



Neutral Citation Number: [2014] EWHC 3979 (Admin)

Case No: CO/17269/2013

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**MANCHESTER DISTRICT REGISTRY**  
**PLANNING COURT**  
**BETWEEN:**

28 November 2014

Before:

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

**THE QUEEN (on the application of Mrs Gillian Hughes)**

Claimant

and

**SOUTH LAKELAND DISTRICT COUNCIL**

and

Defendant

**(1) OLD BREWERY (ULVERSTON) LIMITED**

**(2) HARTLEY'S (ULVERSTON) LIMITED**

Interested Parties

**Hearing date: 1 October 2014**

Ned Westaway (instructed by Richard Buxton Environmental and Public Law Solicitors)  
for the Claimant

Jonathan Easton (instructed by Legal Services Group, South Lakeland District Council )  
for the Defendant

David Manley QC (instructed by DLA Piper UK LLP Solicitors) for the Interested  
Parties

## **Approved Judgment**

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

## **INTRODUCTION**

1. This is a challenge by way of judicial review to a decision of South Lakeland District Council (“the Council”) taken on 23 October 2013 by which it granted planning permission and conservation area consent (“the Permission”) to the First Interested Party, Old Brewery (Ulverston) Limited, to demolish buildings at, and redevelop, the site of the former Hartley’s Brewery in Ulverston (“the Site”). The First and Second Interested Parties are the owners of the Site. I shall refer to them collectively as “the Owners”.
2. The claim is brought by Ms Gillian Hughes, who lives about 200m from the Site. She belongs to the residents’ group called Keep Ulverston Special (“KUS”) which is opposed to the Development.
3. The challenge is made on five grounds:
  - (1) Ground 1: The screening opinion dated 21 January 2013 (“the Screening Opinion”) was defective;
  - (2) Ground 2: The Council in making its decision failed to give priority weight to the impact of the Development on the local conservation area and the assessment of heritage impacts was otherwise defective;
  - (3) Ground 3: The Council wrongly excluded the question of retail need from its assessment of the planning merits;
  - (4) Ground 4: The Council did not recognise or give proper weight to the Development Plan; and
  - (5) Ground 5: The reasons given for granting the permission were defective and/or unintelligible.

## **BACKGROUND**

4. A plan of the Site is shown at p105 of the Bundle. Some buildings will be demolished while others are to be retained and a new supermarket, car park and a retail/office building will be erected. It lies on the edge of the centre of Ulverston, a well-known small market town in the Lake District. Brewing first commenced on the Site in 1755. The whole of the Site lies within the Ulverston Conservation Area.
5. In 1993 Conservation Area Consent (“the 1993 Consent”) was given to demolish a number of buildings on the Site including the Brewery Tower (“the Tower”). However, not all of the relevant buildings were demolished and in particular the Tower remains. The Council contends that the 1993 Consent remains valid. Mrs Hughes does not accept this.

6. In August 2010 the Site was considered for listing by English Heritage but despite its clear local significance, it was judged not to meet the relevant criteria.
7. An initial application for planning permission and Conservation Area consent was made in 2011 but withdrawn in December 2012 due to concerns over the design of the then-development and its local impact. A revised proposal, which is the one now permitted, was submitted on 7 January 2013.
8. By a letter dated 30 November 2012, English Heritage wrote, stating that although the revised scheme would impact upon the character and appearance of the conservation area, it was clear that considerable efforts had been made to mitigate any harmful impacts and as a result it did not believe that the proposal would lead to substantial harm. Accordingly the process set out in paragraph 133 of the National Planning Policy Framework (“the NPPF”) need not apply and other public benefits of the scheme could be weighed by the Council. I deal with the relevance of this part of the NPPF below.
9. A number of reports and statements were furnished with the application. These included a damage and flood risk assessment, a Geoenvironmental Ground Investigation and a Transport Assessment, all dated December 2012, an Environmental Noise Assessment dated 14 December 2012 and a Bat and Nesting Bird Survey dated 14 November 2012 (“the Reports”).
10. Pursuant to a request made on 20 December 2012, Ms Lawson, the Council’s Principal Planning Officer, produced the Screening Opinion on 21 January 2013. The lengthy and detailed Planning Officer’s Report of almost 40 pages (see 1/312-171) dated 25 April 2013 (“the Report”) recommended the grant of permission subject to various conditions and a s106 agreement. At a meeting the same day, the Planning Committee resolved by a bare majority (7 in favour, 6 against and 2 abstentions) to grant permission.
11. On 25 June 2013 the Secretary of State refused a request to call in the application. The formal grant of permission followed on 25 October 2013.

## **GROUND 1: THE SCREENING OPINION**

### **The Law**

12. The Council accepted that a Screening Opinion was necessary because the area of the development was more than 0.5 hectares and it involved demolition. Although the Screening Opinion refers to the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (“the 1999 Regulations”), by January 2013 they had been replaced by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the 2011 Regulations”). One particular difference between the two regimes is that Regulation 4 (7) of the 2011 Regulations expressly states that the screening opinion should be accompanied by a written statement “giving clearly and precisely the full reasons for that conclusion.” Given that Ms Lawson thought

that the 1999 Regulations still governed, she may not have had that injunction in mind.

