IN THE HIGH COURT OF JUSTICE
PLANNING COURT
BETWEEN:

CO/ /

CHARLCOMBE HOMES LIMITED

CLAIMANT

AND

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

DEFENDANT

AND

WILTSHIRE COUNCIL

INTERESTED PARTY

GROUNDS OF CLAIM

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1. Charlcombe Homes Limited (**"the Claimant"**) seeks an order under section 288(5)(b) of the Town and Country Planning Act 1990 quashing the decision of Inspector Andrew Dawe (**"the Inspector"**) dated 7 August 2017 (**"the decision"**, document 5 in the bundle) to dismiss its appeal against the refusal of outline permission for a housing development.

Summary

2. The Claimant challenges the validity of the decision on the ground that it was not given a fair opportunity of presenting evidence and argument on the single decisive point upon which the Inspector dismissed its appeal. The Inspector dismissed the appeal because he found at paragraphs 22-27 of the decision letter that the "significant width" of the whole site afforded an "undeveloped gap" which preserved the "apparent separateness" of Hilperton's village core and that closing that gap would harm the setting of the village core. The circumstances in which this decision was reached were unfair in that:

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a. The Claimant and the Interested Party, Wiltshire Council, agreed in a statement of common ground before the hearing that the proposed development caused no harm to heritage assets.

b. The Inspector did not cite harm to heritage assets as one of the (statutorily required) "main issues" for consideration in his Agenda circulated at the start of the hearing.

c. During the hearing, the Inspector did not give any indication that any issue related to impact upon the conservation area had or would become a "main issue". He did not alert the Claimant to the possibility that it could become a decisive issue on the appeal.

d. He did not invite evidence or submissions from the Claimant on the impact of the development on the Conservation Area during the hearing.

e. After the hearing, the Inspector sought additional submissions on a distinct issue unrelated to impact on the conservation area. He gave no indication that impact on the conservation area had become a "main issue" in his thinking. He did not take that opportunity to ask for any further evidence or submissions on the point.

f. In his decision letter, he supported the Claimant's case on all issues which had been identified at the hearing as main issues. However, (at paragraph 5) he indicated for the first time that he would treat the impact of the proposal on the character and appearance of the surrounding area as a "main issue" in the decision. He proceeded to dismiss the appeal solely on that ground.

g. The Claimant was substantially prejudiced by the Inspector's course of action in that it was deprived of a "fair crack of the whip" addressing the Inspector's concerns about maintaining "apparent separateness". The Claimant held a prospect of persuading the Inspector that there was no harm to the conservation area given that that had been the view of the local planning authority's officer. And, for example, would have wished to have explained to the Inspector the effect of the section 106 agreement in requiring substantial planting and management, an agreement which the Inspector did not consider in his decision letter.

Factual Background

3. The factual background is set out in the witness statement of Chris Dance prepared in connection with this claim.

4. Charlcombe Homes Limited has been seeking planning permission for the development of a site at The Grange, Devizes Road, Hilperton in Wiltshire since 2014. The Claimant applied for outline planning permission on 17 February 2016 for the development of land shown on the location plan at document 1 for up to 30 dwellings. At that stage both access and layout were to be determined. During the course of negotiations with Wiltshire Council the Interested Party, the application was modified to provide for the development of up to 26 dwellings and for access only to be determined at the outline stage. A revised illustrative layout plan was submitted (document 7) and revisions made to the design and access statement (document 9). A Heritage Impact Assessment (document 10) was also submitted to consider the effects of the proposed development on The Grange, a building of local significance, (though not listed), and on the Hilperton Conservation Area. The site itself lies outside the Conversation Area but its western boundary abuts the southern part of the Conservation Area.

5. The Heritage Impact Assessment concluded at Section 5.1 on page 21 that the design and layout of the proposed development would not have a detrimental impact on the Conservation Area. At page 17 the Heritage Impact Assessment concluded that the boundary treatments, including walls, buildings and mature hedgerows would provide buffers and obscure the site from further afield therefore leading to a degree of protection to the setting of the Conservation Area. The Heritage Impact Assessment concluded at paragraph 5.1 that "the proposed development will not impact in any harmful manner upon the setting of the adjacent buildings, most notably that of the Grange".

6. This view was supported by Wiltshire Council's Conservation Officer. Document 11 sets out the Conservation Officer's initial and subsequent comments following the

submission of the Heritage Impact Assessment and revised illustrative layout (document 7) in which he stated "*...if the detailed scheme delivers the claimed attributes in the Heritage Statement then there should be no issue*".

