



Neutral Citation Number: [2024] EWHC 2291 (Admin)

Case No: AC-2023-LON-001361

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 6 September 2024

**THE HONOURABLE MR JUSTICE MORRIS**

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**Between :**

**THE KING**  
**(on the application of**  
**FRIENDS OF THE WEST OXFORDSHIRE**  
**COTSWOLDS)**

**Claimant**

**- and -**

**WEST OXFORDSHIRE DISTRICT COUNCIL**

**Defendant**

**- and -**

**HARPERCREWE LIMITED**

**Interested**  
**Party**

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**Ben Fullbrook** (instructed by **Leigh Day**) for the **Claimant**  
**Kate Olley** (instructed by **West Oxfordshire District Council Legal Services**) for the  
**Defendant**  
**Constanze Bell** (instructed by **Gowling UK**) for the **Interested Party**

Hearing dates: 16 and 18 January 2024

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**Approved Judgment**

**Mr Justice Morris:**

**Introduction**

1. By this application for judicial review, Friends of the West Oxfordshire Cotswolds (“the Claimant”) seeks an order quashing the decision dated 22 March 2023 of West Oxfordshire District Council (“the Defendant”) to grant Harpercrew Limited (“the Interested Party”) planning permission pursuant to section 73 Town and Country Planning Act 1990 (“TCPA”) (“the Section 73 Permission”) “varying” conditions 2, 3, 5, 7, 8 and 12 in respect of an earlier planning permission (“the Decision”). That earlier planning permission, granted on 20 January 2020 (“the Original Permission”), was for a residential development and a supported living facility, south of Forest Road, Charlbury, Oxfordshire (“the Site”). The Section 73 Permission varies a number of conditions of the Original Permission “to adequately address land level changes and to ensure that a suitable ecological buffer is provided around the edge of the development”.
2. The Claimant contends that the Section 73 Permission was unlawful on the following grounds:
  - Ground 1: The Defendant had no power to grant the Section 73 Permission in circumstances where the Original Permission had expired without lawful commencement.
  - Ground 2: The Defendant failed to have regard to a material consideration in failing to reach a judgment on whether the Original Permission had been lawfully commenced and/or failed to defer its decision until after the conclusion of earlier judicial review proceedings.
  - Ground 3: The Defendant adopted an unlawful approach to the Original Permission as a “fallback” position, in failing to consider that it was incapable of completion and in failing to grapple with the evidence from a statutory body that the Section 73 Permission may be more harmful to the Ancient Woodland than the Original Permission.
  - Ground 4: The Decision was vitiated by predetermination and/or apparent bias.
3. In summary I find that Grounds 1 and 3A succeed. The remaining grounds fail. My conclusion is set out at paragraph 176 below.

**The facts in summary**

4. The Claimant is a charitable incorporated organisation, established to promote the conservation of the Cotswolds Area of Outstanding Natural Beauty (“the AONB”) in West Oxfordshire. The Site is within the AONB and its western boundary is adjacent to an area of Ancient Woodland (Rushy Bank). The Cotswolds Conservation Board (“the CCB”) is an expert statutory body with the purpose of conserving and enhancing the natural beauty of the AONB.
5. The context for the challenge to the Section 73 Permission is the following sequence of events since January 2020.

6. On 20 January 2020 the Defendant granted planning permission, ref.15/03099/FUL (the Original Permission) addressed to the Interested Party for “Residential development of 25 dwellings comprising self/custom build, market housing and affordable housing (use class C 3) and a 12 bed supported living (sui generis) facility with the associated access, parking and landscaping” (“the Development”). In order to mitigate the harm which the Original Permission could cause to the Ancient Woodland and the AONB, it was subjected to, inter alia, three pre-commencement conditions (8, 12 and 13) requiring the approval of details showing, inter alia, where a 5 metre (5m) buffer would be provided along the woodland boundary, and a tree protection plan. Moreover by condition 1 the Development was required to be started within three years, namely by 20 January 2023.
7. On 27 January 2022 the Interested Party applied to the Defendant to discharge a number of conditions in the Original Permission. On 10 August 2022 the Defendant approved the discharge, inter alia, of conditions 8, 12 and 13 (“the Approval”). On 20 September 2022 the Claimant applied for judicial review of the Approval (“the Approval JR”).
8. On 23 September 2022 the Interested Party carried out material operations in reliance upon the Approval in order to commence the development approved by the Original Permission prior to its expiry.
9. On 22 November 2022 the Interested Party applied for the Section 73 Permission (“the Section 73 Application”). On 22 March 2023 the Defendant granted the Section 73 Permission.
10. On 30 March 2023 HH Judge Jarman KC heard the Approval JR and, by judgment dated 20 April 2023 (“the Approval Judgment”), he quashed the Approval and remitted it to the Defendant for re-determination.

### **Detailed factual background**

#### **The Original Application for planning permission: 2015 to 2020**

11. In 2015 the Interested Party applied for planning permission for the development (“the Original Application”). This application was supported by ecological assessments and biodiversity management plans showing a proposed 5m buffer zone between the proposed development and the Ancient Woodland to protect it and the wildlife habitats, including those of endangered species, particularly those contained in the understorey. A landscape masterplan showing such a buffer was also submitted.
12. In an ecology report dated 23 September 2015, from Willder Ecology, acting for the Defendant, Ms Willder stated:

“If all the recommendations and suggestions within the report [i.e. Biodiversity Management Plan Final Wychwood Biodiversity Aug 15] and as illustrated on the landscape master plan are fully implemented then as part of this development biodiversity enhancements can be secured.

... If all the recommended enhancements and mitigation are the incorporated & implemented, the policy and guidance

requirements of Policies in the West Oxfordshire Local Plan, the NPPF (including section 11) and the habitat NPPF regulations & NPPG are all met.” (emphasis added)

In order to secure this, Ms Willder recommended the imposition of a condition, which was subsequently imposed as condition 8 (see paragraph 18 below).

13. Natural England and Forestry Commission standing advice (“the Standing Advice”) and the Defendant’s adopted local plan both require that a buffer of a minimum of 15m be provided between a development and an Ancient Woodland boundary. The importance of the Standing Advice was re-iterated by Natural England in its consultation response to the Original Application.

**Officer Report for Original Application: 22 November 2017**

14. The Officer Report for the Original Application dated 22 November 2017 prepared by Mr Philip Shaw, development manager for the Defendant, states as follows:

“1.ORIGINAL/PREVIOUSLY REPORTED CONSULTATION

...

1.3 Cotswolds Conservation Board

The Board has considered the amended new application but maintain their objection to this development on the basis it is considered to be beyond the settlement and harmful to the landscape/AONB.

...

5. PLANNING ASSESSMENT

...

5.29 Having regard to paragraph 115 of the NPPF it is considered that there would be undue harm to the landscape and scenic beauty of the AONB. If Members consider that the proposals are major development paragraph 116 of the NPPF requires that planning permission for major development in the AONB is refused except in exceptional circumstances and where it can be demonstrated that they are in the public interest. The test has three components which are assessed as follows:

...

3) Any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.

...

Officers acknowledge that some harm would arise in landscape terms, but this harm is in the context of the site being effectively contained by established development, landform and woodland. The harm can to a large extent be mitigated and moderated by the proposed design and effective landscaping. The residual harm will need to be considered against the benefits of the scheme to see whether 'exceptional circumstances' have been established such that the scheme is in the public interest despite the great weight given to the residual harm. This question is addressed in the conclusion.”

(emphasis added)

### **The Planning Sub-Committee meeting: 4 December 2017**

15. At the meeting of 4 December 2017 the Defendant’s Uplands Area Planning Sub-Committee considered the Original Application. The minutes of the meeting record, inter alia, as follows:

“The Development Manager [Mr Shaw] noted that the objections submitted by the Cotswolds Conservation Board had been available in full on the Council's website and had been received by Members from elsewhere.

...

Mr Haine [Councillor and Chairman of the Sub-Committee] noted that, whilst there was significant support for the application, there had also been a lot of local opposition. He was concerned that the grant of consent could set an unwelcome precedent for further development that would be harmful to the Area of Outstanding Natural Beauty, nearby listed buildings and the surrounding landscape.

...

Mr Beaney [Councillor] believed that the security of the buffer zone should be strengthened, perhaps by way of land ownership and, whilst recognising the need to construct the housing prior to the dementia care facility, wish to see greater certainty that the proposed dementia care unit would be delivered rather than a general care home.

...

Mr Cotterill [Councillor and Vice-Chairman] expressed his support for the application, suggesting that condition 12 should be strengthened to protect the integrity of the planting belt...

The Development Manager advised that concerns over materials, landscaping and noise amelioration measures could be addressed

by way of conditions. It would also be possible to strengthen and enhance the buffer zone.”

The minutes record that the recommendation of conditional approval was carried on a vote and that the application was to be permitted subject to a number of conditions. One of those conditions was amendment of a number of the conditions including condition 12 (in terms virtually identical to those finally included in the Original Permission (as set out in paragraph 18 below)).

### **The Original Permission**

16. On 20 January 2020 the Original Permission was granted for the Development (as set out in paragraph 6 above). Permission was granted subject to 16 conditions. Condition 2 provided that the development be carried out in accordance with the approved plans listed below. (The Original Permission set out, at the end, a full list of the “approved plans”.)
17. In summary, conditions 8, 12 and 13 required approval of details showing where a 5m buffer would be provided along the woodland boundary and approval of a tree protection plan.
18. Conditions 8, 12 and 13 of the Original Permission state as follows:

“8. Before any works begin on site a construction management plan [“CMP”] must be submitted for approval as per the recommendations in the submitted Phase 2: Great Crested Newts Report (Earth Ecology), Ecological Assessment Final & Biodiversity Management Plan Final (Wychwood Biodiversity Aug 15) as well as a ten year Ecological Management [“EcMP”] plan based on the Biodiversity Management Plan Final (August 15) which provides further detail to show who will be responsible for carrying out the proposed works including all monitoring work, details and the mechanisms to ensure the success of the proposed buffer zones and enhancements must be submitted for approval to the LPA. Once approved all the works must be carried out as per approved Construction Management Plan and the Ecological Management Plan and thereafter permanently maintained.

REASON: To ensure that Amphibians, Bats, Birds and their Habitats as well as Priority habitats such as water courses, wetlands and ponds are protected in accordance with the Conservation of Habitats and Species Regulations 2010 and Wildlife and Countryside Act 1981 as amended, in line with the National Planning Policy Framework (in particular section 11), West Oxfordshire District Local Plan Policies and in order for the Local Planning Authority to comply with Part 3 of the Natural Environment and Rural Communities Act 2006.

12. A scheme of hard and soft landscaping of the site shall be submitted to and approved in writing by the Local Planning

Authority *before above ground*<sup>1</sup> development commences. The scheme shall include the retention of any existing trees and shrubs and planting of additional trees and shrubs; proposed finished levels or contours; all ground surface treatments and materials; means of enclosure; car parking layouts; other vehicle and pedestrian access and circulation areas; minor artefacts and structure; retained historic landscape features and proposals for restoration, where relevant and shall be implemented as approved within 12 months of the commencement of the approved development or as otherwise agreed in writing by the Local Planning Authority and thereafter be maintained in accordance with the approved scheme. In the event of any of the trees or shrubs so planted dying or being seriously damaged or destroyed within 5 years of the completion of the development, a new tree or shrub of equivalent number and species, shall be planted as a replacement and thereafter properly maintained.

REASON: To safeguard the character and landscape of the area.

13. No development (including site works and demolition) shall commence until all existing trees which are shown to be retained have been protected in accordance with a scheme which complies with BS 5837:2012: 'Trees in Relation to design, demolition and construction' has been submitted to, and approved in writing by, the Local Planning Authority. The approved measures shall be kept in place during the entire course of development. No work, including the excavation of service trenches, or the storage of any materials, or the lighting of bonfires shall be carried out within any tree protection area.

REASON: To ensure the safeguard of features that contribute to the character and landscape of the area.”

(emphasis added)

19. The Original Permission was also subject to the “time limit” condition 1 as set out in paragraph 6 above.

### **The application to discharge and the Approval**

20. On 27 January 2022 the Interested Party sought approval of plans required by the conditions and made an application to discharge, inter alia, conditions 8, 12 and 13. (In fact the plans submitted showed that the 5m buffer could not be achieved at three points along the boundary.)
21. In February 2022, the Claimant identified that, due to discrepancies with the plans approved under the Original Permission, it would not be physically possible to achieve the 5m buffer. In response, by email dated 18 February 2022 the Interested Party’s agent informed the Defendant that the 5m buffer could not physically be achieved under the amended plan. There was one location where the buffer would clip the corner of one

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<sup>1</sup> The italicised words were added to the wording of condition 12 set out in the Minutes: see paragraph 15 above.

of the dwellings. They proposed to extend the buffer around the dwellings with the exception of the small incursion from that property. This, it said, was due to the original ecology reports not accurately considering this location. They proposed an area of planting on the western parcel to provide enhanced biodiversity in that location. The further exchanges on this issue between February and July 2022 are set out at §§20 to 22 of the Approval Judgment. In the course of this period, the Interested Party provided more information to the Defendant specifically in relation to the boundary of the Site.

22. The plan approved in condition 2 of the Original Permission could never meet the requirements of condition 8. Condition 8 always required a 5m buffer to be provided, because the construction management plan and the ecological plan require a 5m buffer. The Interested Party submitted an ecological plan saying that there must be a 5m buffer and at the same time submitted a landscaping plan under condition 12 which showed that a 5m buffer could not be provided in certain areas.
23. As explained in the subsequent witness statement of Mr Adrian Bloor, the Interested Party's CEO, for the Approval JR (see paragraph 33 below), during the determination of the application for Approval and prior to the Approval itself, the Interested Party indicated to the Defendant that it intended to make a section 73 application so that the full extent of a 5m buffer could be provided. In the officer report for the Approval application it was noted that the proposed changes moved the developments fully outside the 5m buffer zone and proposed additional woodland planting on the NW part of the Site.
24. On 10 August 2022 Ms Abby Fettes, a development manager for the Defendant, acting under delegated powers, approved the discharge of conditions 8, 12 and 13 under reference 22/00254/CND (the Approval). The Approval stated as follows:

“Condition 8: CMP

The details submitted for the Construction Management Plan in respect of Ecology are considered sufficient to discharge the condition.