13. A “Schedule 2” development, which this one was, would require an EIA where in the screening opinion the local planning authority (“LPA”) determines that it “is likely to have significant environmental effects because of factors such as its nature size or location” (“EIA Development”). In deciding that question, the LPA must take into account such of the selection criteria in Schedule 3 as are relevant. Those criteria are the same for both the 1999 and 2011 Regulations. They are the characteristics of the development, its location, and the characteristics of the potential impact, each broken down into various sub-criteria.
14. Circular 02/99: “Environmental Impact Assessment” (“02/99”) provides guidance on the sorts of case which, in the light of Schedule 3, will be found in a screening opinion to be EIA development. They are major developments of more than local importance, developments in environmentally sensitive locations and those with particularly complex and potentially hazardous effects. But paragraph 43 of 02/99 emphasises that it is not possible to formulate a universal test for whether a given Schedule 2 development requires an EIA. The question must be considered on a case-by-case basis. What can be offered are broad indications as to whether it is likely or not likely to require an EIA.
15. It therefore follows that just because a development is not of more than local importance, for example, that it will not require an EIA. See *R (TWS) v Manchester City Council* [2013] EWHC 55 at paragraph 121 and also the observation of Moore-Bick LJ in *(R) Bateman v South Cambridgeshire District Council* [2011] EWCA 157 at paragraph 28 that “the three criteria...[in 02/99] are couched in terms so broad that they offer only general guidance in relation to the kind of projects which require an EIA.”
16. The domestic jurisprudence on the approach to be taken by a Court to a Screening Opinion has been helpfully summarised by Lindblom J in *R (Thakeham Village Action) v Horsham District Council* [2014] EWHC 57 at paragraphs 25 – 31. Summarised yet further:
  - (1) The European Court will interfere only where there had been a manifest error of assessment of the question of significant environmental impact. In *R (Loader) v Secretary of State* [2013] Env LR 7, Pill LJ endorsed paragraph 34 of 02/99 which stated that EIA would be required in only a very small proportion of Schedule 2 developments;
  - (2) The role of the Court should be limited to a review of the decision as to EIA on *Wednesbury* grounds;
  - (3) While the LPA does not need to set out at length the considerations taken into account in the Screening Opinion, its essential reasoning

must be plain; this of course is now superseded by the express terms of Regulation 4 (7) of the 2011 Regulations which apply here;

- (4) Just because there is some uncertainty about the likely effects of the development does not mean that the LPA must conclude that an EIA is required. It depends if there is sufficient information available to enable a decision on the issue reasonably to be made. A screening opinion is a decision made almost inevitably on the basis of less than complete information. It is an initial assessment of an intended proposal and the Courts should not impose too high a burden on LPAs;
  - (5) The LPA's reasons may be contained in the Screening Opinion itself or separately if necessary combined with additional material supplied on request. See *Bateman*. And Regulation 4 (7) referred to above speaks of reasons "accompanying" the Screening Opinion.
17. It is clear from paragraph 43 of *Loader* that when considering the overall question, any proposed ameliorative or remedial measures can be taken into account provided that the uncertainties are not such that a negative decision cannot be taken. Put another way, the proposed remedial measures would need to be such that their nature availability and effectiveness were already plainly established and uncontroversial – see the judgement of Laws LJ in *Gillespie v First Secretary of State* [2003] EWCA Civ. 400.

### **The Structure of the Screening Opinion here**

18. The Screening Opinion in question follows a structure dictated largely but not exclusively by a template consisting of 7 questions. The first four deal with the preliminary thresholds for a screening opinion. The Screening Opinion then states:
- “For questions 5, 6 and 7 the overarching question to be answered is whether the development is likely to have “significant environmental effects”. In deciding upon the significance of the environmental effects it is necessary to refer to the selection criteria set out in Schedule 3....”.
19. Reference is then made to Circular 02/99 and the three main types of case where EIA will be required but it is then said:
- “When answering the questions please refer to Schedule 3 as detailed above and also the indicative thresholds and criteria contained in Annex A of 02/99 which help to provide a starting point for consideration.”
20. It is plain that the Screening Opinion's structure thereafter is to deal with the 3 types of development adverted to in 02/99 as being candidates for an EIA and then to deal with some other matters. The Screening Opinion concludes by saying that an EIA is not required. The covering letter from Ms Lawson states as follows:
- “...in my opinion, having taken into account the criteria in Schedule 3..[the Development] would not be likely to have a significant effect on the environment by virtue of factors such as its nature, size or location.....the above development would not require the submission of an [EIA].”