7. The application was reported to the Planning Committee on 14 December 2016 with a recommendation for approval (see document 14). Heritage assets were dealt with at paragraph 9.5 of that report with no harmful impact identified.

8. In the event, the application was refused by the committee on grounds which did not relate to the effect of the development on the Conservation Area (document 15), rather on the basis that there was an up-to-date five-year housing supply; the site was outside the extant village policy limits for Hilperton and because improved secondary school provision was not in place.

9. The appeal against the refusal of planning permission was submitted on 12 January 2017. Although the Appellant had requested that the matter be dealt with by written representations, the LPA requested that the matter be dealt with by of a hearing. PINS decided that a hearing should be held because of the dispute over five-year land supply which at that stage was identified as the main issue.

10. A Statement of Common Ground was submitted to the planning inspectorate in advance of the hearing (document 21). The matters of common agreement are set out at paragraph 5.1 of that document. The first bullet point states that through appropriate layout, detailed design and use of materials the development would result in no harm to the setting of the heritage assets. The matters of specific disagreement are set out at paragraph 6.1. These all relate to the question of whether or not a five-year housing land supply existed.

11. The hearing took place on 6 June 2017 and at the start of the hearing the Inspector presented an Agenda of the items that he wished to discuss (document 4). In the Agenda the Inspector identified, at the start of the hearing (as he is required to do by rule 11(4) of the statutory procedure rules governing the process) three "main issues", namely, the issue of whether there was a five-year housing supply; whether or not the proposal was in a suitable location having regard to sustainability

considerations; and the effect of the proposal on secondary school provision. The Inspector ultimately found in favour of the Appellant on each of those three main issues he had identified.

12. The bulk of the debate at the hearing was taken up with the matter of whether or not the Council could substantiate a five-year housing land supply. The Inspector did not raise the effect of the Development upon the Hilperton Conservation Area as a specific issue for discussion.

13. One issue raised by the Inspector was whether the proposed development was in a suitable location having regard to the principles of sustainable development. The Inspector did not raise any question of the impact on the conservation area in the context of this second "main issue".

14. The hearing was also attended by local residents, Mr and Mrs Jones and Mr Austin from Ashton Road and Ms Castleman from Devizes Road. Towards the end the hearing the residents addressed the Inspector on particular issues. One of the residents made a comment about the impact on the Conservation Area, but there was no substantive discussion or debate on this point and the Inspector did not invite any.

15. Throughout the hearing not once did the Inspector invite any further exploration of the Conservation Area impact issue, and at no time did he indicate that he thought this was an issue which should be addressed further. He gave no indication that it would be promoted to a "main issue" in the decision letter. He did not raise for comment his notion that the whole site acted as a buffer zone between the village core and the suburbs of Trowbridge (the issue on which he dismissed the appeal).

16. Following the hearing, correspondence was received from the Planning Inspectorate dated 27th June related to the five-year housing land supply issue and the Inspector had requested comments from both parties. The Appellant prepared a response dated 3rd July (document 10). The Inspector did not use this post-hearing opportunity to invite comment on the issue of whether, or the extent to which, the erosion of the "gap" would harm the conservation area.

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17. Neither evidence nor argument on the issue of impact of apparent erosion of a "gap" on the conservation area were presented by the Appellant in or after the hearing. The reasons for this are clear from the sequence as set out in the evidence of Mr Dance:

    a. In the Statement of Common Ground agreed before the hearing the Council and the Appellant agreed that it was common ground the development caused no harm;

    b. When the Inspector identified, pursuant to rule 11 (4) of the Hearing Procedure Rules, the main issues in his Agenda at the start of the hearing, he did not identify impact on the conservation area as one of them;

    c. The Inspector did not invite comment, evidence or debate on the point from the Appellant in the hearing;

    d. The Inspector did not raise this as a main issue or a matter for further submissions after the close of the hearing.

18. Mr Dance says that he did not understand the issue to be a main issue upon which the Inspector might conceivably dismiss the appeal. He was entitled to form that opinion and entitled, if not professionally obliged, to focus his evidence and comments on the issues which had in fact been identified by the Inspector as the main issues at the hearing.