Condition 12: Landscaping

Whilst the requirement for the buffer around the edge of the site cannot be physically achieved in some locations due to the proximity of the dwellings to the boundary, the additional details (submitted 6/7/22) showing the amended red line are considered acceptable to discharge the condition.

Condition 13: Trees in relation to design, demolition and construction

The details as submitted are acceptable to discharge the condition.”

25. On 31 August 2022 the Claimant sent a pre-action protocol letter to the Defendant and the Interested Party indicating its intention to challenge the Approval.



## **The Approval JR**

26. On 20 September 2022 the Claimant commenced the proceedings in the Approval JR. In summary it contended that the Approval did not fully respect the requirement, reflected in condition 8, that there should be a 5m buffer between the development and the Ancient Woodland which adjoins the western boundary of the Site. The grounds of review included the following:

Ground 1: The approval of the Ecological Management Plan and CMP under condition 8 does not account for the impossibility of achieving the 5m Buffer;

Ground 3A: The Defendant misunderstood and/or acted irrationally in placing reliance upon Natural England's consultation response;

Ground 4: The tree protection plan approved under condition 13 is inaccurate and does not comply with BS5837:2012.

## **Material Operations: 23 September 2022**

27. Three days later, on 23 September 2022 the Interested Party carried out material operations in reliance upon the Approval in an attempt to commence the development approved by the Original Permission within the time limit ("the Material Operations"). As subsequently explained in Mr. Bloor's witness statement (see paragraph 33 below) those works consisted of the laying out of part of the access road, the installation of tree protection fencing and the installation of newt protection fencing with associated earthworks (as required by the Ecological Management Plan submitted pursuant to Condition 8 of the Permission). It is common ground that those works are of a character, in and of themselves, capable of constituting the commencement of the Original Permission. In his witness statement, Mr. Bloor confirmed that the Material Operations carried out happen to be consistent with the Section 73 Application, such that they would not prejudice the delivery of the development as proposed in the Section 73 Application.
28. On 10 October 2022 the Defendant filed summary grounds of resistance in the Approval JR together with the witness statement of Philip Shaw. In that statement, he stated that Interested Party had indicated to the Defendant that it intended to table a revised submission for different house types and as part of the process would be seeking to ensure that, by revisions to the layout, they would be able to comply with the 5m buffer zone. However it could not risk the then current consent lapsing and exposing them to the risk of having to start again. Mr Shaw commented that this meant that "the scheme as will be built out under any new permission will therefore not have the perceived deficiencies" that the Claimant was claiming undermined the scheme as then currently approved. This statement was also made by the Defendant in its summary grounds. Throughout the course of the Approval JR the Defendant argued that the Section 73 Permission rendered the Claimant's claim in the Approval JR academic. The Defendant made this argument even before the Section 73 Permission had been applied for, let alone granted.

## **The Section 73 Permission**

### ***The Interested Party applies for a section 73 variation: the Section 73 Application***

29. On 22 November 2022 the Interested Party and Launcelot Investments Limited made the Section 73 Application.
30. The Defendant's case is that the Interested Party's purpose was to alter the layout of the development so that the 5m buffer could be provided in its entirety and so that it would be without the small areas where it had become apparent that the buffer could not be provided in full.
31. In the covering letter submitted with the Section 73 Application, the application was stated to be for variation of condition to enable the development to be carried out in line with alternate plans to those approved as part of the original application. The Interested Party described the proposed changes (and their purpose) as follows:

“The proposed amendments to the development seek alterations to the layout of the scheme and the provision of amended elevations. The layout changes are required to adequately address the changing levels on site whilst being able to provide level access through properties as far as possible.

The layout changes have also been proposed to provide more appropriate amenity space for dwellings and to ensure that the 5 metre ecology buffer required around the edge of the site can be provided with no encroachment from the dwellings.”

(emphasis added)

32. In short, the revised layout moved buildings away from, and out of, the buffer zone. The accompanying documents and plans included Block Plan comparison SL-041 Rev A and Construction Management Plan Layout (SL-004 Rev A) and Ecological Management Plan dated October 2022. This updated Ecological Management Plan noted that, by April 2022, in the area of Ancient Woodland that had been felled, “some ground flora had begun to grow back and a few strands of hazel...were present”. It also confirmed that “although recently cleared, the woodland is still regarded as ancient woodland as the soil and seed bank remain” and, further, that the Site remained “immediately adjacent” to the Ancient Woodland. This appears to indicate that the woodland boundary remained unchanged.

### ***Back to the Approval JR***

33. On 28 November 2022 permission to apply for judicial review was granted. On 9 January 2023 the Defendant filed its Detailed Grounds of Defence together with witness statements from Ms Fettes and from Mr Bloor. In its Detailed Grounds, the Defendant maintained its position that the Section 73 Application rendered the JR academic. This predated a number of the consultation responses to the Section 73 Application which were received, including the response from CCB (see paragraph 35 below). Mr Bloor confirmed that it was not physically possible to deliver the 5m buffer proposed by the

Biodiversity Management Plan dated August 2015 and approved pursuant to the Original Permission. In her statement, Ms Fettes stated as follows:

“the application for the discharge of the conditions was submitted by the applicant to make a lawful material start on site and keep the consent alive, but they have now submitted the s73 application to allow minor changes to the layout to provide the 5m buffer zone. I am advised by the applicant that they intend to implement the s73 permission, if granted. In that case, the Claimant's concern that the buffer zone cannot be provided would no longer be relevant.” (emphasis added)

### ***Objections to the Section 73 Application***

34. There were a number of objections to the Section 73 Application, including from the Claimant and the CCB. The Claimant's objections included its contention that the Original Permission had not been lawfully commenced (i.e. Ground 1) and that there was predetermination (Ground 4). The Claimant also raised objections concerning the 15m buffer, the fact that assessments were by then out of date and contended that there should be a new full application for planning permission.

35. The CCB's objection stated, inter alia, as follows:

“... Having reviewed the application plans, we wish to raise an objection to this application due to the potential impact of the proposal on Ancient Woodland which we consider may not accord with Policy EH3 of the West Oxfordshire Local Plan.

The proposed amendments when compared to the approved scheme relate mainly to the alignment of the spine road and changes to house types and orientation of units. However, the Board remains concerned with the proposed proximity of development to an area of registered Ancient Woodland (ID 44876 Rushy Bank) with only a 5m buffer being proposed. The comparison plan (dwg. no. SL-041 rev. A) shows that a number of units would be located closer to the 5m buffer zone in the revised scheme than in the consented scheme and this buffer zone also appears to fall within residential curtilages and over areas of flag paving in some places, for example to the rear of plots 15 and 22 as shown on the Landscape Masterplan.

...

Paragraph 8.9 of the Local Plan reflects Natural England Standing Advice on Ancient Woodland by stating that buffers of at least 15m additional planting of native trees should be provided between Ancient Woodland and development. We support this guidance.

...

Whilst we understand that some of the Ancient Woodland has recently been felled, we consider that the fact that the scheme has been permitted contrary to Natural England's advice is unsatisfactory and this proposed variation brings built development closer to the 5m buffer zone in some places. As such the proposed variations may increase the impact of the scheme on the Ancient Woodland over and above the current consent.

...

We strongly recommend that prior to the determination of this application, the Council should seek Natural England's advice on this specific issue given the potential conflict with the Standing Advice and, by extension, local and national planning policy and guidance.”

As regards the concern raised about residential curtilages and paving stones, it appears that subsequently the plans were amended such that the buffer zone did not, after all, fall within these areas.

36. Natural England's response, dated 21 January 2023, was to remind the Defendant of the Standing Advice concerning a 15m buffer zone and advised the Defendant not to approve development proposals within a buffer zone.

***The Officer Report dated 22 March 2023***

37. The delegated officer report for the Section 73 Application (“the Officer Report”) was written by Ms Fettes. She recommended approval. The Officer Report set out the representations made by consultees, including the CCB objection in full and also set out in some considerable detail the Claimant's objections.
38. The Officer Report stated, inter alia, as follows:

**“PLANNING ASSESSMENT**

...

Section 73 of the Town and Country Planning Act allows for applications for the variation of conditions attached to previously granted permissions. The regulations set out that when determining such applications it is only the question of the conditions attached to the approved consent which may be considered. As such, the principle of the original scheme cannot be re-considered under this application.

The regulations set out that the Local Planning Authority can grant permission with conditions differing from the original permission, or it can refuse the application if it considers that the original conditions should apply. Therefore, when assessing this

application, Officers will consider the impact on the siting, ecological buffer and land levels.

...

### **Fall back position**

The [Original Permission] is considered to be lawfully implemented following the discharge of pre commencement conditions and works commencing on site prior to January 2023.

The matter of the fall-back position is a material consideration in the determination of future planning applications and the Local Planning Authority (LPA) is obliged to have regard to it. This principle has been considered by the courts on a number of occasions. The weight to be attached to the fall-back position as a material consideration will depend on the facts of each case.

In R v Secretary of State for the Environment ex parte Ahern [1998] it was argued that it was necessary for the local planning authority to have regard to three tests:

1. Whether there is a fall-back use, that is to say whether there is a lawful ability to undertake such a use;
2. Whether there is a likelihood or real prospect of such a use occurring; (“the Court of Appeal case of Mansell [2017] has clarified that what is required is a real possibility”) and
3. If the answer to the second question is yes, a comparison should be made between the proposed development and the fall-back use.

The court added that the requirement to have regard to a consideration imports on the decision maker a requirement to have before it sufficient material so that the consideration can be assessed.

In fall-back cases, the question is therefore are the implications of the proposed development likely to be worse or broadly similar to the use which the land would have or might have been put if the proposed development were refused permission?

In this case, the application proposes minor amendments to the position of the dwellings to enable the full extent of the ecological buffer around the site to be provided. This buffer could not be fully provided in accordance with the recommendations of the Ecological Management Plan approved as part of the 2015 application so the amendments proposed as part of the S73 would enable this to happen.

It is considered that the 2015 application has, at this time, been lawfully implemented and, if the S73 planning application was refused, the applicant could continue to exercise their right to implement the 2015 permission (in line with the outcome of the Legal Challenge). Applying Ahern, therefore, the implications of the S73 would be at least broadly similar if not better than the development which already has permission and is capable of being implemented.” (emphasis added)

39. The Officer Report continued by addressing “Ecological and Ancient Woodland Protection buffer” as follows:

“Since the previous application was determined, a number of trees beyond the site boundary have been felled under licence from the Forestry Commission, works that fall outside of planning control.

Natural England were consulted on the application and have referred the LPA to Generic advice in "Annexe A" which refers to relevant paragraphs of the NPPF and standing advice which includes an assessment guide for LPA's to use when considering the impacts of the development on the Ancient Woodland. The Buffer Zone recommendation for Ancient Woodland is 15 metres (to avoid root damage) unless assessment shows that the impacts are likely to extend beyond this distance (referring to air pollution and a significant increase in traffic etc). In relation to compensation the PPG says that one compensation measure could be the creation of new native woodland or wood pasture but this is where there is damage or loss to the existing woodland. In this case, the woodland itself has already been removed so the 15 metres off set for the protection of roots is now somewhat irrelevant.

Notwithstanding this, the proposed changes move the development outside of the 5 metre buffer zone recommended as part of the original application and proposes woodland planting on the north west part of the site. Whilst there is a change in circumstances at the site, the fact there is an extant permission which can be implemented and which would have a closer relationship with the Ancient Woodland is a fall-back position which should be given weight in the determination process. Furthermore, the benefits in terms of the buffer zone and the additional woodland planting should also be a material consideration to which weight should be given.

Officers consider that the changes have clarified the boundary and that the changes are an improvement on the previous application.

### **Siting, layout and design**

The application proposes some changes to the layout and to the approved house types including the addition of rooflights.

...

The layout changes also provide more amenity space for dwellings and ensure that the 5 metre ecology buffer is not encroached upon by any dwellings.

...“

(emphasis added)

40. After referring to the fact that the Interested Party had entered into a section 106 unilateral undertaking to build out in accordance with the fresh section 73 application if granted rather than the Original Permission, the Officer Report’s conclusions were as follows:

“The application seeks approval for amendments to the house types and layout previously approved. The proposed changes are considered to allow for the recommended ecological buffer and ensure that level access can be improved in comparison to the previously approved scheme.

It is considered that the proposed changes would have no greater impact upon the character and appearance of the wider area, as the proposals would sit lower in the site when compared to the approved scheme. The scheme would also enable the 5m ecology buffer to be provided through the site without conflict with built form.

Overall the scheme remains to be comparable to the approved development and given the extant nature of that planning permission, and there is no greater harm associated with the proposed development compared to the extant scheme. It is therefore recommended for approval subject to appropriate conditions”.

(emphasis added)

The Defendant maintains that the Section 73 Application addressed the main concern that underlay the Claimant’s challenge in the Approval JR.

### ***The Section 73 Permission***

41. The Section 73 Permission was granted by Ms Fettes, under delegated power, on 22 March 2023. This was the day before the Defendant’s skeleton for the Approval JR was due, and after the Claimant had filed its skeleton in those proceedings. In the Section 73 Permission, conditions 2, 3, 6, 7, 8 and 12 of the Original Permission are no longer present and, instead, new conditions 1, 2, 5, 6, 7 and 11 of the Section 73 Permission<sup>2</sup> are imposed. In particular, instead of condition 8 of the Original

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<sup>2</sup> Although not referred to on page 1 of the Section 73 Permission, in the fact condition 13 of the Original Permission is no longer present and new condition 12 is imposed, in varied terms.

Permission, condition 7 of the Section 73 Permission now provides that “All works shall be carried out as per approved Construction Management Plan version 1.4 dated November 2022, SL-005 Rev A and Ecological Management Plan dated October 2022 and thereafter permanently maintained.”