21. Finally, the Screening Opinion attaches the text of paragraphs 35-42 of 02/99 and Schedule 3.

### **Challenges to the Screening Opinion**

22. Mr Westaway, on behalf of Ms Hughes, made a number of points which he argued either individually or collectively rendered the Screening Opinion legally inadequate.

#### *Statement of Conclusion*

23. The first was that the Screening Opinion did not actually state expressly that no EIA was required because the Development was not likely to have a significant effect on the environment, but merely said that one was not required. That is correct but (a) it is obviously implicit, given the statement in the Screening Opinion referred to in paragraph 18 above and (b) the covering letter says so in terms and thus forms part of the reasons for the Screening Opinion – see paragraph 16(5) above. There is thus nothing in this point.

#### *Question 5*

24. Next, a point was taken on the answer to Question 5 framed (from 02/99) as “Is it a major development of more than local importance?” The Screening Opinion cited the essential feature of the Development and concluded that “the proposal is a major development of significant local importance it would not have wide-ranging environment impacts to be considered as being of more than local importance. As paragraph 35 of 02/99 makes clear this is addressing the sheer scale of the development. In that sense, the Screening Opinion simply concludes that its significance does not go beyond the local. There is nothing wrong in that conclusion *per se*, in my view.

#### *Question 6*

25. Question 6 then deals with whether the Development was in a “particularly sensitive or vulnerable location” (see paragraphs 36-40 of 02/99). The Screening Opinion points out that the Site is within Ulverston Conservation Area and that it will cause a significant visual change to that part of the town and an impact on the character and appearance of the conservation area especially as alteration and demolition of some traditional buildings are involved. It then goes on to record English Heritage’s view that the proposal will lead to less than substantial harm to the area.
26. However, unlike the answers to Questions 5 (see above) and 7 (see below) no express conclusion seems to be reached about the likelihood of significant environmental impact at all. However, Mr Easton for the Council contended that although it was perhaps not very clear, the answer given by Screening Opinion to Question 6 was “Yes” – the development was in a particularly sensitive or vulnerable location. But paragraph 38 of 02/99 makes clear that it does not follow that every Schedule 2 development in such a location will require an EIA. It depends on whether the likely environmental effect will be significant in that particular sensitive location. And here the views of

consultation bodies should be taken into account. And thus there is the reference to the English Heritage view that there would be no substantial harm. So in truth what is being said is that despite being in a conservation area there was no likelihood of significant environmental effect in that respect. I agree with that submission. And if that is the conclusion, it is not one with which the Court could interfere on *Wednesbury* grounds. Nor do I consider that the fact that this passage was somewhat unclear at first blush means that overall the Screening Opinion has not set out clearly the full reasons for the decision.

27. I should add that the paragraph dealing with Question 6 also states that “this aspect” needs to be considered against government policy within the NPPF and local policies about proposals affecting conservation areas. I do not think that this is of any relevance. All it is saying is that the question of the effect on the conservation area will be considered again in the different context of the planning application itself where planning policy will feature. Equally I do not consider that much turns on the reference to “archaeological considerations” to be taken into account subsequently.
28. Accordingly the treatment of Question 6 does not render the Screening Opinion defective.

#### *Question 7*

29. Question 7 is then framed as follows: “Is the development particularly complex with potentially hazardous effects and likely to have significant effects on the environment? (paragraphs 41 and 42 Circular 02/99)” The first part of the question is clearly drawn from those paragraphs along with paragraph 33. I consider however, given the remainder of Screening Opinion, that the second question (underlined here for identification) is in fact going beyond the “hazardous class of development” identified in paragraphs 41 and 42 to ask the overarching question as to likely significant environment impact overall, although it has not been expressed in quite that way.
30. As to the answer to the first part of Question 7 the Screening Opinion concludes that while there are construction and demolition works with a significant local impact these can be controlled by appropriate conditions and the completed development itself would not result in any significant hazardous environmental impacts. The type of development contemplated by paragraph 41 and 42 is clearly that with long-term hazardous impact ie once completed. This part of the Screening Opinion cannot be legitimately challenged in my view.

#### *Other Matters*

31. However one then turns to the only part of the Screening Opinion which seeks to deal with matters other than those raised by the reference to the three types of development noted by 02/99. Here it is necessary to refer to this section in full:

“The development may have some impact on the adjacent residential properties in terms of noise and activity generated from the proposed development. These impacts have to be weighed against the current and potential activities associated with the site under its existing form and uses.

An Environmental Noise Assessment, Air Quality Assessment and Ground Investigation Report have been submitted with the application and will be used to assess the likely impacts and identify potential mitigation requirements.

The proposal will generate additional traffic movements by both customers and servicing vehicles. The impact and acceptability of this aspect of the proposal will need to be fully assessed by the local Highways Authority and the Highways Agency. A Transport Assessment has been submitted which also includes a travel plan and safety audit to enable these aspect to be assessed.

The site is not located within a high flood risk zone, however, a culverted watercourse crosses the car park which may be affected by the proposal, and will need to be assessed by the drainage authorities.”