19. In his decision letter, however, the Inspector found (for the first time) that the effect of the development on heritage assets should be treated as a "main issue" notwithstanding that it was not in issue between the Council and the Appellant (see paragraph 5). He proceeded to dismiss the appeal on this issue: the reason he gave being his view that the development would infill a gap which acted as a whole as a "buffer" to the existing village core, to the detriment of its setting. He found the harm caused by this would be "less than substantial" but found that harm would not be outweighed by public benefits of the proposal and applying paragraphs 132 and 134 of the NPPF he dismissed the appeal.

20. In a separate decision, the Inspector made a partial award of costs in favour of the Appellant.

Law

Planning Appeals- Hearing Procedure Rules

21. The Town and Country Planning (Hearings Procedure) (England) Rules 2000/1626 (as amended) provide for the provision of a statement of common ground in connection with a hearing under rule 6A.

22. Rule 11 provides, so far as relevant (emphasis supplied):

> (4) **At the start of the** hearing the inspector shall identify what are, in his opinion, **the main issues** to be considered at the hearing and any matters on which he requires further explanation from any person entitled or permitted to appear.
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> (5) Nothing in paragraph (4) shall preclude any person entitled or permitted to appear from referring to issues which they consider relevant to the consideration of the appeal but which were not issues identified by the inspector pursuant to that paragraph
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> (9) The inspector may allow any person to alter or add to a [full statement of case] [1] received under rule 6... so far as may be necessary for the purposes of the hearing; but he shall (if necessary by adjourning the hearing) give every other person entitled to appear who is appearing at the hearing an adequate opportunity of considering any fresh matter or document.

23. Rule 13 of the Hearing Rules (which applies to so called "transferred" appeals meaning those determined by Inspectors rather than the Secretary of State) and provides:

> (3) If, after the close of the hearing, an inspector proposes to take into consideration any new evidence or any new matter of fact (not being a matter of government policy) which was not raised at the hearing and which he considers to be material to his decision, he shall not come to a decision without first–
> (a) notifying in writing persons entitled to appear at the hearing who appeared at it of the matter in question; and
> (b) affording them an opportunity of making written representations to him or of asking for the re-opening of the hearing, and they shall ensure that such written

representations or request to re-open the hearing are received by the Secretary of State within 3 weeks of the date of the notification.

(4) An inspector may, as he thinks fit, cause a hearing to be re-opened and he shall do so if asked by the appellant or the local planning authority in the circumstances and within the period mentioned in paragraph (3); and where a hearing is re-opened–
(a) the inspector shall send to the persons entitled to appear at the hearing who appeared at it a written statement of the matters with respect to which further evidence is invited; and
(b) paragraphs (2) to (6) of rule 7 shall apply as if the references to a hearing were references to a re-opened hearing.

Fairmount Investments

24. These rules reflect principles of fairness and natural justice. In *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 W.L.R. 1255 (UL) following the conclusion of the hearing of evidence, a planning Inspector made his decision based on his own observations at a site visit but gave no opportunity to parties to comment. Viscount Dilhorne held at 1260:

> "In my opinion, there is great substance in the respondent's [Fairmount's] complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion which investigation might have been shown to be erroneous"

At 1266, Lord Russel of Killowen identified the principle that a party should have a "fair crack of the whip" and that the Inspector should have invited parties to make further representations on the matter that had come to light at the site visit in that case.

Edward Ware

25. Applying the principles established in *Fairmount*, the Court of Appeal in *Edward Ware Homes v SSTLGR* [2004] 1 P. & C.R. 6 quashed an Inspector's decision for unfairness. The Court of Appeal held that the purpose of the statutory rules requiring a statement of common ground "is clearly to limit the scope of the Inquiry, and to indicate matters on which (subject to any direction to the contrary from the Inspector) evidence will not be required". As a result of his site visit the Inspector

formed a view that dilapidated buildings on the site would not be reused (contrary to the position agreed), such that he disagreed with the parties' common ground on the potential "fall back" level of traffic. The Court of Appeal held, allowing the appeal and remitting the case, that the interests of procedural fairness required the inspector to withhold forming his own conclusion on those issues without giving the parties an opportunity to make submissions and asking the experts to assist. The failure to do so meant that the Appellant had been unfairly prevented from addressing the issues. The Court of Appeal's findings as to the unfairness of the procedure were made in the context of r.18(3) of the *Inquiries* procedure rules (which mirrors rule 13 of the Hearing Procedure Rules requiring an Inspector to revert to the parties on any new evidence or matter of fact after the hearing).