### **The quashing of the Approval**

42. On 20 April 2023 HH Judge Jarman KC handed down the Approval Judgment, allowing the claim on grounds 1, 3A and 4, and quashing the Approval. He remitted the Approval decision for redetermination.
43. In his judgment, HH Judge Jarman KC set out the factual and policy background, including the Standing Advice in relation to the 15m buffer zone. At §12, he noted that there was no challenge as to why that policy had not been followed in this case (and it was not clear why not), but observed that “the fact that the buffer zone in the permission is only one third of the distance set out in policy and guidance serves to underline the importance of the buffer zone which was required in the permission” (emphasis added). He went on to record (at §22) that there was no dispute between the parties that, in light of the discrepancies with the plans approved under the Original Permission, it was not physically possible to achieve the 5m buffer under the Original Permission. There were three points where the buffer could not be achieved. At §§25-31, the judge accepted the Claimant’s submission that the witness evidence provided by the local authority (including from Ms Fettes) was contradicted by contemporaneous documentation. Accordingly, he decided to “treat them with a good deal of caution”.
44. In upholding ground 1 (see paragraph 26 above), the judge held that the Approval was inconsistent with what was required under condition 8. He found (at §38):

“In my judgment, condition 8, as worded, permits no room for officers subsequently to vary the width of the buffer zone on an application to discharge. It could have been worded in that way, but it was not. What it requires was is that the works and maintenance are to be carried out as per the approved plans, which provided for a 5 meter buffer zone.”

In upholding ground 4 (see paragraph 26 above) the judge confirmed (at §47) that condition 13 of the Original Permission required the submitted tree protection plan to comply in full (not in substance) with BS5837:2012. The tree protection plan submitted by the IP did not so comply because it did not correctly show the Site boundary. At §§48 to 50, he went on to consider whether he should grant relief. First, he rejected the argument that the recently granted Section 73 Permission rendered the claim academic or otherwise provided a basis for refusing relief. He stated (at §49):

“Both these parties accept that that development was commenced in reliance upon the discharge of conditions under challenge. If that discharge is quashed then it is [sic] at least arguable that the [Original] permission has not been validly commenced by 20 January 2023 and cannot now be lawfully commenced.” (emphasis added)



45. In addition the judge declined to apply section 31(2A) Senior Courts Act 1981 (“SCA 1981”). He considered that it was not highly likely that the outcome would not have been substantially different, stating (at §50):

“Given the express importance of the buffer zone (which was only one third of what policy required) and the protection measures, the decisions complained of must be quashed and resubmitted for determination in accordance with the foregoing meanings of the conditions sought to be discharged”.

### **The Issues**

46. The Grounds are set out in paragraph 2 above. Under each Ground, I will identify the issues which arise. At this stage I observe that Grounds 1 and 3A are essentially distinct: Ground 1 is that the Original Permission cannot be lawfully implemented because it was not commenced in time. Ground 3 is that the Original Permission cannot be implemented (and thus cannot be a fallback) because the 5m buffer zone cannot possibly be built under that permission. Nevertheless, as pointed out below, there is some overlap between those two Grounds. Moreover Ground 2 arises in the alternative to Ground 1.

### **Relevant legal background**

#### **Town and Country Planning Act 1990**

47. Section 73 TCPA provides as follows:

“73. — Determination of applications to develop land without compliance with conditions previously attached.

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application

[...]

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

(5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made.”

(emphasis added)

### **Relevant planning policy**

48. Ancient Woodland is described in national planning policy as an “irreplaceable habitat”. The National Planning Policy Framework (“NPPF”) states that development which would result in the loss or deterioration of such habitats should be refused “unless there are wholly exceptional reasons”. The Standing Advice and the Defendant’s adopted local plan (§8.9) both require that, in such circumstances, a buffer of a minimum of 15m be provided between the development and the Ancient Woodland boundary. As pointed out above, the importance of the Standing Advice was referred to by Natural England in its consultation responses both to the Original Application and to the Section 73 Application. The 5m buffer is just one third of the minimum required by the Standing Advice. As HH Judge Jarman KC pointed out, no explanation or justification for this has ever been provided.

### **Ground 1: No power due to expiry of Original Permission (without lawful commencement)**

#### **The Ground and the Issues**

49. Ground 1 is set out in paragraph 2 above. The following three issues arise on Ground 1:
- (1) Whether the quashing of the Approval has retrospective effect;
  - (2) If the answer to (1) is yes, if the matter is properly one for the Court, whether the Original Permission was validly commenced;
  - (3) If the answer to (2) is no, whether the Defendant had the power to grant the section 73 Permission.

## **The Parties' submissions in outline**

### ***The Claimant's case***

50. The Claimant contends that the Defendant had no power to grant the Section 73 Permission in circumstances where the Original Permission had expired without lawful commencement. The Approval related to pre-commencement conditions (conditions 8, 12 and 13) and was relied upon to commence the Original Permission. However the Approval was quashed with retrospective effect and thus the Original Permission was commenced in breach of those pre-commencement conditions. As a result the Original Permission expired on 20 January 2023 and thus the Defendant had no power to grant the Section 73 Permission.

### ***The Defendant's case***

51. The Defendant submits that the Claimant's argument is fundamentally misconceived. Ground 1 raises issues on the effect of failing to comply with pre-commencement conditions and who is the correct arbiter of that. In relation to Issue 2, the relevant principles to be applied in relation to pre-commencement conditions are set out in *Barrett v The Welsh Ministers* [2023] EWHC 2503 (Admin) at §19 (see paragraph 65 below). The fact that a condition is not complied with does not necessarily render the entire development unlawful. In particular the question whether the pre-commencement condition goes to the heart of the planning permission can only be answered by a fact-sensitive enquiry into the terms of the condition in the context of the permission and the permission in its planning context. That question is a matter of planning judgment, for the Defendant, and not for the Court. Moreover, it would not be unlawful not to enforce any breach of condition. As to Issue 3, it is not correct that the Defendant had "no power" to grant the Section 73 Permission at the time.

### ***The Interested Party's case***

52. As to issue 1, the Interested Party does not accept that the quashing of the Approval leads inexorably to the conclusion that that quashing had retrospective effect. As to Issue 2, in relation to the legality of commencement, the Interested Party supports the Defendant's submission on the approach to this issue. The Interested Party had a valid section 73 application and an extant permission and the Approval when the Material Operations were carried out. Those operations were authorised by the Original Permission and implemented the Original Permission. Even if any of that analysis fails in the light of the Claimant's highly technical argument, the Court should nonetheless exercise its discretion and decline to quash the Section 73 Permission noting that unlawful decisions can still have lawful consequences.

## **Ground 1: Issue 1: Retrospective effect**

### ***Relevant legal principles***

53. I have been referred to *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *Boddington v. British Transport Police* [1999] 2 AC 143; *R (Shoemith) v Ofsted and others* [2011] PTSR 1459; *R (Majera) v Secretary of State for the Home Department* [2022] AC 461; and *Lewis on Judicial Remedies in Public Law* 6th edn § 5-007. The position can be summarised as follows.

- (1) The general principle is that, once pronounced unlawful by a Court, an administrative act is recognised as never having had any legal effect at all: *Boddington* per Lord Irvine LC at 155C-D citing Lord Diplock in *Hoffmann-La Roche* at 365.
- (2) There are judicial observations suggesting that, in ill-defined circumstances, an ultra vires act *may* have legal consequences in the period between the act and a subsequent court finding of invalidity. However these observations are all obiter and such circumstances have not been clearly identified: *Boddington* per Lord Browne-Wilkinson at 164B-D and per Lord Slynn at 165A-E; *Shoemith* per Lord Neuberger MR at §141 and *Majera* per Lord Reed at §§27 to 41 (see also §§42 and 43).
- (3) Where an administrative act depends on an earlier act which is subsequently found to be unlawful, the following factors will militate against the later act remaining valid in the period prior to the finding of invalidity: where it is the public authority responsible for the act (rather than a third party) which is seeking to rely on continuing validity; where the public authority has been put on notice that the earlier act was unlawful; where the public authority at the time had the benefit of legal advice; where there was no requirement for urgent action on the part of the public authority; where holding the later act to be invalid did not cause particular prejudice to the public body. See *Shoemith* per Stanley Burnton LJ at §§136-137 and per Lord Neuberger MR at §§142-147.
- (4) Whilst in *Shoemith* the two acts in question were made by different public authorities, in my judgment, a similar approach should apply where, as here, the two relevant acts (the Approval and the Section 73 Permission) are the acts of the same public authority, and the question is whether the second act was valid in the period prior to the finding of the invalidity of the first act.

### ***The Parties' submissions on Issue 1***

54. The Claimant submits that, in accordance with well established principles of public law, the quashing of the Approval (a decision of a public authority) falls to be treated as a nullity and as having never had any legal effect. It follows that the pre-commencement conditions remained in force. The Defendant does not resist this contention.
55. However the Interested Party does not accept that the quashing had retrospective effect. Applying *Majera*, the position is more complex. First, the statutory regime requires the Defendant to consider the position at the point of the application under section 73. At that time, there had been no grant of permission in the Approval JR and shortly thereafter Material Operations took place under the Original Permission. Secondly, public certainty in planning decisions is a factor underpinning the planning regime. Thirdly the Interested Party, a third party, has relied upon the validity of the grant of the Section 73 Permission and indeed relied upon the validity of the Approval when carrying out the Material Operations.

### ***Discussion***

56. In my judgment, in the present case, there is no sufficient justification to depart from the general principle, that the effect of the quashing of the Approval is that the Approval

never had legal effect at all i.e. that the quashing had retrospective effect. This is not one of those “ill-defined circumstances” where the act in question may have legal consequences in the period prior to the court’s decision. Here the factors identified by Stanley Burnton LJ and Lord Neuberger MR in *Shoemith* militate against the Approval remaining valid in the period before the Approval Judgment. First, at the time of the relevant act, all parties were on notice that the Approval was under challenge. They had been put on notice by the Claimant. At the time that the Defendant took the Decision, it knew the Approval was under challenge. Indeed it knew that permission in the Approval JR had been granted and that the Claimant was alleging that if the Approval JR succeeded it would make the commencement unlawful and that on that basis the Section 73 Permission would be unlawful. Moreover, by that time, the Defendant must have had the benefit of legal advice, at the least in the course of contesting the Approval JR. Secondly, given the imminence of the Approval JR hearing, there was no particular urgency to proceed to the Decision. Thirdly, unlike the position in *Shoemith* itself, here the Defendant is responsible for its own unlawful decision in granting the Approval. In this regard I note that the decision maker itself - the Defendant – does not contest this issue. Fourthly, whilst there is some prejudice to the Interested Party, that is not a strong countervailing factor, since it had been aware of the challenge to the Approval at all material times. It was party to the Approval JR and it would have been open to it to make submissions to HH Judge Jarman KC that relief should be refused on the basis that that quashing the Approval JR would cause it significant prejudice. For these reasons I find that the quashing of the Approval had retrospective effect, and thus the conditions were not at any time discharged.

## **Ground 1: Issue 2: The Whitley Principle**

### ***Relevant legal principles***

57. I have been referred to a number of authorities: *Whitley & Sons v Secretary of State for Wales* (1992) 64 P & CR 296; *R (Hammerton) v London Underground Limited and others* [2003] JPL 984; *R (Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin)<sup>3</sup>; *Bedford BC v Secretary of State for Communities and Local Government* [2009] JPL 604; *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2012] JPL 39 CA; *Stefanou v Westminster City Council* [2017] EWHC 908; *Meisels v The Secretary of State for Housing Communities and Local Government* [2019] EWHC 1987 (Admin); and *Barrett v The Welsh Ministers* [2023] EWHC 2503 (Admin). Following the close of oral argument, I was also referred to *Southwood v Buckinghamshire Council* [2024] EWHC 71 (Admin).

#### *(1) The Whitley principle*

58. In *Whitley* itself, Woolf J stated the relevant principle in the following terms (at 302):

“... it is only necessary to ask a single question: are the operations (in other situations the question would refer to the development) permitted by the planning permission read

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<sup>3</sup> In this judgment I refer to the EWHC report of the judgment in *Hart Aggregates* (and the paragraph numbers therein). The report at 2 P & CR 31 has different paragraph numbers and does not appear accurately to reproduce the full official version of the judgment. For example, the last sentence of paragraph 67 of the judgment (below) is omitted from the P & CR report.

together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities.”

(emphasis added)

This is referred to as “the *Whitley* principle”. In the context of pre-commencement conditions, in summary the following three criteria can be distilled from these authorities, which would have to be met for the *Whitley* principle to apply.

- (1) As a matter of construction, the pre-commencement condition in question must prevent the works comprised in the material operations from being carried out without compliance with it. The condition must be a “true condition precedent”.
- (2) The condition must “go to the heart of the permission”, in the sense that it is a condition without which the local planning authority would not have been content to permit the development at all; and with the consequence that failure to comply with it will mean that the entire development, even if completed and in existence for many years must be regarded as unlawful: *Hart Aggregates* at §61.
- (3) It must not be unlawful in public law terms for the local planning authority to take enforcement action in respect of the breach of condition. Unlawfulness in this context includes “*Wednesbury* unreasonable/irrational” and abuse of power: see *Hammerton* §§127, 130-131 and 141<sup>4</sup> and *Hart Aggregates* §90. This is referred to as the exception to the *Whitley* principle, i.e. if it would be unlawful in public law terms for the planning authority to take enforcement action, then the *Whitley* principle does *not* apply and the material operations would not have been unlawful.

(2) “*Going to the heart*” of the permission

59. Whilst in *Barrett* (at §19 vi) and vii), HH Judge Jarman KC set out a summary of the position, nevertheless I consider the relevant case law in chronological order.
60. The origin of the “goes to the heart” approach is *Hart Aggregates*. That was a judicial review of the decision of a local authority that original planning permission had lapsed for breach of a condition. Sullivan J stated, in relation to the condition in issue:

“61. Condition 10 is a "condition precedent" in the sense that it requires something to be done before extraction is commenced, but it is not a "condition precedent" in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many

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<sup>4</sup> All references are to the paragraph number in the JPL report.

years, or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful.

