy and I cannot see how in reality the Small Tesco's compliance would cause a rational Planning Committee to even consider refusing permission on that basis.

S11 and requirement (iv)

51. Proposal S11 is also part of the Revised Trafford UDP June 2006. The complaint is that while the Report mentioned S11 it did not focus on its particular requirements but instead concentrated upon the applicable national policy PPS 4. As a result the Planning Committee failed to have regard to a development plan and there was a breach of s38 (6) of the Planning and Compulsory Purchase Act 2004.

52. S11 provided that out of town retail development should not be permitted unless (among other things) (i) there was a need (ii) a sequential approach to site selection was adopted, (iii) the scheme would be highly accessible, and (iv) [and most relevant] the development would not lead to the sporadic siting of comparison goods shopping along a road corridor. In all cases it would be necessary to show by means of an impact study that there would be no serious adverse effect on the vitality and viability of any town centre. Justification 2 for

S11 was that it reflected government guidance within PPG 6 and PPG 13. PPG 6 (revised June 1996) did indeed say much the same thing including item (iv).

53. However, later national policy, as reflected in PPS 6 (March 2005) and PPS 4 (December 2009) changed. It is common ground that need was removed as a requirement from these policies, that (ii) and (iii) were reproduced and that (iv) was absent. It does not seem to be to be open to doubt that S11 does not now reflect national policy insofar as it still makes reference to items (i) and (iv). By 2009 new Development Plan Documents were expected to be forthcoming which ultimately would supersede UDPs. But in the meantime the Trafford UDP was "saved" by the Secretary of State's letter of 13 May 2009. This did not mean that the Secretary of State would endorse that policy if it were presented then as a new policy. The letter went on to say that after 19 June 2009 the "extended" policies should be read in context and where adopted some time ago material considerations and in particular new national and regional policy and new evidence would be afforded considerable weight in planning decisions.

54. Paragraph 9 p32 of the Report states that the Joint Application must be assessed against relevant policies in local regional and national planning guidance. Reference was then made to PPG 6 and two of its factors namely sequentially preferable sites and impact on nearby town centres. No reference is made to sporadic siting on road corridors. Paragraph 10 referred to national retail planning policy and to the fact that PPS 4, published in December 2009 and which superseded PPS 6, "now forms the national policy guidance on retail planning and it is the provisions of PPS 4 which have informed the assessment of the planning application." The later sections of the report do then indeed apply all relevant aspects of PPS 4 which include requirements similar to items (ii) and (iii), but not (i) and (iv) of S11.

55. The view which was obviously taken in the Report was that the relevant policy for retail developments of this kind could now be found exclusively in PPS 4 and there was no need to assess it against the requirements of S11. The body of the Report reflects that approach. As both sides accept that need has been ruled out, the only difference in practice concerns (iv). It can reasonably be inferred that the reason why the Report contains no assessment as to whether the Large Tesco store would amount to sporadic siting on a road corridor is because this was not now considered to be relevant. Mr Castle's commentary on S11 in his witness statement at 3/857 suggests that his approach was to follow S11 to the extent that it was still reflected in national policy although he does not say so in terms. I agree that it remains arguable that this limb of (iv) could be said still to have survived, although for my part I incline to the view that as national policy was one of the justifications lying behind S11 and that no longer includes (iv) and given the terms of the "saving" letter, requirement (iv) is no longer relevant. But on any view it seems to me that the approach taken by the Planning Officer of giving primacy to the terms of PPS 4 (thereby in effect disregarding any element in S11 which does not now reflect PPS 4) was an entirely rational and reasonable approach. On a matter such as this I do not consider that it was necessary for Mr Castle to advert to the possibility that another view might be that requirement (iv) has in fact still survived. On a debate of that kind, it is very likely that members would defer to the view of

a particular policy as expressed by the Chief Planning Officer and certainly I cannot see that there was any prospect of such further reference affecting the minds of those who voted for the Joint Application.