32. The essential point made here is that in relation to the issues of noise, air quality and traffic movement impacts in particular, while this section has (correctly) regarded them as matters going to the overall question of likely significant environmental impact or not, the Screening Opinion has not in truth engaged with them or provided a reasoned conclusion as to whether they are likely to lead to such an effect or not.
33. I think that there is force in this. The Screening Opinion does not express a view one way or the other. This is not a case where a particular proposed remedial measure is stated, weighed up and then considered to offset an environmental impact. In such a case this might be legitimate – see paragraph 17 above. Here no weighing is done at all and in effect the Screening Opinion is saying “it will all have to be assessed later”. That seems to me to be deferring an important aspect of the environmental effect question which is raised here, to the planning process and that is not a legitimate approach.
34. In answer to that it is said that the Reports are very detailed and are more than one often has at this stage. See the extracts provided at 2/985-1012. I follow that, but it does not answer the difficulty referred to in the preceding paragraph. Likewise, this is not a case where the Screening Opinion has in truth taken a view about a known remedial measure and accepted that it would counteract an effect of the proposal, for example the additional seating capacity in the stadium proposal at issue in *R (Catt) v Brighton and Hove CC* [2007] EWCA Civ. 298 at paragraph 33-38 thereof.
35. I was then referred to Ms Lawson’s witness statement dated 24 December 2013. At paragraph 4 she said that she had available to her the reports accompanying the application which included the Ground Investigation, Environmental Noise Assessment Damage and Flood Risk and Bird and Bat Reports “which contained full details of the ...development and its likely impact on the environment”. She then says somewhat tersely at paragraph 5 that the reports were taken into account when preparing the Screening



Opinion. She adds that taking into account all of the information “that is now available my conclusion would be the same.”

36. It is always necessary to treat such *ex post facto* accounts with caution. In particular, here, Ms Lawson gave no indication in the Screening Opinion at all that she had read and considered the Reports and formed the view that they showed no likelihood of significant environmental impact. On the contrary their content and these matters would have to be assessed on another day. (Her evidence in paragraph 5 that she would have reached the same conclusion now I deal with below in relation to discretion.) In other words her evidence here is clearly inconsistent with the way the matter was put in the Screening Opinion – it was not a simple matter of clarification or elucidation. See the well-known observations of Hutchison LJ in *R v Westminster City Council Ex p Ermakov* [1996] 2 All ER 302 and the judgment of Jackson LJ in *R (Lanner Parish Council) v Cornwall Parish Council* [2013] EWCA Civ 1290 at paragraphs 59, 60 and 64.
37. I take the point that the request for a Screening Opinion dated 20 December 2012 referred to the Reports as part of the documents dealing with the Development and its environmental effects – but that does not alter the way the matter was dealt with in the Screening Opinion or whether Ms Lawson’s evidence can help. Nor does the fact that Ms Lawson had been involved with this proposal and its previous incarnation over the previous 12 months. The same goes for the fact that the planning conditions actually imposed (eg Condition 9 dealing with construction) were uncontroversial.
38. Put another way, I do not consider that in these respects the Screening Opinion has provided clearly and precisely the full reasons for (at best an implied) conclusion that they are not likely to lead to a significant environment impact, as required by Regulation 4 (7).
39. I do not accept (as contended for in paragraph 4.9.3 of the Council’s Skeleton Argument) that her reference to future assessment of noise and traffic impact must actually mean that while those matters will require consideration at the planning stage, she had already decided that there was no significant environmental impact caused thereby. One simply cannot get that from this part of Screening Opinion or indeed from Ms Lawson’s own evidence. In other words, it cannot it be said that in truth, this entire section was mere surplusage (cf the screening opinion at issue in *Thakeham* – see paragraphs 50-60 and 108-111 thereof).

#### *Consideration of Schedule 3*

40. A final over-arching point made is that there was no consideration by the screening opinion of the Schedule 3 factors, independently of the three 02/99 questions raised. This is in the context that paragraphs 31 and 35-42 of 02/99 deal in essence with a starting point and are not a complete code for assessment. I take the point that while there is a reference in the covering letter to having considered the Schedule 3 factors, they are not specifically dealt

with. In this case, however, I consider that they were in substance dealt with in the context of the particular questions raised, save in relation to the potential impact noted under “Other Matters”. For the reasons already given those particular matters were not in truth addressed.