62. In my judgment, the principle argued for by the defendant applies only where a condition expressly prohibits any development before a particular requirement, such as the approval of plans, has been met. Condition 10 is not such a condition. If it had been breached some 34 years ago, the effect of that breach would have been to render any restoration in breach of condition, and therefore unlawful. Other activities permitted by the 1971 permission, such as extraction, would not have been rendered unlawful.”

After considering further case authority, Sullivan J continued:

- “67. For the reasons set out above, I believe that the statutory purpose is better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular facts, and the outcome may well depend upon the number and the significance of the conditions that have not been complied with. Provided that the Court applies Wednesbury principles when considering these issues, there is no reason why it should usurp the responsibilities of the local planning authority.”  
(emphasis added)

61. Later, in the context of considering the exception to the *Whitley* principle (see paragraph 58(3) above), Sullivan J stated as follows:

- “89. Given the Court of Appeal's endorsement of the approach of Ouseley J in Hammerton, my agreement with that approach is superfluous. However, I too wish to express my agreement with Ouseley J's approach in Hammerton, since it gives practical effect to those parts of the statutory code which deal with enforcement, and ensures that a judge-made principle is not applied so inflexibly as to produce results which defy common sense and serve no useful planning purpose.

90. Applying the Hammerton approach, if I had concluded that condition 10 of the 1971 permission was a "condition

precedent" of a kind to which "the Whitley principle" applied, I would have concluded that there had nevertheless been an effective implementation of the 1971 permission. I would have reached that conclusion on the basis that, limestone having been extracted from the original quarry for some 34 years and the restoration scheme mentioned in condition 10 having been overtaken by the restoration provisions in the 1989 and 1996 permissions, it would be both irrational and an abuse of power for the defendant now to commence enforcement action for the purpose of preventing or controlling extraction in the original quarry under the guise of a complaint that the claimants had, many years ago, failed to comply with condition 10, not least because if what is wanted is an up-to-date restoration scheme, that can be obtained by the defendant in its response to the claimant's ROMP application.” (emphasis added)

62. In *Bedford*, supra, HH Judge Waksman QC (as he then was), commented upon paragraph 67 of *Hart Aggregates* as follows (at §38):

“Paragraph 67 admits of the need to undertake a careful and possibly factual analysis of the condition in question. Equally, in my judgment, the last sentence of [67] is still part of the stage 2 reasoning. All Sullivan J was saying, in the context of the judicial review application before him, was that what he had said earlier did not mean that the court was second-guessing the judgment of the body being reviewed, i.e. the local council or the inspector, as to the proper construction of a condition, which may involve some factual considerations and judgments. The court would not substitute its own view for that of the relevant body. It was simply ensuring that the body’s conclusion was not Wednesbury unreasonable.”

At §24 of his judgment, Stage 2 had been identified by Judge Waksman as being whether the effect of a breach of condition was such as to render the development as a whole unlawful i.e. criteria (1) and (2) in paragraph 58 above.

63. In *Greyfort*, the Court of Appeal declined to interfere with the planning inspector’s conclusion that the pre-commencement condition relating to ground floor levels was fundamental to the development permitted and that the condition went to the heart of the permission. The work was carried out in breach of that condition and could not therefore amount to commencement of the development authorised by the permission. The inspector’s decision turned on the application of the *Whitley* principle. Mitting J upheld the inspector’s decision and the Court of Appeal agreed. Ground 2 of the appeal was “to the effect that the inspector erred in finding condition 4 to be a condition precedent going to the heart of the planning permission”. This ground was rejected. After expressing his own views on that issue, Richards LJ said the following

“44. Fourthly, the local planning authority was in my view reasonably entitled to treat the ground floor levels of the building



as a matter of sufficient importance to justify the inclusion of a condition prohibiting the commencement of any work on the site, including access work, before the levels were agreed. By condition 4 it chose wording clearly intended to achieve that result. I can see no good reason for declining to respect its judgment on this point.”

...

46. None of the arguments advanced before this court has come near to persuading me that the inspector fell into legal error in concluding as he did that the planning permission was not lawfully implemented. Condition 4 was a clear, express prohibition on the commencement of any work on the site before the ground floor levels of the building had been agreed. The inspector was entitled to find that those ground floor levels were fundamental to the development permitted and that the condition went to the heart of the permission. The access works were carried out in breach of the condition. They fell squarely within the *Whitley* principle, on the basis of which they could not constitute a lawful implementation of the planning permission. None of the recognised exceptions to the *Whitley* principle applies. There is nothing in the reasoning of Sullivan J in *Hart Aggregates* to suggest that the principle should not be applied in the circumstances such as these. Application of the principle does not produce absurd results or tend to frustrate the underlying purpose or policy of the legislation. On the contrary, the conclusion reached through application of the principle strikes me as an entirely sensible one on the facts.”

(emphasis added)

64. *Meisels* was a challenge to an inspector’s decision, rejecting an appeal against an enforcement notice. The claimants challenged the inspector’s decision that a condition was a pre-commencement condition which went to the heart of the original permission. Mr Ockelton sitting as a deputy high court judge stated as follows:

“18. Nevertheless, when an authority has clearly made a condition requiring some further act before the commencement of work, there must be scope for saying that the intended function of the condition was to prevent the commencement of work (or render it unlawful) before the condition had been fulfilled. That will be the case if the condition ‘goes to the heart of the planning permission’: if it does, it is a condition going beyond the detail of a matter that is agreed in principle: it is, instead, something without which the authority would not be content to permit the development at all. It is this distinction which in my view underlies the difference between the admittedly widely-contrasting scenarios suggested by Sullivan J in *Hart Aggregates* at [67]: on the one hand where there is permission only in principle because there are no details at all,

and on the other hand the case where the failure is limited to a single aspect of the development.

19. The question whether a condition “goes to the heart of the planning permission” is not merely a matter of construing the grant of permission. The grant may give reasons why the condition is imposed: but those reasons cannot resolve the question by themselves. Rather the question can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context. In other words the question is a matter of planning judgement. It is not for the Court: it is for the Inspector; and unless the Inspector’s decision on the issue is at fault in a Wednesbury sense, the Court will not intervene”.

(emphasis added)

65. Finally, as regards the first two criteria set out in paragraph 58 above, in *Barrett* supra, HH Judge Jarman KC considered the case law (above) and set out his summary of the relevant principles as follows (at §19):

“i) The interpretation of a condition attached to a planning permission is a matter for the courts.

ii) The starting point is to consider what it meant by the words of the condition.

iii) If a condition is intended to prohibit something, this should be spelled out in clear terms.

iv) There is no difference between a condition which provides that no development should commence until a scheme is submitted and approved and one which provides that a scheme should be submitted and approved before development commences.

v) Whether a breach of such a condition means simply that enforcement action may be taken to remedy the breach or whether it renders any commencement of development unlawful depends on whether the condition goes to the heart of the planning permission.

vi) Whether a condition goes to the heart of the planning permission can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context.

vii) Such a question is a matter of planning judgment and is not a matter for the court.”

Whilst sub-paragraphs i) to v) of §19 are based on earlier case law, the propositions in sub-paragraphs vi) and vii) are derived from §19 of Mr Ockelton's judgment in *Meisels*. The characterisation of the issue of "going to the heart of the permission" as a matter of planning judgment was introduced for the first time in *Meisels*.

66. In the most recent case, *Southwood*, the claimant sought judicial review of the decision of the local authority to grant permission for a change of use from storage to residential use. The question arose as to whether the building in question was unlawful because the development began before two pre-commencement conditions had been complied with. The local authority had originally decided that those conditions did not go to the heart of the original permission, and this was subsequently endorsed by the report of the Defendant's planning consultant upon which the Defendant's later decision was based. Julian Knowles J (at §§118 to 131), citing *Hart Aggregates*, *Meisels* and *Greyfort*, concluded that the planning consultant was entitled to reach that conclusion as a matter of her planning judgment.
67. Finally, in *Stefanou*, which did not concern the question of a whether a condition "goes to the heart", a developer obtained planning permission for a basement in Westminster in 2008. This was renewed in 2011 pursuant to section 73. In 2014, on application, conditions were discharged. In 2016 he applied for, and was granted, a further section 73 variation to permit an extension of time and for the redesigned link between two building. By that time the local authority policy on basement development had become much stricter. The claimant, a neighbour who objected, challenged the 2016 permission, and argued, first, that the 2011 permission had not lawfully commenced and had expired. The council's treatment of the 2011 permission as extant was erroneous and there was no basis in law for a grant under section 73. Secondly, and alternatively even if the development had been commenced, the revised scheme had to be considered against the new policy and it was not. The council wrongly assumed that all it had to address were the changes in the scheme then proposed. This second issue is addressed below under Ground 3A.
68. On the first issue, the local authority found that the work had commenced and that the 2011 permission had been implemented. Whilst the judge thought that if he were the decision maker he might well have concluded that the works were not "material operations" and thus that the 2011 permission had not been implemented, this had been a decision for the local authority which they had previously taken and which the claimant had not challenged it in time. Gilbert J stated (at §85):

"I have set out my conclusions on the factual matters. If I were the decision maker, I would be very attracted by the factual conclusions which the Claimant's seeks to persuade me are to be drawn. Mr Lockhart-Mummery submits that this court is the fact finder for the purposes of determining whether there was jurisdiction to consider the s 73 application. I accept that submission up to a point. This Court may have to find facts which are disputed and which have not themselves been determined within the planning history. But if a decision in that planning history has been made on a particular factual basis which is alleged to be erroneous, then the time for challenging it was at the time it was made, and not two years' later in the context of a further discrete application. That is in essence what

the Claimant's claim is seeking to do, which in my judgement is impermissible. Even if I had thought that it had merit, I would decline to exercise my discretion to quash the 2016 decision on this ground.” **(emphasis added)**

*(3) The exception: unlawful to take enforcement action*

69. In *Whitley*, Woolf J stated at 306:

“... whether or not the planning permission has been implemented has to be tested by examining the situation in an enforcement context by considering whether enforcement action is possible and if it is, leaving the outcome to be determined in the enforcement proceedings”

70. In *Hammerton* Ouseley J stated at §127:

“I consider the principle discernible in Woolf LJ's reasoning is that where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development. Three of the passages from his judgment, to which I have referred in para 104, related his approach to the rational availability of enforcement proceedings. Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the development cannot be stopped from proceeding.

At §§130 and 131, Ouseley J continued:

“130. However, if after the expiry of the five year period, it is possible to conclude that enforcement action is not lawfully possible, I see no reason why the development which cannot be enforced against should not be regarded as effective to commence development. The role of enforcement, and the statutory flexibility which it brings, cannot be left wholly out of the picture when reaching a conclusion on a matter about which the Act is not explicit – can development in breach of planning control ever be effective to commence a planning permission? This is itself a judicial interpolation into the statutory code. It too arises from the application of public law principles as to the legal consequences of unlawful though not criminal acts. No sound distinction can be drawn for these purposes between development which cannot be enforced against because there has been no breach of planning control and development which cannot be enforced against because such action would itself be unlawful. If, in language which the post Carnwath Report enforcement regime has made redundant, development in breach of planning control is immune from enforcement control, it

should be regarded as effective to commence development. Such an approach flows from my analysis of the *Whitley* line of cases.

131. On that analysis, it would be insufficient to show that the authorities were indifferent to the breach, or unlikely to take enforcement action or indeed that they had decided not to (although no concluded view is required). It is necessary to conclude that they could not do so.” (emphasis added)

Finally at §141 in answer to the question whether enforcement action would be unlawful in the case before him, Ouseley J said:

“The enforcement proceedings which it is necessary to contemplate for the purposes of Mr Clayton’s submissions are not those which might seek to remedy the breach of condition by requiring the carrying out of the works of clearance and landscaping of the exchange land, for that would not prevent the carrying out of the underlying development. It is necessary to decide whether the authorities could rationally seek to prevent the whole development by asserting that the works were being carried out without any permission at all. I consider that such enforcement action would not be irrational, however unlikely in fact it might be, unless LUL could demolish the listed and unlisted Goods Yard, apart from the Viaduct, anyway.” (emphasis added)

In *Hart Aggregates* Sullivan J addressed this issue at §90 (set out in paragraph 61 above).

## ***The Parties’ submissions on Issue 2***

### *The Claimant’s case*

71. The Claimant submits that the Original Permission was not lawfully commenced. The Material Operations carried out by the Interested Party on 23 September 2022 did not lawfully commence the Original Permission. Material operations carried out without compliance with pre-commencement conditions are unlawful and as such incapable of commencing development: pursuant to the *Whitley* principle. The criteria for the application of the *Whitley* principle are met in this case. As a matter of construction Conditions 8 and 13 to the Original Permission are pre-commencement conditions and they go to the heart of the permission i.e. they are conditions without which the Defendant would not have been content to permit the development at all. The Defendant and the Interested Party’s own statements appear to accept that the validity of the Original Permission rested on the lawfulness of the Approval.
72. In the circumstances of the present case, namely a challenge to the vires of a subsequent section 73 permission, this Court can and should determine this issue and should find that clearly conditions 8 and 13 “go to the heart” of the Original Permission. The “planning judgment for the local authority” approach has only been expressly identified in the two most recent cases, and in any event, whilst it may be appropriate, and has

only arisen, in cases where the court is reviewing a prior decision of the planning authority or an inspector, it is not appropriate in a case such as the present. The Claimant relies on *Hart Aggregates* at §§61 and 90 as an example of the Court reaching its own conclusion as to whether a pre-commencement condition “goes to the heart” of the permission. Sullivan J expresses his own view, and accepts that it was open to him to have reached a conclusion that it was a condition precedent which went to the heart.

73. As regards the lawfulness of taking enforcement action, the Claimant submits that under the third criterion and the exception to *Whitley* the relevant question is whether the local planning authority “could” take enforcement action and it is only if it could not lawfully take such action, that the exception applies. Here plainly the Defendant cannot say that enforcement action could not be taken.