56. Indeed, although the failure to refer to item (iv) is a point now taken by Mr Highton in these proceedings I note that his lengthy letter of objection to the Council dated 27 January 2010 made no reference to it.

57. There is one further factor, however. In his decision in November 2006 to refuse Tesco's appeal against an earlier refusal of permission by the Council for a new store not as large as this one, the Inspector did refer to and apply S11. The application in issue there was essentially to add to the food store permitted in 2004 principally to accommodate comparison goods. He considered all six factors set out in S11 including need and item (iv). That was despite the fact that item (iv) was no longer in national policy, as expressed by PPS 6. He almost comprehensively rejected Tesco's appeal on the grounds of lack of need, other sequentially preferable sites, disaggregation, sporadic development on a road corridor, design and diminution of local amenity and raised concerns over retail impact. Various aspects of his findings were referred to and discussed in the Report but not his finding on (iv). Should this have been drawn to members' attention in the Report?

58. In my judgment, not. Where the Inspector's report was considered to be relevant it was referred to in the Report. See for example, 1/105, 110, 113, 132, and 138-140. It can properly be inferred that the Inspector's finding on item (iv) was not considered relevant because if it had been then that requirement would have been set out as a general matter for consideration anyway. But it was legitimate to take the approach of giving primacy to PPS 4. And wherever his report was discussed it was in the context of that part of PPS 4 which was equivalent to the aspect of S11 which he considered. Since sporadic siting did not arise under PPS 4, neither did what the Inspector said about it.

59. Again, one notes from Mr Highton's letter dated 27 January 2010 that although he refers in detail to some of the Inspector's findings against Tesco in 2006 he makes no reference to his finding on item (iv). He, therefore, cannot have seen this as material.

60. In my judgment therefore the fact that the Inspector applied item (iv) was not something material which should have been referred to in the Report.

61. Moreover, Mr Holliss, the Council's retail consultant, has said in his witness statement that in his view the Inspector was wrong about sporadic siting anyway and in his view there was no violation of (iv). So had it been necessary to tell members that the Inspector had considered (iv) and that it arguably might apply the Council would no doubt have gone on to say that its view was that (iv) was not a problem here. If that had happened it is inconceivable that the members who voted for would have changed their minds and not followed the Report's recommendation because of it.

62. Accordingly I find against Derwent on Ground 9.

Ground 3 – failure to take back to the Planning Committee certain matters arising at the Inquiry in September 2010

63. Derwent alleges that at the Inquiry new material considerations arose which should have been taken back to the Planning Committee, under the principles in *Kides v S Cambridgeshire DC* [2002] EWCA Civ 1370. It is common ground that in relation to events occurring after the LPA had resolved to grant permission but before the actual grant, the test for whether they should be brought back is whether they would amount to a "reason for a rational planning committee to change its mind." See *Dry v W Oxfordshire CC* [2010] EWCA Civ 1143 per Carnwath LJ at para. 20. The events relied upon here relate to (a) H10, (b) S11 and (c) Shopping Park.

H10

64. This arose at the Inquiry because in cross-examination Mr Holliss accepted that the Small Tesco satisfied H10, too. But, for the reasons already given in paragraph 50 above, this was not material in the required sense and there was no need to refer it back to members.

S11

65. This arose at the Inquiry because Mr Holliss accepted that the retail component of the Joint Application had to be assessed against S11. But he was not asked about (iv) in particular and it seems that it was not on any view considered relevant at the Inquiry. And insofar as S11 was still reflective of national policy it would not much matter whether one applied the S11 or PPS 4 factors because they were common to both. I have already concluded that at the time of the meeting it was not necessary for the Report to have addressed item (iv). I do not see that what Mr Holliss said at the Inquiry changes the position. And again, if Mr Holliss, advising the Council had given his view it would have been that (iv) was not broken here. So this was not a material matter either.

66. I would only add that if there had been any point in respect of H10 or S11 it was always there – these were not matters which in truth only arose at the Inquiry.