26. The Court found for the Appellant in that case applying *Castleford Homes v Secretary of State for the Environment [2001] P.L.C.R. 29* in which Ouseley J. said at para.[65]—

> "If an Inspector is to take a line which has not been explored ... fairness means that an Inspector give the party an opportunity to deal with it. He need not do so where the party ought reasonably to have been aware on the material and arguments presented at the Inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed."

Poole

27. *R. (on the application of Poole) v Secretary of State for Communities and Local Government and Cannock Chase DC [2008] EWHC 676 (Admin),* (Sullivan J) an Inspector permitted the local authority's witness to give evidence by reading a document (which was not a proof of evidence nor a summary) which had not been copied to anyone else in the inquiry. When it became clear that the witness was departing from the implications of the statement of common ground, the inspector refused to grant an adjournment to enable the appellant to call expert arboricultural evidence. Until that point, the appellant had not called arboricultural evidence because it was not relevant to the Council's sole reason for refusal. The inspector proceeded to refuse the appeal solely on arboricultural grounds despite the fact the Council's witness had resiled from that point in cross-examination. Sullivan J. quashed the decision. He held that the inspector was not bound by the statement of common ground but could form her own view subject only to giving the appellant a

fair opportunity to comment. The importance of the statement of common ground was emphasised by Sullivan J. He held at paragraph 39:

> 39. I accept Mr Auburn's submissions, firstly, that the Inspector was entitled to use her own planning expertise and form her own judgments using that expertise: see *Westminster Renslade Ltd v Secretary of State for the Environment* [1983] J.P.L. 454 at p.455; and secondly that the Inspector was not bound by the statement and was entitled to form her own view subject to giving the applicant a fair opportunity to comment: see *Wigan MBC v the Secretary of State for the Environment* [2002] J.P.L. 417 at p.40; [2001] EWCA Admin 587.
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> 40. However, it is most important when deciding whether the parties at an inquiry have had a fair opportunity to comment on an issue raised by an Inspector of his or her own motion, and whether they could reasonably have anticipated that an issue had to be addressed because it might be raised by an Inspector, **to bear in mind the highly focused nature of the modern public inquiry where the whole emphasis of the Rules and procedural guidance contained in Circulars is to encourage the parties to focus their evidence and submissions on those matters that are in dispute...**
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> 43. The older authorities dealing with fairness in the context of public inquiries **should now be read with the modern inquiry procedure rules in mind,** where the parties are now not expected to cover every conceivable eventuality in their proofs of evidence in circumstances where, as used to be the case, the procedural rules did not require the issues in dispute to be identified, or sufficiently identified, well in advance of the inquiry.
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> 44 **I accept that an Inspector is bound to take into consideration arguments raised by third parties, but the imperative in the Rules requiring the principal parties to focus their attention on the issues that are in dispute would be wholly frustrated if Appellants and local planning authorities were unable to place any degree of reliance on matters that had been apparently resolved in a statement of agreed facts.** It would be entirely unsatisfactory if, having agreed such matters, the principal parties to an inquiry would still have to prepare their evidence on the basis that the Inspector might wish to pursue a particular line of reasoning that departed from the agreed statement. While of course it is open to an Inspector to do so, whether of his or her own motion or in response to third party representations, if there is not to be a return to the "bad old days" where proofs were prepared to cover every conceivable eventuality, **it is essential that inspectors recognise that if they do intend to depart from what is the agreed position between the principal parties, it may be necessary to accede to applications for adjournments to enable the parties to address the (now disputed) issue or issues properly by way of expert evidence. It may not be good enough to ask a witness who happens to be at the inquiry for his or her view.** By definition, that witness may well not have the professional expertise which is relevant to the matter which has been agreed between the parties as set out in the statement of common ground.
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> 45: In deciding whether there has been unfairness, all such factors should be taken into account. Among them, the importance of the issue in respect of which the Inspector is differing from the position agreed in the statement of common ground. In this case, as it turned out, the question whether tree T7

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could be retained was not simply an important issue; it was the determining issue. Given the statement, it is clear that the Applicant not merely did not anticipate, but could not reasonably have anticipated that the retention of tree T7 would be in issue at all, let alone that it would be the determining issue."

Gates Hydraulics Ltd

28. Another example is *Gates Hydraulics Ltd v Secretary of State for Communities and Local Government* [2009] EWHC 2187 in which the appellant and the local authority had in their Statement of Common Ground agreed that there was no longer any issue between the parties relating to noise. At the inquiry, the local authority's witness confirmed that there was no issue on this topic and accordingly the appellant's counsel released the noise witness. The inspector dismissed the appeal on the noise issue. It was held that this was procedurally unfair.