*The Defendant’s case*

74. The Defendant submits, on the basis of *Barrett* and *Meisels*, that whether or not Condition 8 and 13 in the present case “go to the heart of” the Original Permission is a matter of planning judgment for it, the Defendant, to determine; this Court cannot make that determination. To date, the Defendant has not made that determination and so Ground 1 must fail. In all the cases, the Court has gone out of its way to emphasise that this is an issue of planning judgment and one to be determined by the appropriate authority. The Defendant submits, in the alternative, that if this is an issue which the Court should determine, then it has not had the opportunity to make appropriate submissions as to why these conditions do not “go to the heart”
75. In the Officer Report the Defendant considered that the Original Permission had been validly commenced. At that time, that conclusion was open to the Defendant. The quashing of the Approval post-dates that conclusion. It is a matter which the Defendant will have to consider in the context of its decision as to whether or not to take enforcement action. Relevant to that decision is the fact that the Material Operations do not prejudice the delivery of the new section 73 scheme or what Conditions 8, 12 and 13 seek to achieve.
76. The redetermination of the Approval decision is pending. The challenge is therefore premature. Until it is known whether conditions 8, 12 and 13 can be duly discharged, it cannot be said that the Material Operations were in contravention of the conditions and thus incapable of commencing the development authorised. Until the decision is remade, as directed by HH Judge Jarman KC, it cannot be said definitively that the Original Permission was not validly commenced. Moreover, even if not, it is for the Defendant planning authority to decide what if any enforcement action to take and including to consider the question whether the conditions breached were one which went to the heart of the Original Permission. There is no basis upon which to conclude, in advance of Defendant’s reconsideration, that condition 8 cannot be lawfully discharged.
77. As regards the lawfulness of taking enforcement action, the Defendant submits the relevant question is whether the local planning authority would or will in the future take enforcement action and it is only if it would take such action, that the *Whitley* principle applies i.e. that the Material Operations will turn out to have been unlawful; and that is a matter which the Defendant has not yet decided upon. It might be irrational for Defendant to take enforcement action in the future. If so, and therefore it remains

possible it will be unlawful to take enforcement action, the exception applies and *Whitley* cannot apply

*The Interested Party's case*

78. In relation to the legality of commencement, the Interested Party supports the Defendant's submission that ultimately these are matters of planning judgment and the redetermination of the Approval decision which is pending. Further, to take enforcement action in this case would not be lawful but rather would be extraordinary and arguably unreasonable.

*Discussion*

79. On Issue 2, three questions arise. First, can this Court determine whether conditions 8 and 13 are (a) pre-commencement conditions precedent which (b) go to the heart of the permission or can that only be determined by the Defendant at some later date? Secondly, if this Court can determine that question, are conditions 8 and 13 true conditions precedent which go to the heart of the Original Permission? Thirdly, if conditions 8 and 13 are true conditions precedent which go to the heart of the Original Permission, do they nevertheless fall within the exception to the *Whitley* principle i.e. would it be unlawful in public terms for the Defendant to take enforcement action against the Material Operations which have taken place?
80. By way of preliminary observation, whilst at certain points in argument, the Defendant suggested that it would be open to it, upon remittal from the Approval Judgment, to grant the approval of discharge of conditions 8, 12 and 13 under the Original Permission, it is clear that no such approval could ever be granted, as Ms Olley accepted in oral argument (see paragraph 141 below). It follows that there was breach of these conditions. Nevertheless, even if the conditions have not been and cannot be discharged, whether the Original Permission had not been lawfully commenced turns on the issues of whether the conditions were true conditions precedent which go to the heart and whether the exception to the *Whitley* principle applies.

*(1) Can this Court decide?*

81. First, it is not entirely clear to me that the question whether a condition is a "true condition precedent" and whether it is one which goes to the heart of the permission are as distinct as suggested in *Barrett* (and as suggested by the Claimant). Whilst *Barrett* §19 v) appears to make this distinction, §§61 and 90 of *Hart Aggregates* do not make such a distinction; nor does *Bedford* §38 or *Meisels* §18 regard them as separate questions. In my judgment, the single question is whether the condition is a condition precedent to which the *Whitley* principle applies. That single question involves both consideration of the wording of the condition and the wider question of whether the condition "goes to the heart" of the permission. It is ultimately a question of construction, involving factual considerations and judgments: see *Bedford* §38.
82. Secondly, in all these cases referred to in paragraphs 60 to 66 above where the Court has suggested that the question whether a condition goes to the heart is a matter for the decision of the planning authority or for the inspector, and one upon which the Court would not interfere save on *Wednesbury* grounds, what was before the Court was a challenge to such a decision by the planning authority or inspector. Moreover, in none

of those cases, was there any issue arising under section 73. *Barrett, Meisels* and the other cases are all cases where the court was considering a prior decision of the local planning authority or an inspector as to whether a condition was a condition precedent and which went to the heart (in the context of whether there had been lawful commencement). It is orthodox principle that in such cases, the Court will be slow to interfere with the decision of the planning authority or inspector.

83. Thirdly, as regards “planning judgment”, whilst the “goes to the heart” requirement is long established and originates from *Hart Aggregates*, the characterisation of the issue as being a matter of planning judgment is an additional gloss which has first appeared in the recent decision of *Meisels* §19 and which was then adopted in *Barrett* §19 vi) and vii) and accepted in *Southwood*.
84. Fourthly, in my judgment the nature of the question to be addressed and whether the question can be determined only by a planning authority are distinct. The fact that, where a planning authority or inspector decides the issue of whether a condition “goes to the heart”, it does so by exercising planning judgment (with which a court on review will not readily interfere) does not mean that such an issue can only ever be decided by a planning authority (i.e. that the planning authority has exclusive jurisdiction to consider such a question). It may be that it is only in rare circumstances, such as the present – and in a section 73 context - , that the question will come before the Court without it having first been considered by the planning authority. Nevertheless in my judgment, where it does, the decided cases do not establish that the Court does not have jurisdiction to consider the question.
85. Fifthly, and moreover, *Hart Aggregates* §90 and *Bedford* §38 suggest that in certain circumstances it may well be appropriate or necessary for the Court to decide whether a pre-commencement condition goes to the heart of the permission. Further *Stefanou* at §85, albeit not a “goes to the heart” case, provides further support for this proposition that the Court may decide questions of fact where what is in issue is the jurisdiction of the planning authority to consider a section 73 application and where there are disputed facts which have not themselves been determined within the previous planning history.
86. Sixthly, by contrast to the cases referred to in paragraph 82 above, in the present case, there has been no prior determination by the Defendant (or an inspector) on the question of whether the relevant conditions go to the heart of the permission. This is not a case of a challenge to such a prior determination.
87. Seventhly, and critically, in the present case the ultimate question on Ground 1 is the jurisdiction of the local planning authority to grant permission under section 73. That question is before the Court and it depends in turn upon whether, inter alia, the original permission was lawfully commenced/the application of the *Whitley* principle. It has not been determined within the planning history. If the Court cannot determine now whether the *Whitley* principle applies, and it is necessary to await a further decision of the Defendant at a later point in time, it will be too late to challenge the Section 73 Permission *on this ground*. By that later point in time, the time to challenge the Section 73 Permission on this ground through court proceedings will have long expired. Regardless of the outcome of the Defendant’s consideration of the issue, the section 73 Permission will remain.



88. I conclude therefore that this Court is not precluded from determining whether Condition 8 and 13 go to the heart of the Original Permission. Whilst in other cases, the issue will be determined by the planning authority and the Court will only interfere with such a decision on judicial review grounds, the circumstances of the present case mean that it is appropriate and necessary for this Court to determine this issue.

*(2) Does condition 8 and 13 “go to the heart” of the Original Permission?*

89. First, in my judgment, the Defendant and the Interested Party have had appropriate opportunity to put their case on this issue. In its Statement of Facts and Grounds and in its skeleton argument, the Claimant expressly asserted (with reasons) that each of conditions 8, 12 and 13 is a true condition precedent and goes to the heart of the Original Permission. In their several written responses, other than in respect of condition 12, neither the Defendant nor the Interested Party contested the Claimant’s case in this regard.
90. Secondly, as a matter of construction, it is not disputed and it is clear from their wording (set out at paragraph 18 above), that each of conditions 8, 12 and 13 are true conditions precedent. Each prevents the works comprised in the material operation from being carried out without compliance with the condition in question. Each meets the test as set out in *Barrett* §19 iii) and iv).
91. Thirdly, in my judgment, conditions 8, 12 and 13, at least in so far as they required the 5m buffer, are conditions that do go to the heart of the Original Permission. They are something without which the Defendant would not have been content to permit the development at all - without which the Original Permission would not have been granted. The potential harm to the landscape and the protection of the AONB were central considerations in the grant of the Original Permission. The importance of protecting the landscape and the AONB was a central concern of consultees, officers and Committee members. Conditions 12 and 13 were imposed to achieve this aim and condition 12 was strengthened and amended at the request of Committee members. Condition 8 was essential to ensure the acceptability of the Original Permission on ecological grounds. This is clear from the following matters, arising in the lead up to the grant of the Original Permission: the observations and recommendation in the Willder Report (paragraph 12 above) commissioned by the Defendant and which led to the imposition of condition 8; the nature of the CCB’s objection (paragraph 14 above); Mr Shaw’s observations in the officer report (paragraph 14 above); the concerns raised by the councillors, and met by the conditions, in the minutes of the planning committee meeting in December 2017 (paragraph 15 above). Moreover, at §§12 and 50 of the Approval Judgment (see paragraphs 43 and 45 above), HH Judge Jarman KC referred to the express importance of the buffer zone to the grant of the Original Permission.
92. This conclusion is reinforced by the fact that the Defendant has previously expressly stated that the Approval was relied upon by the Interested Party to provide a lawful basis for the commencement of the Original Permission: both in the evidence in the Approval JR and in the Officer Report. In this way the Defendant appeared to accept that the validity of the Original Permission rested on the lawfulness of the Approval i.e. to accept that if the conditions are not discharged, then the Original Permission was not lawfully commenced. It is thus implicit that the Defendant accepted that the conditions in question do go to the heart of the Original Permission, (and that it would not be unlawful to enforce them.)

*(3) The lawfulness of enforcement action?*

93. First, the relevant question in this context is whether enforcement action is now lawfully *possible*. For the exception to apply, it must be shown that the planning authority *could* not lawfully take enforcement action: see *Hammerton* §§130 and 131. If the authority *could* rationally seek to prevent the whole development by taking enforcement action, then the exception to the *Whitley* principle does not apply: *Hammerton* §141. Whether the authority (here the Defendant) *would* or *will* in the future take such enforcement action is not the relevant issue.
94. Secondly, in my judgment, on the facts here, the taking of enforcement action in respect of the Material Operations cannot be ruled out; the Defendant cannot, and indeed does not, say that such enforcement action could not be taken or that it would be irrational or an abuse of power to take such enforcement action. Here plainly the Defendant cannot say that enforcement action could not be taken. The fact that the Defendant has taken no decision as to possible enforcement action in relation to the Material Operations and the fact that it remains possible that enforcement action will not be taken does not undermine the conclusion that it remains equally possible that enforcement action will be taken i.e. enforcement action is lawfully possible.

*Conclusion*

95. For these reasons I find in favour of the Claimant on Issue 2 of Ground 1. The *Whitley* principle applies. The Material Operations contravened the conditions and so did not commence the development authorised by the Original Permission. They were unlawful and the Original Permission was not lawfully commenced.

**Ground 1 Issue 3: the power under section 73**

*The relevant legal principles*

96. The case of *Pye v Secretary of State for the Environment* [1999] PCLR 28 is relevant both to this issue and to Ground 3A below. In *Pye*, planning permission was granted subject to conditions. Condition 2 required the submission of reserved matters within three years. Condition 4 provided that development had to begin not later than five years from date of planning permission or within two years of final approval of reserved matters. After expiration of the three years in condition 2, but before expiry of the period under condition 4, an application made under section 73 to extend the three year period for submission of detailed plans in connection with reserved matters. Sullivan J upheld the decisions of the council and the inspector to refuse the application. The original planning permission remained a baseline. In summary Sullivan J held that an application under section 73 to extend the time-limit for submitting reserved matters for approval on an unimplemented planning permission amounted to a renewal of that permission and therefore the planning authority was entitled to reconsider the principle of the development.
97. Sullivan J stated (at 44A):

“An application made under section 73 is an application for planning permission (see section 73(1). The local planning authority’ duty in deciding planning applications is to have

regard to both the development plans, which brings into play section 54A, and to any other material considerations (section 70(2)).”

At 45B-46F, he continued:

“Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a "normal" application for planning permission under section 70, but as Keene J. pointed out at page 207 of the Frost case, how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the particular materials to be employed in the construction of the building, the local planning authority's consideration will be confined within a very narrow compass.

Since the original planning permission will still be capable of implementation, the local planning authority looking at the practical consequences of imposing a different condition, as to hours or materials, will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated.

Equally, if an application is made under section 73 within the original time-limit for the submission of reserved matters, whilst implementation of the planning permission is still possible and is not precluded by the provisions of section 93(4), for a modest extension of time for the submission of reserved matters, the local planning authority's role in considering only the question of conditions subject to which planning permission should be granted will be more confined than in a normal section 70 case. The practical effect of submitting details one year later than would otherwise be allowed may be very limited.

In my view, however, the position is different where, as in the present case, an application is made under section 73 to alter a condition so as to extend the period for submission of reserved matters at a time when the original planning permission is no longer capable of implementation by reason of the effect of section 93(4), because time for submission of reserved matters has expired.

Whilst the council is constrained to consider only the question of the conditions subject to which planning permission should be granted, in deciding whether to grant a planning permission subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), is it required to ignore the fact that the original planning permission is no longer capable of implementation so that if it adopts a latter course it will not be

possible for the development to take place, whereas if it adopts the former course, it will be possible for the development to take place?

...

I do not see why, in such circumstances, the council in considering an application under section 73 should be required to shut its eyes to those practical consequences. If that is correct, I do not see why the position should be any different if the planning policies have changed since the grant of the original planning permission so that its implementation has become less desirable in planning terms.