Shopping Park

67. This could not sensibly have been brought by the Report into the equation at the time of the meeting because it had not been raised by Derwent at that point. See paragraphs 17-18 above. But Derwent submitted that once evidence about it had been received at the Inquiry, things changed. That was especially in the light of the fact that in cross-examination Mr Holliss said that he had not at the time of the meeting assessed the cumulative comparison goods impact of the proposed new Tesco together with such non-food trade at WCRP as was permitted which went beyond the existing "bulky goods" use. He then said that with hindsight there ought to be. Derwent contends that this was a material new factor which should have been taken back to the Planning Committee.

68. On the facts Mr Holliss has explained the whole sequence of events in his witness statement at paragraphs 4 to 13 which I have no reason to doubt. In his earlier evidence to the Inquiry he had made clear his view that he did not accept that a modified Fallback so as to include the Shopping Park was a realistic prospect. And that is reflected in Derwent's closing submissions to the Inspector repeated at paragraphs 3.54- 3.56 of his report.

69. Ms Lefevre's notes of his evidence say that he agreed that there had been no "assessment of Tesco comparison goods and retail park" which Derwent says means A1 unrestricted use and that he agreed that with hindsight there ought to be. His recollection, assisted by these notes, is that he accepted that with hindsight it would have been useful to have had a cumulative comparison goods assessment with some degree of comparison goods turnover uplift at WCRP. See his paragraphs 14 – 18.

70. In my judgment, this concession, if that it be, is of very limited import. First he had already expressed the view that the comparison use in mind from Derwent's point of view was the Shopping Park which he did not regard as realistic. Second, and, critically, the Shopping Park concept was dismissed by the Inspector anyway. It would be no answer to say that the Inspector's conclusion came only recently (February 2011) and what Mr Holliss said in September 2010 should have been taken back to members immediately. This concerned a subject heavily in issue at the Inquiry and it would have made little sense in reconvening to consider the Joint Application once again before even knowing the Inspector's conclusions on these points.

71. Insofar as it was contended that a putative cumulative comparison goods assessment should have been made on the footing that there was some non-bulky goods trade from WCRP albeit <u>not</u> in the form of the Fallback, whether or not modified by the Shopping Park concept, that is quite unrealistic in this context since the latter were the only alternatives to existing trade actually advanced by Derwent (either originally or at the Inquiry).

72. In reaching this view I have taken account of how Mr Tucker put the case at the Inquiry as recounted at paragraph 2.13 of the Inspector's report and the footnote thereto, but this takes the matter no further in my judgment.

73. Overall, and as with H10 and S11, nothing in the evidence about the shopping park at the Inquiry was reason for a rational planning committee to change its mind. There was no need for it to be referred back.

Ground 7 – Confusion and the s106 obligation

Introduction

74. Derwent alleges first that there was general or at least some significant confusion among the Planning Committee as to the notion that each element of the Joint Application had to be considered separately from a planning point of view but it then had to be voted on as a whole, with the attendant risk that members might take the fact of the cross-subsidy into

account so as to dismiss or ignore any perceived objection in the Tesco element from a planning point of view – so that the permission to Tesco was being "bought" by the cross-subsidy to some extent. Secondly Derwent contends that the s106 obligation referred to in paragraph 1 of the Report at 1/30 is itself unlawful and/or evidence of an impermissible link between the Cricket Club and Tesco elements of the Joint Application which somehow violated the principle of separate consideration.

75. It is not suggested that the Council erred when accepting the Joint Application as a valid application in the first place. Nor could it be. This was one site joined by a pedestrian walkway albeit with two elements. Mixed applications are of course not unknown. Nor did Derwent allege that the fact of the cross-subsidy was *per se* objectionable.