### *Conclusion*

41. For the reasons given above in respect of the Other Matters, I consider that Screening Opinion was legally unsound.
42. However, I am then invited to exercise my discretion not to quash the Permission as a result, on the footing that inevitably a new Screening Opinion would be to the same effect. This is on the basis that (a) Ms Lawson has said that she would have come to the same view on a further screening opinion and (b) the underlying Reports would compel that conclusion anyway.
43. I have not found this an easy matter, but on balance and in relation to this particular challenge, I would exercise my discretion not to quash. I do so not merely (or even mainly) because of Ms Lawson’s evidence which must be treated with some caution if taken by itself. It is because if one looks at the Reports themselves, they either state that there is no real adverse impact (eg on traffic flow) or propose straightforward and uncontroversial measures to deal with it (eg a 35dBA limit on noise, in fact adopted later as one of the conditions of the permission). At the end of the day, the Development was a supermarket and offices not a factory. If, therefore, the Reports had been engaged with properly on the question of significant environmental effect, it seems to me that they would obviously entail a conclusion that with the relevant mitigation measures, there would be none generated by those particular matters.
44. Mr Westaway submits that as a result of the decision of the House of Lords in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, any direction not to quash in an area such as this where the legislation is derived from a European Directive, is severely circumscribed. However, it is clear from the observations of Lord Carnwath and Lord Hope in particular in *Walton v Scottish Ministers* [2013] PTSR 51 (see paragraph 124-140 and 155) that this is too rigid a view and that what was said in *Berkeley* must be read in the particular context in which it arose.
45. Mr Westaway has also referred me to paragraphs 30 and 31 of the judgment of Moore-Bick LJ in *Bateman* where he refused to exercise his discretion not to quash the planning permission and only quash the screening opinion. He said that if any step of the process was flawed then all of it was flawed. But this was where it was accepted that the screening opinion would have to be re-done. However, it seems to me that the position is different if the Court concludes that done correctly, the screening opinion’s conclusion would still have been the same.

46. Accordingly I see no legal impediment to exercise my discretion so that the Permission is not quashed on this ground. Accordingly the challenge under Ground 1 fails.

## **GROUND 2: WEIGHT GIVEN TO HERITAGE AND CONSERVATION IMPACTS**

### **The Law**

47. By s72 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, in the exercise of an LPA's planning functions,  
"special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."
48. Guidance about this is given in paragraphs 131-135 of the NPPF as follows:
- "131. in determining planning applications, local planning authorities should take account of:  
the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;  
the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality;  
.....
132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification.....
133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:....
134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.
135. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."
49. It is common ground that the Site was located within a heritage asset being the local Conservation Area. To the extent that it is relevant here I set out in paragraph 78 below in the context of Ground 3, the nature and status of the NPPF.
50. The Court of Appeal in *E Northants DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137 ("*Barnwell*") made clear that the duty imposed by s72 (1) meant that when deciding whether harm to a conservation area was outweighed by the advantages of a proposed development the decision-maker should give particular weight to the

desirability of avoiding such harm. There is a “strong presumption” against the grant of permission in such cases. The exercise is still one of planning judgment but it must be informed by that need to give special weight to maintaining the conservation area. See paragraphs 22, 26 and 29 of *Barnwell*.

51. This was then followed by Lindblom J in *R (Forge Field) v Sevenoaks DC* [2014] EWHC 1895. See in particular, paragraphs 48-51.
52. It is clear that the first part of paragraph 132 seeks to express the s72 (1) presumption. The remaining provisions then give guidance on how it may be applied in a case involving a heritage asset. So if there would be substantial harm to a listed building permission would have to be either exceptional or wholly exceptional. See the second part of paragraph 132. If there was to be substantial harm to a non-listed heritage asset, then consent should be refused unless that harm was necessary to achieve substantial public benefits or the particular matters set out in [a] to [d] apply. See paragraph 133. Finally if the harm is less than substantial it must be weighed against the public benefits including its optimum viable use. See paragraph 134.
53. As is made clear in paragraph 45 of *Forge Field*, even if the harm would be less than substantial so that paragraph 133 did not apply but paragraph 134 did, the harm must still be given considerable importance and weight. That of course is doing no more than following the injunction laid down in s72 (1). The presumption therein needs to be “demonstrably applied” – see paragraph 49 of *Forge Field*. Put another way, in a paragraph 134 case, the fact of harm to a heritage asset is still to be given more weight than if it were simply a factor to be taken into account along with all other material considerations, and paragraph 134 needs to be read in that way. By way of contrast, where non-designated heritage assets are being considered, the potential harm should simply be “taken into account” in a “balanced judgment” - see paragraph 135. It follows that paragraph 134 is something of a trap for the unwary if read - and applied - in isolation.

### **The Challenge here**

#### *(a) The Failure to apply the Presumption*

54. It is contended that the Officer’s Report (“the Report”) on which the decision to grant permission was based failed to apply the statutory presumption, rendering the decision legally flawed.
55. The start of the Report (1/132) notes the impact of the Development on the conservation area as one of the main issues. It later (1/157-158) recites the relevant parts of the NPPF. More detail is given of the impact in the section headed “1. Impact upon the Conservation Area.” What then happens is that the Report recites the Heritage Statement submitted which says that less than substantial harm will be caused. It then “applies” paragraph 134 but without any reference to or application of, the Presumption. It ends by saying that the scheme will strike a reasonable balance between the harm that will be caused to the heritage of Ulverston and the public benefits of the new store and design quality of the replacement buildings. It is true that this concentration on

paragraph 134 in isolation was how English Heritage dealt with the matter but that is not determinative of the Council's duty. The minutes of the Planning Committee meeting also refer to the balancing exercise – see 1/127.