The local planning authority has to have regard to the factual circumstances as they exist at the time and to have regard to the facts that exist **at the time of its decision**. **If at that time** the original planning permission is incapable of implementation by reason of section 93(4), I can see no basis in the statutory code for requiring the local planning authority to ignore that important fact.” (**emphasis** added)

98. In *R v Leicester CC ex parte PowerGen UK Limited* (2001) 81 P & C R 47 outline planning permission was granted. Condition 1 required an application for approval of reserved matters to be made within three years and also required the development to be begun within five years or if later within two years from the final approval of the reserved matters. Condition 2 required particulars of reserved matters to be submitted and approved before the development was begun. Within the three years an application for approval of reserved matters was submitted in respect of part of the site (the foodstore). Four days later there was an application under section 73 to extend the time limit in condition 1 to four years. There was no application for approval of the reserved matters for the rest of the site before the end of the three years. The first application for approval of reserved matters was approved after the expiry of the three years. There was then a further section 73 application to vary condition 2 so as to enable the reserved matters referred to in condition 1 to comprise only those matters relevant to any part of the site which the applicant wished to develop at any time. Both section 73 applications were refused. The later application was refused because allowing it would allow work to begin on the foodstore with reserved matters approval which would be contrary to changed shopping policy. Judicial review of that second refusal was dismissed. The Court of Appeal held, inter alia, that the effect of granting a new permission in the terms sought would be to enable a development to proceed after the expiry date of the permission.
99. After setting out section 73, Schiemann LJ set out (at §26), and approved of (at §27), the judgment of Sullivan J in *Pye* (including the passages set out above). He then commented at §28 as follows:

“Subsection (4) indicates that the section clearly does not apply where the application purportedly made pursuant to it is made at a time when development had not been begun within the time specified by a condition. However, what is the position where

the application is made in time but the consideration by the authority of that application is after the expiry of time? Does the Authority lose jurisdiction by reason of the expiry of time? In my judgment, based in part on the use of the verb “apply” in both subsections (1) and (4), the crucial time is the time of the application and there is no subsequent loss of jurisdiction to consider the matter. We have heard no submissions to the contrary.”  
(emphasis added)

100. In *R(Atwill) v New Forest Authority* [2023] PTSR 71 the condition attached to the grant of permission for the construction of a replacement dwelling on the site of an existing structure included a requirement that the development be begun within three years. At the behest of a neighbour, in 2021 the local authority served an enforcement notice on the developer. The developer appealed the enforcement notice and also applied to the authority, under section 73 to vary the conditions of the planning permission so as to permit the as-built scheme or an alternative scheme. The authority concluded that the original permission remained extant, as the demolition of the original dwelling had amounted to lawful implementation of the permission within the requisite three-year period. It granted the section 73 variation sought, subject to a condition that the agreed alterations be made within 2 years. The neighbour challenged the lawfulness of the decision on various grounds including that the development which was the subject of the 2018 permission had not lawfully begun within the required timescale and the permission had therefore lapsed, with the result that the condition imposed on the grant of the 2021 variation had the effect of unlawfully extending the time for development contrary to section 73(5)(a) of the 1990 Act.
101. Lane J upheld the challenge. On ground 1, he held, first, that the 2018 permission had not been lawfully implemented; reliance by the local authority on the demolition works alone was unlawful since that demolition was not properly referable to the dwelling authorised by the 2018 permission. Lane J then stated at §§44 and 45:

“44. The second element of ground 1 is that, if it is correct that the 2018 permission was not lawfully implemented, it was unlawful of the defendant to impose a condition upon the 2021 variation, which extended the implementation period by a further two years by stating:

Within two years of the date of this decision, the as-built dwelling shall be amended in accordance with drawing numbers SGA-143-102D Issue PL 1 and SGA-143-104N Issue PL2 unless otherwise agreed in writing with the [defendant].

45. I find that this condition is contrary to section 73(5). Although it purports to refer solely to “amendments” to a building, the 2018 permission was not implemented. This means the works that are the subject of the 2021 variation represent development which requires lawful commencement. In purporting to allow these works to take place, whether by way of amendments or otherwise, the defendant purported to allow the

development to commence beyond the relevant three-year time limit imposed by the 2018 permission.”

***The Parties’ submissions on Issue 3***

102. The Claimant submits that by virtue of section 73(4) TCPA, given that the Original Permission was not lawfully commenced and the time for commencement has expired, the Defendant had no power to grant the Section 73 Permission.
103. In response, the Defendant, submits, first that it is not correct that the Defendant had “no power” to grant the Section 73 Permission. The decision maker has to have regard to the factual circumstances as the time of making the decision: see *Pye* at 45B-F (last paragraph). At the time of *the determination* of the Section 73 Application, the Interested Party had implemented the Original Permission within the three year time limit and section 73(4) did not apply. Secondly, (and somewhat contradictorily), the Defendant submits that it had power, pursuant to section 73, to grant the Section 73 Permission, because at the time that the Section 73 Application was made, the three year time limit in Condition 1 had not yet expired: see *Powergen* §28. The fact that by the time that the Section 73 Permission was *granted*, time had expired without lawful commencement of the Original Permission is not relevant. Thirdly the Claimant’s reliance, in response (see paragraph 105 below), on section 73(5) TCPA is misplaced, because that subsection only applies to an application to vary a condition as to the time within which development is to be begun. Here there was no application to vary condition 1 of the Original Permission. Moreover the principle in *Powergen* at §28 applies generally and not just to an application to vary a time condition.
104. The Interested Party supports the Defendant’s second submission. The Section 73 Application was made in time for the purposes of section 73(4).
105. In response, the Claimant submits that section 73(4) does apply in the present case. The relevant time is the date when the section 73 application is *determined*, not when it is made. The observations of Schiemann LJ in *Powergen* are obiter dicta, and made without hearing argument. Secondly, and in any event, the subsequent enactment of section 73(5) overrides those dicta.

***Discussion***

106. The Claimant’s case on Ground 1 as a whole is based on the proposition that section 73(4) applies: the Defendant had no power to grant the Section 73 Permission because the time within which the development under the Original Permission was to be begun had expired without it having been lawfully implemented.
107. On the facts, as at the date of the Section 73 Permission being *granted* (22 March 2023), the time for commencing the Original Permission had expired (on 20 January 2023). On the other hand, as at the date of the making of the Section 73 Application (28 November 2022), time for commencing the Original Permission had not expired. As at that date, Material Operations had taken place; however, on the basis of my conclusion on Issue 1, there was no extant Approval.
108. The resolution of this issue is not straightforward. However I have concluded that the Claimant’s contentions are correct, for the following reasons.

109. First, *Pye*, *Powergen*, and *Atwill* are all cases concerning section 73 generally and directed to the situation where the application under section 73 is made after time has expired generally. None of them are concerned with the *Whitley* principle (i.e. where there has been a breach of a pre-commencement condition and so there has been no *lawful* commencement within time).
110. Secondly, §28 of *Powergen* is obiter dictum; it was not directly relevant to the issue in that case.
111. Thirdly, there appears to be a tension between what is said in §28 of *Powergen* and with *Pye* (at 46E) which refers to consideration of the position as at the time of the *decision* of the section 73 application. Indeed the Defendant positively relied on this latter proposition. In the present case, there is no doubt that by the time of the *decision*, time had expired without lawful implementation.
112. Fourthly, and in any event, even if §28 of *Powergen* was a possible view at the time, I consider that it has been overtaken by the enactment of section 73(5). On the analysis in §28, if a section 73 *application* to extend time for commencement were made before time had expired, it would be permissible to *grant* that application, even at a date when time had expired. However the position now since the enactment of section 73(5) makes it clear that this approach cannot stand. Section 73(5) prohibits the *grant* of such an application, even if “the application is made in time”. The emphasis on the prohibition of *grant* is inconsistent with the emphasis on the word “apply” in §28 of *Powergen*. The fact that, in the present case, the Section 73 Application is not directly to extend time for commencement is not relevant. It is the introduction and terms of section 73(5) in general which undermines the construction of section 73(4) advanced in §28 of *Powergen*.
113. Finally, the position envisaged by §28 of *Powergen* is to be distinguished from the present case. In the former, it proceeds on the assumption that, although by the time of the determination, the time limit has expired without lawful commencement, nevertheless, as at the time of the application, the original permission is still capable of lawful commencement within the time limit. §28 does not address the position where at the time of the application, it is known that time would expire without lawful commencement. However, in the present case, as at the time of the Section 73 Application, whilst the condition 1 time limit had not expired, then, on the basis of the retrospective effect of the Approval Judgment, there was no approval; and indeed there could never be approval and so the Original Permission was not, at that time, capable of lawful commencement within the time limit (see paragraph 141 on Ground 3A below). This is consistent with the analysis of Sullivan J in *Pye*, which based on the proposition that at the time of an application within the time limit, implementation of the planning permission is still possible. That analysis was fully accepted in *Powergen* §§26 and 27; §28 was an additional gloss on the accepted *Pye* analysis. (This is where there is some overlap between Grounds 1 and 3A). In the present case, in my judgment, merely to look at the facts as at the date of application or the date of decision (and without taking account of the quashing of the Approval) would be to ignore the conclusions I have reached on Issues 1 and 2 and on retrospectivity. For these reasons, I conclude on Issue 3, that section 73(4) applies and the Defendant had no power to grant the Section 73 Permission.

## **Conclusion on Ground 1**

114. In the light of my conclusions on Issues 1, 2 and 3 in paragraphs 56, 95 and 113 respectively, I conclude that the Defendant had no power to grant the Section 73 Permission because at the date of grant the Original Permission had expired without lawful commencement. The Section 73 Permission will be quashed on this ground.

## **Ground 2: Failure to decide whether Original Permission had been lawfully commenced**

### **The Ground and the Issue**

115. Ground 2 is set out at paragraph 2 above. It is advanced as an alternative to Ground 1. In the light of my conclusion on Ground 1, Ground 2 does not strictly arise for determination. Nevertheless, I address it in brief terms.

116. The issue on Ground 2 is whether the Defendant acted unlawfully in relation to the question of whether the Original Permission had been lawfully commenced prior to granting the section 73 Permission.

### **The Parties' submissions**

#### ***The Claimant's case***

117. The Claimant submits that, even if the question of whether the Original Permission had been lawfully commenced was a matter of planning judgment for the Defendant, the Defendant was obliged to consider that question before granting the Section 73 Permission. It was a "material consideration" (see *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 at §32). At the time of the grant of the Section 73 Permission, the Defendant knew that the Approval was subject to legal challenge with an imminent hearing which, if successful, could be to render the implementation of the Original Permission unlawful, and in circumstances where the Defendant was expressly relying on the Original Permission as a "fallback". No reasonable planning authority would ignore the question of commencement and the Defendant unlawfully failed to reach a view on the status of the Original Permission in the event that the Approval were to be quashed following the Approval JR. The potential inability to complete an underlying planning permission is a material consideration in a section 73 application. The Defendant never considered the issue.

#### ***The Defendant's case***

118. The Defendant submits that it is clear from the Officer Report that, *at the time of making the Decision* the Defendant did reach a judgment that the Original Permission had been lawfully implemented. That was all the Defendant needed to do at that stage. A decision stands until it is quashed. The decision maker is not required to proceed as if its decision will be found to be unlawful. Further it would be contrary to good administration to halt or delay decision-making in that way. It is not accepted that a defendant ought to behave as though the impugned decision is liable to be quashed once judicial proceedings are served. A defendant is entitled to pursue its defence and act in accordance with its own assessment until the court decides otherwise. A pending legal challenge is not a "material planning consideration".



### *The Interested Party's case*

119. The Interested Party submits that Ground 2 fails for the reasons identified in respect of Ground 1. In any event, the Approval was valid until quashed. That is sufficient to defeat Ground 2. Further, a “possibility” that a decision might be quashed is not the sort of “so obviously material” consideration contemplated by the Supreme Court in the *Samuel Smith* case. It cannot be right that the Defendant was required to conduct its own exercise analogous to the court’s task in the Approval JR. Even had the Defendant mentioned the “possibility” that the Original Permission had not been commenced, given that it is not disputed that Material Operations have occurred capable of implementation, the point would have gone no further than to note that, until such time as the Court held otherwise, the Approval was legally sound and the Original Permission was extant. In any event, if the Defendant had done as the Claimant suggests the outcome would have been the same and thus section 31 (2A) SCA 1981 would apply.

### **Discussion**

120. If I had concluded that Ground 1 failed, I would also have concluded that Ground 2 was not made out. Even assuming that the issue of whether the Original Permission had been lawfully commenced was a material consideration in accordance with the principles in *Samuel Smith*, I do not accept that the Defendant failed to have regard to it.
121. First, the Defendant was aware of the court challenge to the Approval at the time, and, in the Officer Report did give consideration to the issue of lawful implementation and to the existence of the court challenge. It set out in some detail the Claimant’s argument that the Original Permission had not been lawfully implemented (see paragraphs 34 and 37 above). Then, in its conclusions it recorded the view that the Original Permission had been lawfully implemented. In doing so, it qualified that statement by stating “at this time” and “in line with the outcome of the Legal Challenge”. Although those qualifying words may be somewhat ambiguous, they nonetheless suggest an awareness of the possible uncertain impact of the Approval JR.
122. Secondly, as at that time, the Defendant was entitled to rely upon the then current validity of the Approval. It was not required to proceed as if the Approval had been or would be quashed. At that time the Defendant was, at it was entitled to do, contesting the Approval JR. In these circumstances, it could not conclude that the Approval was invalid and it was not irrational for the Defendant to proceed on the basis of its current validity. Whilst the Claimant suggests that the Defendant should have “confronted the issue”, it is hard to see what more the Defendant should have done, short of conducting its own freestanding exercise of the merits of the Approval JR and then concluding that, contrary to its then view, that the Approval was, after all, invalid.
123. Finally, even if it could be said that the Defendant should have examined or considered the disputed issue in more detail, given the Defendant’s then position in the Approval JR, it is highly likely that the outcome would not have been substantially different. Had the point arisen, I would have refused relief pursuant to section 31(2A) SCA 1981 (see paragraph 128 below.)

### **Ground 3: unlawful approach to the Original Permission as a “fallback”**

#### **The Ground and the Issues**

124. Ground 3 is set out in paragraph 2 above. Under this ground there are two issues:

- (a) Whether the Defendant acted unlawfully in its treatment of the Original Permission as a “fallback” (Ground 3A).
- (b) Whether the Defendant acted unlawfully in failing to grapple with evidence from the CCB that the Section 73 Permission would be more harmful to the Ancient Woodland than the Original Permission (Ground 3B).