Confusion

76. Paragraph 1 of the Report at p30 makes clear that each element had to be considered and justified separately from a planning point of view before the Joint Application could be approved and that the cross-subsidy could not be used to justify any objectionable part of the Tesco element. The advice given here was, in my view, logical and not difficult to follow. (I deal with the s106 element below.) Indeed the whole thrust of the Report proceeds on that basis and it concluded that each element was planning-acceptable. Moreover, Derwent accepts that the evidence from Ms Lefevre, the Council's solicitor, Mr Carney and Cllr Walsh was that members were told clearly that they had to be sure that each element was acceptable in planning terms before they could approve it. In fact Mr Carney's later note of 4 May records that they all had "numerous reminders" about this. Mr Castle also affirmed this advice at the meeting when he read out his prepared note Summary of Planning Arguments at 3/1057-1058. Derwent says that Ms Lefevre's reminder came only just before the vote but that may not have been a bad thing and anyway there were earlier reminders.

77. Nonetheless Derwent contends that this advice was not actually followed by at least some members and that there was confusion as to whether the cross-subsidy was relevant to the Tesco element. At paragraph 4.13 of Mr Tucker's Skeleton Argument are certain remarks noted by Ms Lefevre as having been said to show that this was so. But they are all brief extracts from Councillors' observations, the first of whom voted against, anyway. And it cannot be said from the remarks attributed to the other two, who voted in favour, that they did so on the basis that they had identified planning objections in the Tesco element which they then disregarded because of the cross-subsidy. One has in any event to be wary of attributing too much significance to the speeches of only a few (here 2 out of 8) of the voting majority – see for example *R v London County Council* [1951] 2 KB 471 per Buckley and Pickford LJJ at p489 and *R v Exeter County Council* [1991] 1 QB 471 per Simon Brown J (as he then was) at pp483-484. I see no reason not to accept paragraphs 19 and 20 of Mr Lefevre's witness statement where she discounts any real possibility of confusion, and paragraph 51 of Mr Castle's first witness statement. I see no basis for Mr Carney's sweeping observation in paragraph 34 of his witness statement that it was "clear that the Committee members disregarded.." the advice given to them to be sure about each

element. In fact if they followed the Report when voting for the Joint Application (and there is no evidence that anyone voted for it on some other basis) they would have been sure. There is therefore nothing in this first aspect of Ground 7.

The s106 Obligation

78. The second point made under this ground (and the one more emphasised in argument) concerns the nature and impact of the s106 obligation referred to in paragraph 1 at p30 of the report set out at paragraph 12 above. That obligation is referred to again at paragraph 250 of the Report and as part of the legal agreement referred to in the Minutes. It forms part of a series of covenants given by LCC and Tesco in a s106/s111 agreement made between them and the Council and Nat West Bank on 21 September 2010. In relation to all those obligations it is stated in Recital (K) that they are all necessary to make the Development acceptable in planning terms, directly relate to it, and fairly and reasonably relate to it in scale and kind ie conforming to reg. 122 (a) of the Community Infrastructure Levy Regulations 2010 and the prior guidance given in ODP 05/05. Paragraph 10 of Schedule 1 Part 2 which are Tesco's covenants, states that "The Foodstore element shall not open for the retail sale of goods to the public until the Stadium Contract has been entered into."

79. The first point to note is that this obligation could not have been put there so as to ensure that Tesco paid over the £21m to be used as the cross-subsidy because, self-evidently, by that time Tesco would have paid over the money so as to acquire the site whether on a freehold or a long lease basis. Moreover the very fact of the planning permission would secure those funds, assuming that Tesco did indeed intend to avail itself of it, because it had first to acquire the land.

80. Clearly the s106 Obligation linked the two elements of the Joint Application in some way because of its very terms. The reason behind it is explained in paragraph 23 of Ms Lefevre's witness statement. It was there as a means to ensure that the expressed very significant regeneration benefits from the redevelopment of the Cricket Club were brought on stream as soon as possible not least because of the aim of securing international test match status in time for the 2013 Ashes. The means to this end was the linkage to the opening of the Tesco store. The idea was obviously that as one of the joint applicants would in some way be able to encourage LCC or assist it, in getting on with the job of letting the building contract for the redevelopment of the Cricket Club.