56. It is clear from *Forge Field* that unless there is clear and express recognition – and application – of the Presumption, the mere fact that paragraph 134 on its own is apparently followed will not save the decision. That is so even where (as in both *Barnwell* and *Forge Field* but not in this case) there was express reference to the Presumption. And it is so even where (as here) there is reference at the outset to paragraph 132 when reciting this part of the NPPF. None of that matters if all that is actually done is a “simple balancing exercise” – see paragraph 55 of *Forge Field* where Lindblom J went on to say that: “Once he had found that there would be some harm to ...the conservation area, the officer was bound to give that harm considerable weight in the planning balance.” That was not done in the instant case, where the only reference point was paragraph 134.
  57. Mr Easton for the Council contended that I should read the relevant *dicta* in *Barnwell* and *Forge Field* against a backdrop where the decision-maker had in fact adopted a presumption running the other way. In my judgment that is irrelevant. Those cases make plain that the key defect was the failure to apply the Presumption.
  58. Equally the mere fact that the impact was mentioned in the Report (as it clearly was) is irrelevant. What is at issue is not the acknowledgment of the harm but how it is dealt with. Nor can it be said that it must be obvious from the references thereto that the author of the Report was in fact applying the Presumption. There is no evidence of this at all.
  59. That being so, it must follow that the Report and hence the decision based upon it, are flawed.
  60. There is no conceivable basis for exercising my discretion not to quash here. The whole issue of harm to, and preservation of the heritage assets constituted by the Old Brewery was a major part of the planning debate. Given that, and the fact of a bare majority voting to grant permission, it is quite impossible to say that even with the application of the Presumption, the result would have been the same. The Permission must therefore be quashed on this ground.
- (b) *The Tower*
61. The proposed Development included demolition of the Brewery Tower. This in fact had been permitted under a previous consent numbered 5/93 of 1993. There is an issue whether this was still valid as at April 2013 but this does not matter in my view because, as was conceded on behalf of the Council, the demolition of the Tower clearly formed part of the instant application and needed to be considered. The complaint is that it was not, and that as it was a material consideration, the Report and hence the decision were flawed on this specific point.

62. It is plain that the Tower was acknowledged as forming part of the application and was considered. First, it is treated as included under “Demolition Works” at 1/134. Second, the Conservation Officer’s comments are reproduced and at 1/143 it is recited that “Notwithstanding the previous consent..it is considered that a compelling case has been made for the loss of the Brewery Tower buildings that would comply with the four tests within Policy 133 of the NPPF.” Third Save Britain’s Heritage’s position, that the loss of the Site including the Tower was wholly unacceptable, was noted, as was Ulverston’s Conservation Area’s Character Appraisal which noted that it had made a positive contribution to the area.
63. I agree that in the conclusions there is no specific reference to the Tower but given that overall the Report found that the heritage objections did not prevent the Development, it must by implication have considered that the demolition of the Tower was not fatal. The likelihood is surely that the Planning Officer accepted the Conservation Officer’s view. And here, the application of paragraph 133 (because there was substantial harm due to demolition of the Tower) would have given effect to the Presumption. I agree that it is not said which limb of paragraph 133 applied but I do not think that matters here.
64. I do not consider that this part of the challenge is made out.
65. The upshot is this: if Ground 2 (a) (failure to give weight to the Presumption generally) succeeds, this Ground 2 (b) is irrelevant. Moreover if in fact Ground 2 (a) failed, so there was no defect in considering the heritage impact generally, I find it impossible to see how Ground 2 (b) could then succeed or that it would have made any difference.

### **GROUND 3: FAILURE TO CONSIDER RETAIL NEED**

#### **Introduction**

66. The net available floorspace in the proposed new supermarket was 1,775m<sup>2</sup>. A point taken by objectors was that the Council’s own study, as updated by the consultants NLP on its behalf, identified capacity for further floorspace of only 313 m<sup>2</sup>. This disparity was dealt with the Assessment section of the Report which repeated NLP’s point that the disparity “must be viewed in context with the fact that retail need is not a test that an applicant must satisfy...” It is common ground that the Report effectively adopted that stance.
67. Mr Westaway contends that this was a material error because Local Plan R5 requires retail need to be established and as it formed part of the Development Plan it was not followed. This constitutes the first and principal part of the challenge under Ground 3.
68. The second part alleges that the prospective competition between the new supermarket and the existing out-of town centre Booths supermarket (1,672 m<sup>2</sup>) was not considered and this was a material error, too.

69. I deal with each point in turn.

**(a) Retail Need and R5**

*The Policies*

70. Local Plan R5 states as follows:

*“RETAIL-DEVELOPMENT OUTSIDE ULVERSTON TOWN CENTRE*

Further proposals for new, large scale, retail/ development outside Ulverston town centre will not be allowed, unless the proposal is 'accompanied by evidence to demonstrate that the development would not have an adverse effect on the vitality and viability of Ulverston town centre . In addition, development proposals will need to:

- (a) provide evidence of a demonstrable need for the development;
- (b) demonstrate the following sequential test:.....”