#### **Ground 3A: “fallback”**

#### **The legal principles relevant to Ground 3A**

##### ***“Fallback” development***

125. The relevant legal principles concerning the correct approach to consideration of a “fallback” development are summarised in *R (Widdington PC) v Uttleford DC* [2023] EWHC 1709 (Admin) at §30 as follows:

“30. A “fallback” (i.e. development which an applicant could take without a further grant of planning permission) is capable of being a material consideration in favour of granting planning permission. The law as to how a decision maker should consider this is well settled. The relevant propositions can be derived from the decision of the Court of Appeal in R (Mansell) v Tonbridge and Malling BC [2019] PTSR 1452 at para 27 and the decision of Dove J in Gambone v SSCLG [2014] EWHC 952 (Admin) at paras 26-28 which draw on earlier cases. The key points (so far as material for present purposes) are:-

- a. The applicant has a lawful ability to undertake the fallback development;
- b. The applicant can show that there is at least a “real prospect” that it will undertake the “fallback” development if planning permission is refused. In Mansell at §27, Lindblom LJ explained that: “the basic principle is that “for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice”.
- c. Where a planning authority is satisfied that a fallback development should be treated as a material consideration, the authority will then have to consider what weight it should be afforded. This will involve:
  - i. An assessment of the degree of probability of the fallback occurring. As Dove J observes in Gambone at para 27, the weight which might be attached to the

fallback will vary materially from case to case and will be particularly fact sensitive; and

ii. A comparison between the planning implications of the fallback and the planning implications of the Proposed Development: Gambone paras 26-28.

d. The Courts have cautioned against imposing prescriptive requirements as to how and with what degree of precision the fallback is to be assessed by the decision maker. This is in recognition of the fact that what is required in any given case is fact sensitive. As Lindblom LJ observed in para 27(3) of Mansell, there is no general legal requirement that the landowner or developer set out “precisely how he would make use of any permitted development rights”. Lindblom LJ continues that “[i]n some cases that degree of clarity and commitment may be necessary; in others, not”. (emphasis added)

126. In *Gambone* Mr Ian Dove QC (as he then was) at §§26 and 27 clearly identified the “two-stage approach”, namely, first, whether a fallback amounts to a material consideration (i.e. §30 b of *Widdington*) and secondly, if it does amount to a material consideration, the weight to be attached to the fallback, including the extent of the prospect of it being used (i.e. §30 c i of *Widdington*).
127. The earlier case of *Stefanou* (see paragraph 67 above) illustrates how the planning authority should approach a fallback. On the second issue in that case, (on the basis that the 2011 Permission was still extant) as to whether the local authority failed to consider the new basement policy, when considering the fresh 2016 section 73 application, the judge held (at §§90-91) that the duty of the local authority was to assess the application against the plan as it stood in 2016 and all material considerations at that date (including up to date policy changes). The judge addressed both the approach to a fallback and also whether the decision would have been the same in the following paragraphs:

“91. One such consideration, and no doubt one to which WCC might have wanted to ascribe great weight, was the fact that there was a permitted scheme in existence, which if it went ahead would include the restoration of the listed building. It may be that, on applying s 70(2) TCPA 1990 and s 38(6) PCPA 2004 that fallback position would have outweighed the clear objective of CM 28.1 of preventing a development with basements such as these from being built, with the consequent disruption of the street scene and of neighbours for an extended period. But assessment of the weight to be given to the fallback position must have looked at the likelihood of it going ahead without the proposed 2016 amendments, and of the likelihood of a scheme not going ahead which would not have included basements of the scale proposed here.

92. Those considerations were simply never explored by WCC. I do not suggest what weight should be given, nor how the competing advantages or disadvantages should be weighed the one against the other, or the s 38(6) balance determined. That is a matter for the local planning authority, and not for the Court.

93. Ground 2 therefore succeeds, subject to consideration of whether the decision would have been the same in any event.

...

95. I return therefore to the effect of my conclusions on Ground 2. Given my conclusion that WCC approached this case with the erroneous mindset that it could not refuse permission for something which was in large part already approved, I do not consider that this is a case where I can conclude that, had it approached its duties in accordance with the law, the outcome would have been the same.” (emphasis added)

### ***Section 31(2A) SCA 1981***

128. Section 31(2A) provides that the Court must refuse relief if it appears to the Court to be highly likely that the outcome [i.e. here the Decision] would not have been substantially different if the conduct complained of had not occurred. In *Widdington* (at §122) the Deputy Judge set out four key points on the approach to section 31(2A) in the context of a planning decision where the approach to a fallback was found to have been wrong. First, the burden is on the defendant and the interested party; secondly, the “highly likely” test sets a high hurdle; thirdly the Court must undertake an objective assessment of the decision making process, looking back at the situation at the date of the decision; and fourthly, the Court should be cautious about straying into the forbidden territory of assessing the merits of the planning decision under challenge.

### **The Parties’ submissions**

#### ***The Claimant’s case***

129. The Claimant submits that if, contrary to Grounds 1 and 2, the Defendant had the power to grant the Section 73 Permission, the Defendant adopted an unlawful approach to the Original Permissions as a “fallback” position. The Defendant failed to understand that the Original Permission is incapable of completion and therefore could not be a “fallback” and thus could not be a material consideration.
130. In the Officer Report the Defendant concluded that the Original Permission would be lawfully completed and that it could therefore be considered as a “fallback”. This conclusion was unlawful. HH Judge Jarman KC confirmed that condition 8 does not allow the Defendant to approve any reduction in the 5m buffer below 5m. The Defendant and the Interested Party have accepted that it is not physically possible to provide the 5m buffer under the Original Permission and it is therefore not possible to complete the Original Permission lawfully i.e. in accordance with condition 8. There is therefore no real prospect that the Original Permission will be implemented because

it is physically and legally impossible. Furthermore, the Defendant has accepted it has not reached a view as to whether the Original Permission was validly commenced or whether it has expired (Grounds 1 and 2).

131. Further, even if there was a real prospect that the Original Permission could be completed, that could not be said to be anything other than “highly unlikely” and thus it could only be given very limited weight as a “fallback”. The Defendant failed to appreciate and apply the correct legal principles relating to consideration of a “fallback” development, as summarised in *Widdington* at §30 (and in particular §30 e i). In addition to the 5m buffer issue, the Original Permission would be unlikely to be completed because of issues concerning the layout and levels of the site – which were altered in the Section 73 Application.

### ***The Defendant’s case***

132. The Defendant submits that its approach to the issue of the Original Permission constituting a “fallback” contained no legal error. The Defendant was well aware that it is necessary, first, to consider whether a fallback exists and then to consider what weight to apply to it. This is clear from the Officer Report. The Claimant’s approach is over legalistic. Weight is a matter for the decision maker.
133. The Officer Report correctly referred to the leading case of *Mansell* and, the likelihood of the fallback occurring, and then assessing that the applicant “could” continue to implement the Original Permission. *Mansell* emphasises that for there to be a “real prospect”, a possibility is sufficient. That is exactly in line with the language in the Officer Report stating “could” rather than “would”. As to whether following the Approval Judgment the Original Permission could in future be implemented, this will follow from the Defendant’s redetermination of the approval application. (See submissions on Ground 1). Further the decision maker clearly recognised that legal proceedings were on foot in the Officer Report.
134. Further, even if the Claimant is correct that the Original Permission could not be a fallback, it is highly likely that the outcome would not have been substantially different and section 31(2A) SCA1981 applies. The Decision places significant weight on the fact that according to the Section 73 Application the 5m buffer required by condition 8 will be provided in full. That would remain the same on any redetermination. That was the driver of the Section 73 Application.
135. The *Whitley* principle is relevant under this ground too. The Claimant’s argument that the Original Permission could not be a fallback rests on the Claimant’s assumption that the Original Permission is incapable of implementation.

### ***The Interested Party’s case***

136. The Interested Party submits, additionally, that the fallback point, whilst it was “material”, was not determinative of the Section 73 Application in any event. The planning history was also material. The Defendant was still bound by the principle that “like applications are decided in a like manner” and regard would need to have been had to the Original Permission. Even if the Claimant’s criticisms are correct, it made no difference to the outcome of the Section 73 Application. It is highly likely that it would have been granted even if the fallback analysis is removed from the decision-

making process. The wording of the Officer Report makes clear that the Defendant considered that the impact of the original development permitted by the Original Permission was acceptable and that the impact of the Section 73 Decision was comparable, if not an improvement, and were therefore also acceptable. Moreover, it is not accepted (as the Claimant appears to suggest) that the Original Permission was flawed in planning policy terms. No such determination has been made by the Court.

137. Further there is no prescriptive requirement as to how a planning authority should assess the fallback. The Interested Party submits that the Claimant accepts that the law is correctly set out in the Officer Report. The Claimant is wrong to say that the Officer Report does not address the “weight” to be given to the fallback. The Officer Report notes that weight to be given is “fact sensitive”. That is a matter of planning judgment and subject only to *Wednesbury* principles (which are not relied on). Given the Claimant’s acknowledgement that the legal principles in the Officer Report are correct, Ground 3A cannot succeed.

### ***The Claimant’s response***

138. In response, the Claimant submits that the Defendant does not offer any explanation as to how it might be possible to implement the Original Permission in future, pending redetermination of the Approval. As to the Interested Party’s case, first, *at the time of the Decision*, it was physically and legally impossible to implement the Original Permission. The Approval Judgment merely confirmed what was always the legal position. Secondly, the legal principles set out in the Officer Report were mistaken. In any event, any planning judgment which afforded the Original Permission anything more than limited weight as a fallback would be *Wednesbury* unreasonable. Thirdly Ground 3 is independent of Ground 1 and of any decision made on re-determination of the approval and on whether or not the Original Permission was validly commenced. *Whitley* has no application. Fourthly, it is clear that the Defendant considered that the “fallback” of the Original Permission *was a material consideration*. Finally it cannot be said that it is highly likely that the outcome would have been the same, if the Original Permission had not been a “fallback” or only carried limited weight as such.

### **Discussion**

139. There are two issues: first, whether the Defendant was correct to consider that the Original Permission was a material consideration as being a fallback, and if so, whether its approach to the weight to be attached to the fallback was correct; secondly, if the Defendant was wrong in its consideration of the Original Permission as a fallback, must relief be refused pursuant to section 31(2A) SCA 1981.

### ***The Original Permission as a fallback***

140. It is clear that the Defendant approached the Section 73 Application on the basis that the Original Permission was a fallback development. As appears from the Officer Report, fallback analysis was a central part of the rationale and reasoning for the Decision, both as a matter of legal analysis and on the facts. The reasoning was centred on pure comparison between the Section 73 Application with the Original Permission and in particular the comparison in relation to the 5m buffer. This is apparent in the Officer Report in the substantial section under the heading “Fallback position”, and then, in the section headed “Ecological and Ancient Woodland Protection buffer” and

finally in the conclusions section (see paragraphs 38, 39 and 40 above). I further accept the Claimant's submission that the Defendant must have placed significant reliance on the Original Permission as a fallback (and the fact that it specifically allows a 5m buffer in principle) given the significant non-compliance with the general principle of a 15m buffer.

141. Secondly, and critically, the Original Permission could, and can, never be implemented. It is not physically possible to provide the 5m buffer under the Original Permission; the plans approved by that Permission do not provide a full 5m buffer: see paragraph 22 above. As held by HH Judge Jarman KC, condition 8 does not allow the Defendant to approve any reduction in the 5m buffer. It follows that it is not, and was never, possible to complete the Original Permission in accordance with condition 8. Leaving to one side the challenge on Ground 1 and even if the Original Permission was or could be lawfully commenced or is not invalid because of non-commencement, in practical terms the Original Permission without variation is useless and could never be built. It follows that at the time of the Decision, the Original Permission was not a fallback at all. However the Decision was based on the express conclusion in the Officer Report that "the applicant that *could* continue to exercise their right to implement the Original Permission". That was an erroneous conclusion. It could not. Moreover, it follows that, in any event, the first condition for a fallback (at §30 a in *Widdington*) was not satisfied. There is no lawful ability to undertake the fallback development.
142. Thirdly, whilst the Officer Report did set out relevant legal principles to be applied to a fallback, it did not sufficiently identify the two-stage approach set out in *Gambone* and *Widdington* (at §30 b and 30 c i). In particular, it did not specifically consider the second stage question of how likely it was that the fallback would actually occur, once it was concluded that it was a possibility and thus a material consideration. The second of the "tests" identified in the Officer Report amounted to a reference to the first stage at §30 b of *Widdington*. Even if there was some prospect that the Original Permission could be completed, I accept the Claimant's submission (paragraph 131 above) that that was highly unlikely and in any event the Defendant did not address its mind to the degree of likelihood, nor to the issues of levels and layout. At most the Officer Report concluded it could be implemented and did not seem to consider at all whether it would be.
143. The Officer Report did not properly take account of the existence of legal proceedings. Despite the uncertainty of legal proceedings, the Officer Report proceeded on the assumption that the Original Permission *could* be lawfully implemented.
144. In these circumstances, the Decision took into account as a material consideration (put at its lowest) something, namely the prospect of the implementation of the Original Permission, which in fact was not capable of being a relevant material consideration. In fact, the Original Permission as a fallback was central to, and highly material to, the Decision when it was in reality not a relevant factor at all. For this reason, I conclude that the Decision was unlawful.

***Section 31(2A): highly likely the Decision would have been the same***

145. The question is whether, if at the time of the Decision the Defendant had appreciated that the Original Permission, providing for the 5m buffer, could not be implemented, it is highly likely that the Decision would have been the same i.e. the Defendant would

have granted the section 73 variation. I can see some force in the contention that the development in principle had already been approved and in particular a 5m buffer was considered acceptable in principle.