81. There are only two possible objections to the s106 Obligation. Either it is, in itself, unlawful because it fails to comply with the requirements of Reg. 122. Or, if not unlawful, it somehow amounts to an impermissible link between the Cricket Club regeneration and Tesco which has infected the decision-making process at the meeting of the Planning Committee and thereafter.

82. As to the first objection, it seemed to me, and Mr Tucker accepted, that an obligation to ensure that the promised benefits (including those which would only arise if the Ashes 2013

were secured) came about could well be justified in planning terms and under Reg. 122. It was not obviously unlawful. But if so I cannot see why the mere linkage to the opening of the Tesco store as a means to achieve that end makes it necessarily illegitimate. If there could be no objection *per se* to a scheme whereby the Cricket Club element will not proceed without the cross-subsidy funded by Tesco (and there was none made by Derwent) then I cannot see why at a later stage, the fact that Tesco is involved in the mechanics of bringing about the Cricket Club regeneration is any more objectionable. On the face of it and having regard in particular to the evidence of Ms Lefevre, I cannot see why there has not been compliance with Reg. 122 as recital K states.

83. I therefore turn to the second objection. The admitted link between the Cricket Club works and the Tesco store could only be wrongful if it meant, in truth that the Permission for the Large Tesco was being "bought" so that its objectionable features from a planning point of view could be disregarded, and that in voting for the s106 Obligation the Planning Committee must have or may have proceeded on that basis.

84. In my judgment that proposition is wrong. First, on the evidence, it seems clear that those who voted for the Joint Application did so because they agreed with, and followed the recommendations of the Report and the A.I.R. That means that they did indeed consider that each element was acceptable in planning terms. But if so the s106 Obligation cannot conceivably be seen as buying an otherwise unacceptable Tesco development – because it was not <u>thought</u> to be unacceptable. Second, as already noted, the s106 Obligation does not secure the funding for the cross-subsidy in the first place. That had already happened, notionally, by the time of the operation of that obligation.

85. The mere fact that there is a s106 Obligation proposed and voted for which contains a link between the Cricket Club works and Tesco does not mean that the need to consider the planning acceptability of each element has been disregarded. Although this point was forcefully argued for by Mr Tucker, it is, at the end of the day, a non-sequitur.

86. It also follows that I reject the contention made in the context of the confusion point, that paragraph 1 page 30 of the Report is itself confusing or self-contradictory.

87. In reaching these conclusions, I have also considered the subsidiary point that when, shortly before the meeting, Derwent issued its own "Unilateral Undertaking" to pay £21m for the regeneration of the Cricket Club, the A.I.R said that even if the Derwent Application was otherwise acceptable (which it was not) the undertaking could not form a valid s106 Obligation. See 3/1029-1030. There is nothing in this point. The cross-subsidy emerging from Tesco was not itself even offered as the subject of a s106 Obligation. The funding for the cross-subsidy would here emerge quite independently because it comes from the purchase price for the site without which Tesco cannot develop at all. That is why there was and is no parity between the positions of Tesco and Derwent in relation to the £21m.

88. So I do not accept that the Report or decision to grant permission were defective because of the s106 Obligation or that members should have been told to disregard it.

Ground 6 - Reasons

89. The last ground to be considered is that, contrary to (what was then) A22 (1) (b) of the Town and Country Planning (General Development Procedure Order) 1995 (as amended) there was no "summary of the reasons for the grant together with a summary of the policies in the development plan which are relevant to the decision."

90. The reasons section of the Permission (apart from reasons given for each Condition) stated:

> "**Informatives**
>
> 1. [reference to Order] This informative is only intended as a summary of the reasons for the grant of planning permission. For more detail on the decision please contact Planning & Building Control.
> 2. The proposal would result in a satisfactory form of development that is considered to comply with the provisions of Proposals [reference is then made to the policies and their titles including S11 although there is no reference to PPS 4 or H10]
> 3. In determining this planning application the Local Planning Authority have had due consideration of the information contained in the applicant's Environmental Statement (ES) including (additional information subsequently submitted), all comments made by the consultation bodies, and all representations from members of the public abut environmental issues."