71. When adopted in 2007, it followed the then national policy set out in PPS 6 but that was superseded by PPS 4 in 2009. The latter retained the requirement for retail need but only in the context of formulating the Development Plan, not as a condition for individual planning permissions. In respect of individual permissions there were two tests: (a) no sequentially preferable location and (b) no unacceptable impact. PPS 4 has now been superseded by the NPPF, issued in March 2012, (though it remains relevant as guidance).

72. The PPS factors are followed through in the NPPF which requires LPAs to apply a sequential test (see paragraph 24) and then conduct an impact assessment (see paragraph 26). If either test is not met, then the application should be refused (see paragraph 27). It is plain that this is a complete code and that there is no longer any requirement to demonstrate retail need.

73. The NPPF goes on to state in paragraph 151:

“Local Plans must be prepared with the objective of contributing to the achievement of sustainable development. To this end, they should be consistent with the principles and policies set out in this Framework, including the presumption in favour of sustainable development.”

74. Paragraph 14 is also relevant. It states that where the development plan is “absent, silent, or relevant policies are out of date” the presumption in favour of sustainable development means that permission should be granted unless specific policies within the NPPF indicate otherwise or the adverse impacts of the development demonstrably outweigh the benefits when assessed against the NPPF’s policies taken as whole.

75. On a fair analysis of these documents, it is clear that retail need is not part of national policy as set out in the NPPF and R5 is thus inconsistent with it. I do not accept the proposition advanced on behalf of Ms Hughes that since the NPPF did not expressly prohibit LPAs from requiring retail need as part of their local plans, they were free to do so, and thus R5 is still a real requirement. Such a proposition would mean that LPAs were free to adopt whatever policy they wished even if clearly inconsistent with national policy and I regard that as wholly unrealistic. Moreover it conflicts with the very terms of paragraph 151 of the NPPF and thus impliedly with paragraph 14.

### *The Law*

76. s70 (2) (a) of the Town and Country Planning Act 1990 requires the LPA when dealing with a planning application to “have regard to the provisions of the development plan so far as material to the application..” s38 (5) of the Planning and Compulsory Purchase Act 2004 provides that if to any extent a policy in a development plan conflicts with another policy in that plan the conflict must be resolved in favour of the later policy. Then, s38 (6) provides that if regard is to be had to any development plan for the purpose of any determination, “the determination must be made in accordance with the plan unless material considerations indicate otherwise.”
77. Cases such as *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1457 emphasise the statutory requirement for priority to be given to the development plan, to identify it and interpret it properly and identify the other material considerations. Assessing the weight of those considerations in that context is then a matter of planning judgment. See pages 1458C-F, 1459B-E. See also the decision of Lindblom J in *Wakil v Hammersmith and Fulham LBC* [2013] EWHC 2833 at paragraph 62 where he puts the questions as first, seeing whether the proposal conforms with the development plan as a whole and second, whether in the light of all the other material considerations permission ought to be granted.
78. The NPPF is not part of the development plan. Its function was to replace the numerous PPG and PPS documents (among others) with one compendious statement of national planning policy. But it plainly is, and was stated in terms to be a material consideration – see paragraphs 2 and 3 of the Introduction.

### *Analysis*

79. It cannot be said that R5 no longer exists. But it is obviously out of date and inconsistent with the NPPF. That being the case it is impossible to see how any weight could be attached to it at all. The fact that it is out of date is a highly material consideration running against compliance with the development plan in this respect. That would justify, indeed I would say compel, the LPA to disregard it when considering whether or not to grant permission. See s38 (6) of the 2004 Act. Of course it is correct that the Report did not first identify R5 as part of the development plan, then point out the inconsistency with NPPF and then conclude that R5 should be given no weight. But in the circumstances here, that is not in truth any different in substance from saying, as it did, that retail need does not have to be shown.
80. It is true that retail need can come into the picture in relation to impact upon the town centre. Indeed paragraph 5.4 of the Owners’ Supplementary Retail Statement dated March 2013 says as much in the chapter headed Retail Impact. I accept that it also makes reference to R5. But that is after adopting NLP’s point that there no longer a requirement to demonstrate need. Moreover there is no challenge here to the assessment of impact in the Report or by the Council. So I consider that paragraph 5.4 is irrelevant to this issue.



81. On that basis I do not consider that in substance there was a material error here. However, even if there was, I would exercise my discretion not to quash since the decision (not to require retail need) is bound to have been the same, given that no weight could be sensibly attached to R5.
82. A further argument was that R5 is in fact rendered inapplicable by virtue of the operation of s38 (5) of the 2004 Act since it conflicts with the later South Lakeland Core Strategy. However that document was at a somewhat higher level and as there was limited argument on the point I prefer not to express a view here, which in any event is not necessary given my earlier findings.