146. However, I take account of the fact that it is for the Defendant and the Interested Party to overcome the high hurdle of establishing the case for refusing relief on this basis. I note too that the Defendant did not raise this issue in its summary or detailed grounds of defence. I am not satisfied that they have discharged that burden.
147. First, in the Officer Report, the entire approach to the exercise was a comparison between the fallback of the Original Permission and the Section 73 Application. However, if there had been no fallback, then that entire approach was wrong. In those circumstances, the Defendant would have been required to consider the Section 73 Application effectively as a fresh application for permission or at least for a renewal of the Original Permission. If, on a section 73 application, it can be seen that the original permission cannot still go ahead, then the extent of the consideration of the section 73 application is necessarily wider. The principle of the development has to be revisited and the authority has to be satisfied that it accords with the development plan and all material considerations, *as at that time*. See *Pye* at 44A and 46D and *Stefanou* at §91. In the present case, the Defendant approached the Decision incorrectly because it concluded that the Original Permission was a fallback. However if it was not a fallback, it would be back to the drawing board. In summary, the Defendant would have been required to consider the overall picture afresh, including, but not limited to the substantial objections raised by the CCB and Natural England to the lack of a 15m buffer. The buffer was a crucial issue which absent the Original Permission might well have led the Defendant to reconsider it.
148. Secondly, the development was being considered over 7 years after the Original Application and 5 years later than the planning committee meeting of December 2017.
149. Thirdly, and critically, in the Officer Report the fallback analysis was so central to the Decision that it is not possible to reach a firm conclusion on the likelihood of the same decision being reached, absent that fallback analysis - particularly given the objections. Even if the Original Permission as fallback was not determinative of the Decision, it was highly material to it.
150. I am therefore not satisfied that it is highly likely that the Decision would have been the same. I decline to refuse relief based on section 31(2A) SCA 1981.

### **Ground 3B: the CCB objection**

#### **The legal principles relevant to Ground 3B**

151. First, a local planning authority is required to give the views of an expert statutory body, such as the CCB, considerable weight and not to depart from them without cogent and compelling reasons: *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), §72.
152. Secondly, I have been referred to a number of authorities setting out statements of principle as to the contents of, and the approach which the Court should adopt towards, reports of planning officers; in particular *R (Maxwell) v Wiltshire Council* [2011]



EWHC 1840 (Admin) at §43; *R (Bishop's Stortford Civic Federation) v East Herts DC* [2014] PTSR 1035 at §40; *R v Mendip DC ex parte Fabre* [2017] PTSR 1112 at 1120D; *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452 at §§41-42 and 62-63; and *Southwood* supra, at §56 and 57. Amongst the principles there stated are the following:

- (1) Part of a planning officer's expert function is to make an assessment of how much information needs to be included in his or her report.
- (2) Officer Reports are not to be read with undue rigour, but with reasonable benevolence.
- (3) Legalistic challenges should not be mounted. Planning decision makers approach such reports utilising local knowledge and much common sense.

153. However those principles were all expressed in relation to officer reports which were addressed, and were provided by way of advice, to the council members on the planning committee of the relevant local authority, which was the body charged with making the planning decision in question. That was not the role of the Officer Report in the present case. Here the author of the Report, Ms Fettes was the person who took the Decision under delegated powers. Thus, the underlying context, and some of the reasoning, for those statements of principle do not apply to the present case, and for that reason I consider them to be of limited direct relevance to the present case and the criticisms of the Officer Report.

### **The Parties' submissions**

#### ***The Claimant's case***

154. The Claimant submits that, in any event, the Defendant failed to grapple with the evidence from the CCB that the Section 73 Permission would be more harmful to the Ancient Woodland than the Original Permission. The Defendant did not give the views of the CCB, as an expert statutory body, considerable weight and did not give cogent and compelling reasons for departing from them. The Section 73 Permission did not address CCB's objection that the Development had been brought closer to the woodland in some areas (proximity of the buildings to the 5m buffer). This concern was additional to CCB's objection about a lack of a 15m buffer. The Officer Report contains no analysis of the CCB's objection, which was a material consideration.

#### ***The Defendant's case***

155. The Defendant took fully into account the representation of the CCB. The essence of the CCB's objection related to the lack of a 15m buffer, and not to the 5m buffer, which was recommended in the Original Permission. The Officer Report must be read fairly and as a whole. Legalistic challenges should not be mounted. Part of a planning officer's expert function is to make an assessment of how much information needs to be included. All matters of planning judgment are within the exclusive jurisdiction of the decision maker. It was for the Defendant to highlight what was important. It is clear from the section of the Officer Report headed "Ecological and Ancient Woodland Protection buffer" that the Defendant was well aware of Natural England's advice in relation to a 15m buffer. However the decision maker considered that the changes to the scheme represented by the Section 73 Application were an improvement to the scheme in the Original Permission. That conclusion was entirely open to the Defendant.

### *The Interested Party's case*

156. The Officer Report has a dedicated section on the buffer and concludes that the changes “allow for the recommended ecological buffer”. The Officer Report quotes the CCB’s advice in full. It follows that it cannot be said that regard was not had to that advice. Further it quotes the Claimant’s own submissions in full. Both the submissions of the CCB and the Claimant to the Defendant were tentative in nature. The CCB never advanced a concrete case that the variations would have an increased impact on the Ancient Woodland. They simply raised a query. Ultimately it was for the Defendant to assess whether an adequate buffer had been provided which was acceptable in planning terms. It was considered and addressed. That was a planning judgment which the Claimant does not assert to have been *Wednesbury* unreasonable.

### **Discussion**

157. The CCB appears to have had three concerns: first, an objection in principle to the lack of a 15m buffer zone; secondly, that under the varied scheme, some of the buildings were closer to the 5m buffer zone than under the Original Permission; and thirdly, that under the varied scheme, some of the curtilages and gardens fell within the 5m buffer zone. This latter point was subsequently addressed (as set out in paragraph 35 above)
158. First, I agree that the CCB’s main concern remained the absence of a 15m buffer zone. In my judgment this was adequately expressly addressed in the Officer Report, and in any event, if the Original Permission (which also lacked the 15m buffer zone) was properly a fallback, then this would not be a reason not to refuse the Section 73 Application. To this extent, the Claimant’s case here does not materially add to its case on Ground 3A.
159. Secondly, as regards the second concern (buildings outside, but closer to, the 5m buffer), it is the case that this was not clearly expressly addressed by Ms Fettes herself in the relevant sections of the Officer Report, and to that extent, there is some merit in the Claimant’s case. However, the objection itself was expressly set out in the Officer Report. Moreover, this additional objection was expressed in tentative and non-specific terms: it said only that the variations “may increase” the impact of scheme. Ultimately whether an adequate buffer had been provided was a question for the assessment of the Defendant.
160. I do not consider that Ground 3B is a self-standing basis upon which to impugn the Decision. It does not add materially to Ground 3A. Had I concluded, under Ground 3A, that the Original Permission was properly taken into account as a fallback, then given the CCB’s main concern, I would not have found that the failure to address this second concern would have been sufficient to vitiate the Decision. For these reasons Ground 3B fails.

### **Ground 4: apparent bias/predetermination**

#### **The Ground and the Issue**

161. Ground 4 is set out in paragraph 2 above. The issue is whether the Defendant’s decision to grant the Section 73 Permission was vitiated by apparent bias and/or predetermination

## **The legal principles relevant to Ground 4**

162. The test for deciding whether a planning decision is vitiated by bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased. The fair-minded observer has full knowledge of the facts and is “neither complacent nor unduly suspicious”. Further a decision may be vitiated by predetermination where there is a “real risk that minds were closed”. See *R (CPRE (Somerset) v South Somerset DC* [2022] EWHC 2817 (Admin) at §§20 and 25.
163. In *R (Carlton-Conway) v Harrow LBC* [2002] 3 PLR 77 a chief planning officer, acting under delegated powers, granted planning permission. A neighbour applied to quash the permission on the grounds that the planning officer had not acted within the scope of his delegated powers. After the grant of permission to apply for judicial review but before the case was heard, the planning committee resolved that they would have been minded to grant permission had the application come before them. At that time they had the judicial review well in mind and that was the purpose of the reference to the committee. The judicial review was then heard and the Court of Appeal allowed the neighbour’s appeal and quashed the permission; the planning officer acted beyond his powers. Moreover the Court of Appeal rejected the local authority’s argument that the Court should not grant relief in its discretion because the full committee had stated that they would have granted permission, had the matter been submitted to them. Pill LJ stated:

“In my judgment, the appellant is entitled to a fresh consideration of the application by the planning committee. There is a real risk that in taking the decisions they did in October 2001 there was a potential motivation, as would be perceived by a fair-minded member of the public, that a wish to support their chief planning officer and to avoid the possibility of judicial review were factors which led to the relevant decisions. I stress that it is a potential risk. There is no evidence that there was improper motivation”.

## **The Parties’ submissions**

### ***The Claimant’s case***

164. The Claimant submits that a grant of planning permission will be unlawful where it is vitiated by predetermination or apparent bias. There is a particular risk of such occurring where a decision is made to grant planning permission in circumstances where it is relied upon as a defence to an extant judicial review: see *Carlton-Conway* supra. In the present case, the Defendant was relying on the Section 73 Permission (or, at the earlier stage, on the Application) as a defence to the Approval JR, as is clear from the Defendant’s pleadings in the Approval JR and from the timing of the Section 73 Permission and the events in the Approval JR. The impression was given that the Defendant was determined to grant the Section 73 Permission, no matter what, because it would provide the Defendant with a defence to the Approval JR. At the very least a fair-minded and informed observer would conclude that this was a realistic possibility.

### *The Defendant's case*

165. The Defendant submits that the Decision is not vitiated by predetermination or apparent bias. The Claimant's suspicions as to the timing of the Decision are misplaced. The Defendant behaved openly, indicating from the outset that the Section 73 Application was in train. The facts of the present case do not resemble those in the *Carlton-Conway* decision. The Decision was not made through the prism of the Claimant's proceedings in the Approval JR but was the fulfilment of a process set in train by the Interested Party itself before the Approval decision was even made. It is entirely normal for a local planning authority's planning officers to decide planning applications including ones relating to a site they have already considered.
166. In the Approval JR, the Defendant made the point that the court should take the Section 73 Application into account in determining the question of relief and that the Court should consider it to be highly relevant to that question, that the Interested Party was going to correct the very matter which was driving the Claimant's application in that case. Further a fair-minded and informed observer would not see bias in the decision because the same officer made the determination. In making the Decision the Defendant was making a different decision to the Approval. Ms Fettes had no personal or prejudicial interest in the matter. Finally in the Officer Report the recognition that the Interested Party would have a fallback "in line with the outcome of legal challenge" shows that the matter was properly recognised to be in the Court's hands.

### *The Interested Party's case*

167. The Interested Party submits that the fair-minded observer would understand the function of a section 73 application and that the planning authority was not empowered fundamentally to alter the proposal. The fair-minded observer would also understand that this Section 73 Application was designed to resolve issues identified at the Approval stage. The Interested Party's cover letter makes clear that the Application was an attempt to address and resolve the planning issue of the buffer. The scheme had already been judged acceptable in principle. *Carlton-Conway* is not authority for the proposition that a planning authority cannot determine another planning application in connection with the site that is the subject of a judicial review. Finally the Claimant's allegation that the timing of the grant of the Section 73 Permission would indicate apparent bias relies on an unduly suspicious observer. The Section 73 Application was not rushed through to suit the purposes of the judicial review. Ultimately the Claimant complains that the Section 73 Application sought to correct the issue identified in the Approval JR. Far from being suspect, this was a logical and unremarkable next step taken by the Interested Party and the Defendant and the Interested party were both transparent about such a step being taken.

### **Discussion**

168. In the present case, the relevant sequence of events was as follows: the Interested Party applied for the Approval; in the course of that process, and prior to the Approval, it indicated that it intended to seek a section 73 variation to include full provision of a 5m buffer; there was then the Approval. The Claimant commenced the Approval JR; early in those proceedings the Defendant relied on the fact that a section 73 application was to be made. The Section 73 Application was then made and four months later the Decision was made, the day before the Defendant was due to file its skeleton and one

week before the Approval JR was heard. The Defendant sought to rely upon the Decision as a ground for refusing relief in the Approval JR.

169. It is the case that in the course of the Approval JR, the Defendant consistently relied upon the Section 73 Application, maintaining that it rendered the Approval JR academic and did so, both prior to the Section 73 Application being made and then prior to receiving any consultation objections. Then, the Decision itself was taken just prior to the Defendant's skeleton in the Approval JR was due to be served.
170. However, I am not satisfied either that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker – here Ms Fettes - was biased or that the Decision was vitiated by predetermination on the grounds there was a “real risk that her mind was closed”.
171. First, the Interested Party indicated its intention to apply for the section 73 variation at an early stage, and before the Approval itself and thus before the Approval JR. The Section 73 Application was not made simply to defeat the Approval JR.
172. Secondly, the facts in *Carlton-Conway* were different. That was a case of the planning committee itself seeking to retrospectively validate one and the same decision of its own planning officer. Here there was a separate and free-standing application by the Interested Party for a different decision.
173. Thirdly, despite the criticism made of Ms Fettes by HH Judge Jarman KC in the Approval Judgment, there is no reason to think that she could not act objectively. It is far from unusual for the same council planning officer to take different decisions in relation to the same site and related applications. The mere fact that it was the same person who granted the Approval and made the Decision would not of itself lead the fair-minded and informed observer to conclude that there was real possibility that she was biased.
174. Fourthly, strictly, in the Approval JR the Defendant did not rely upon the Section 73 Application and subsequently the Decision as a defence to the claim, but rather as a discretionary ground for the refusal of relief, if the case was otherwise made out. Moreover in her statement in the Approval JR (paragraph 33 above) and prior to the Decision, far from saying that the Section 73 Application necessarily rendered the Approval JR academic, she made clear that that “would” be the position “if” the Section 73 Application was granted. That is not suggestive of a closed mind or bias.
175. For these reasons, I conclude that Ground 4 fails.

## **Conclusions**

176. In the light of the conclusions at paragraphs 114, and 144 and 150 above, the Claimant's claim for judicial review succeeds. The Decision will be quashed. I will hear the parties on the appropriate form of order – particularly in the light of my findings on Ground 1 and Ground 3A – and any consequential matters.
177. Finally I am grateful to counsel for their assistance and for the detail and quality of the argument placed before the Court.