91. I have been referred to numerous cases on this topic. For present purposes I adopt the oft-quoted words of Collins J in *R (Tratt) v Horsham District Council* [2007] EWHC 1485:

> "26 …It seems to me that reasons in relation to planning decisions must normally deal with the main issues that have been raised. That is again a clear basis upon which the adequacy of reasons should be judged. …. It seems to me that the reasons ought at least to have stated, albeit only in a sentence in each case, why those issues have been decided in favour of the applicants."

92. This was a case where all the relevant policies were stated save for H10 and PPS 4. That omission would be no reason to quash because no one who read the Report could be in any doubt that they had been considered and applied. Indeed PPS 4 featured heavily and it was also the means by which factors which also appeared in S11 (to the extent still relevant) were applied.

93. But there was no indication of the way in which the policies were relevant here and certainly there was no summary of the main issues for example in relation to adverse impact. Only a few sentences were required and it would have been a straightforward task to summarise them, using the Report as the source. However I reject the suggestion that there should have been a statement about the s106 obligation. This was in my view a subsidiary matter and not so material as to require comment here. Mr Tucker also suggested that the summary of reasons should have recorded the fact that both elements of the Joint Application were considered separately. But that is a record of procedural matters at the meeting, not a reason for the grant, so its absence caused no breach here.

94. To the extent just indicated there was a breach of A22. But it cannot possibly found a quashing of the Permission for two reasons:

(1) Mr Tucker conceded that if I were against him on all other points (as I am) it would be wrong to quash on this ground alone;

(2) At best, the appropriate relief would have been an order that the Planning Committee reconvenes in order to give a proper summary now. But that is wholly unnecessary. This is a case where the Planning Committee followed the recommendations in a lengthy and detailed Report and where Mr Castle in his witness statement addressed reasons in relation to the policies. The reasons for granting the Permission cannot seriously be in doubt. In those circumstances and as a matter of discretion therefore no substantive relief is required at all. This approach mirrors that taken in cases such as *Garner v Elmbridge BC* [2011] EWHC 86 per Ouseley J at para. 100, *Loader v Poole BC* [2009] EWHC 1288 per Sales J at para. 31, *Ling v East Riding Council* [2006] EWHC 1604 per Sir Michael Harrison at para 54 and *Enstone v W Oxfordshire DC* [2008] EWHC 3275 per Sir Michael Harrison at para 55.

Final Observations

95. One general point made by the Council and Tesco was that in respect of many of the matters complained of by Derwent, it would have been open to them at any time after promulgation of the resolution on 15 March 2010 to go back to the Council and ask for a reconsideration pending actual grant – which was itself delayed by the Secretary of State's consideration as to whether he should call in the application. I agree with that. Derwent argues that it was not reasonable to expect them to do this when there was still a prospect that the Joint Application would be called in. I disagree. There could be no certainty that it would be called in and it would then be for the Council to take a view on the new material provided. In all six months elapsed before the actual grant of Permission was made. This was ample time to revert to the Council. In my judgment this feature is an additional reason not to quash the Permission but it is not essential to my reasoning for reaching that conclusion which has been set out above.

96. I received some evidence and heard some submissions on the question of prejudice. LCC in particular said that there were numerous and significant benefits from the regeneration at the Cricket Ground and elsewhere which would be lost if the permission were quashed. That cannot be relevant to a consideration of its unlawfulness and moreover if the Permission clearly was unlawful and there were no other reasons not to quash I cannot see that the loss of those benefits would entail that there should be no quashing. As it happens, these points do not arise because of my conclusion.

97. It follows therefore that this claim is dismissed. I am most grateful to Counsel for their helpful and thorough oral and written submissions.