**(b) The Booths Point**

83. It is correct that when dealing with the Impact Test in the Assessment part of the Report (1/165), it was stated that most of the competition would be with the out of centre Booths (15% diversion) which was not a material planning consideration. Indeed, Booths did not object to the Development. Nor is there any policy which says that the LPA should consider the effect of any competition with an existing out of centre store, as opposed to retail facilities within the centre.
84. Nonetheless it is argued that such competition was a material factor to have been taken into account. It is said that somehow it would affect town centre retail demand because if there are two supermarkets competing with each other then that creates a larger potential impact on the town centre than if one simply takes into account their existence and floorspace as separate facilities. It was then said that if trade was taken from Booths by the new supermarket then Booths would have to take other unspecified measures to regain lost ground which could also have an adverse impact upon the town centre. I am afraid that I found all of this highly speculative to the extent that I could not see that it began to form a material consideration which should have been put to the Planning Committee.
85. It was also said that paragraph 26 of the NPPF at least did not rule out such a consideration since it stated that an impact assessment for a proposal like the Development should consider the impact on town centre vitality and viability including “trade in the town centre and wider area.” Thus the wider area could encompass Booths. I do not accept this. This part of the NPPF is concerned with ensuring the vitality of town centres. The trade in wider areas is surely therefore trade in other town centres. In any event even if I were wrong here I would still find against Ms Hughes on this point because it is so speculative.
86. Accordingly I dismiss also this part of Ground 3 which Mr Westaway frankly accepted was not at the forefront of his submissions.

**GROUND 4: GENERAL FAILURE TO STATE OR FOLLOW THE DEVELOPMENT PLAN**

87. Local Plan C16 provides as follows:

**“CONTROL OF DEVELOPMENT AFFECTING CONSERVATION AREAS**

Within Conservation Areas, priority will be given to the preservation and enhancement of the character or appearance of the special architectural and historic interest of the Area.....Development in a Conservation Area will not be permitted:

- (a) which results in the demolition or partial demolition of a building which contributes to the character or appearance of the Area. In exceptional cases, where demolition is allowed, a planning condition may be imposed, requiring that demolition shall not commence until a clear commitment is in place to carry out the proposed replacement development;”

88. It is alleged that the Report was defective because this particular provision was not drawn to the attention of the Planning Committee. However, I consider that this policy is equally out of date because it conflicts with paragraphs 134 of the NPPF as stated above, which does not prohibit demolition in cases where less than substantial harm will be caused. The correct criterion is thus paragraph 134 (and where applicable paragraph 133) fortified by the Presumption as explained under Ground 2, above. On that footing the failure to refer to C16 in my judgment does not constitute a material error. Alternatively, had C16 been referred to expressly and explained by reference to the NPPF I cannot see how there could possibly have been a different outcome and I would therefore have exercised my direction not to quash. In any event, given that the main part of Ground 2 has succeeded, this related point becomes unnecessary.

**GROUND 5: REASONS CHALLENGE**

89. Mr Westaway accepts that if the Court was with him on any of the prior grounds (as it is) there is no need to decide Ground 5. However I deal shortly with this challenge in any event.

90. There is no longer any statutory requirement to give reasons for the grant of planning permission –see art. 7(a) of the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013.

91. That said, reasons were given (see Permission at 1/113). They were as follows:

“The proposed development is in accordance with the aims and objectives of the National Planning Policy Framework and with policies CS1.1, CS1.2, CS3.1, CS7.5, CS8.6, CS8.8, CS9.2, CS10.1 and CS10 of the South Lakeland Core Strategy and saved policies C16, S2 and S10 of the South Lakeland Local Plan. There are no material considerations that indicate against the proposal. The Local Planning Authority has acted positively and proactively in determining this application by identifying matters of concern within the application (as originally submitted) and negotiating with the applicant, acceptable amendments to the proposal to address those concerns. As a result, the Local Planning Authority has been able to grant planning permission for an acceptable proposal, in accordance with the presumption in favour of

sustainable development, as set out within the National Planning Policy Framework.”

92. It is argued for Ms Hughes that first, the reasons were wrong because, for example, there were material considerations running the other way and secondly, the reasons were not themselves intelligible.
93. As to that, it is clear that the statement of reasons given was merely a summary. In a case like this reference would obviously have to be made back to the very extensive and detailed Report whose recommendation was followed. That very clearly set out all the “pros and cons”. Once that is done, the reasons cannot be said to be “unintelligible”; indeed I do not see the reasons as stated in the Permission as being unintelligible.
94. Accordingly, either there was no unlawfulness in the giving of reasons here or, if there was, the obvious course would be to exercise my discretion and not to quash.

### **CONCLUSION**

95. However, this application for judicial review succeeds on Ground 2 (a) and I therefore quash the Permission.
96. I am most grateful to Counsel for all their most helpful oral and written submissions.