Grounds of Challenge

29. Applying the above authorities to the specific facts of this case, it is clear that in this matter the hearing was procedurally unfair:

    a. The Claimant and the Interested Party, Wiltshire Council, agreed in a statement of common ground before the hearing that the proposed development caused no harm to heritage assets. As set out in each of the authorities cited above, it is not disputed that the Inspector was entitled to depart from that statement of common ground in his decision. However, as also made plain in those authorities, where he was proposing to do so he had to give the parties an opportunity to make submissions and asking the experts to assist, such opportunity potentially extending, depending on the context to an adjournment or an opportunity for further written or oral evidence.

    b. The Inspector was required by the rule 11(4) of the Hearing Procedure Rules to identify <u>at the start of the hearing</u> the main issues. "main issues" is a statutory term and the identification of them is designed to focus submissions by the main parties (as described by Sullivan J in ***Poole***). Where a

matter is both agreed not to be in issue between the parties, and is not defined as a main issue, again it is not suggested the Inspector is precluded from subsequently treating it as a main issue. But again, a fair opportunity of addressing it as such must be given to an Appellant, such opportunity requiring at a minimum the knowledge that the issue has become a main issue, and extending, depending on the context to further evidence and submissions in writing and orally.

c. During the hearing, the Inspector did not give any indication that any issue related to impact upon the conservation area had or would become a "main issue". He did not alert the Claimant to the possibility that it could become a decisive issue on the appeal. The Claimant was deprived even of the knowledge of the main issues (which the rules are designed to promote).

d. The Inspector did not invite oral evidence; he did not invite oral submissions, he did not offer to allow any further written evidence or submissions. He did not give the Appellant reason to consider that such submissions or evidence might be required notwithstanding the statement of common ground and the identified main issues.

e. After the hearing, the Inspector had the power to re-open the hearing or to seek further written submissions pursuant to rule 13(4) and he had the duty to invite further submissions on any new evidence or any new matter of fact pursuant to rule 13(3). Indeed, the Inspector used those powers and sought additional submissions on a distinct issue unrelated to the impact on the conservation area, but he still gave no indication that impact on heritage assets had become a "main issue" and he did not take that opportunity to ask for any further evidence or submissions.

f. In his decision, he supported the Claimant's case on all issues which had been identified at the hearing as main issues. However, (at paragraph 5) he indicated for the first time that he would treat the impact of the proposal on the character and appearance of the surrounding area as a "main issue" in the decision. He proceeded to dismiss the appeal solely on that new main issue.

30. The common law demands more than compliance with the procedure rules, as the authorities above demonstrate. But the fact that in this case both the letter and the spirit of the rules was breached is indicative of the unfairness of the process. As Sullivan J indicated in Poole, the raising of a new matter which had formerly been common ground, may lead to a need to adjourn, but at the very least required a clearly defined request for comment at the hearing. Neither course was taken and the Appellant was in the dark as to what the main issues truly were. Indeed, it was misdirected as to the main issues upon which its evidence and submissions ought to focus. The process clearly failed to meet the standards of fairness required.

31. For the avoidance of doubt, while objectors did allude to what they saw as a need for a "buffer zone" very briefly in submissions, the basis on which the Inspector ultimately found a harm that required him to dismiss the appeal (the question of the whole site affording a "gap") was not identified by any objector to the proposal in their representations.

Substantial Prejudice

32. The Claimant was deprived of a "fair crack of the whip" addressing the Inspector's concerns about maintaining "apparent separateness". For example, as set out in the evidence of Mr Dance, the Claimant would have wished to have explained to the Inspector the effect of the section 106 agreement in requiring substantial planting and management, an agreement which the Inspector did not consider in his decision letter because he assumed it to be relevant only to issues relating to ecology. The Inspector considered there to be "less than substantial harm", while the Council's heritage officer, the Council members and the Appellant's expert did not consider there to be *any* harm to heritage assets (as recorded in the statement of common ground). The Claimant need only show that there was some prospect of a different overall balanced judgment having been reached in the appeal, and clearly it cannot be said that the Inspector's view of this issue was inevitable or the only one that was open to him.

Remedy

33. For the reasons set out above, the Claimant therefore asks that the Court grant an order quashing the decision of the Inspector and remitting it for reconsideration. The Claimant asks for its costs.

Alex Goodman
Landmark Chambers
180 Fleet Street
London EC4A 2HG

15 September 2017